

10 Sexual Harassment Questions

By: Roy A. Ginsburg

In our inaugural issue of this newsletter, more than a decade ago, we included an article entitled, "Ten Sexual Harassment Questions." Since that time, as the law of sexual harassment has evolved and developed, we have periodically revisited this subject. Despite the fact that more than 20 years have elapsed since the EEOC first incorporated a definition of sexual harassment into its regulations and despite the fact that the United States Supreme Court now has rendered five key harassment decisions, questions still abound regarding this subject. Set forth below, therefore, are 10 more questions on the law of sexual harassment. These questions were derived from inquiries posed at training seminars we present on harassment for our clients.

QUESTION 1: One of our Human Resources consultants suggested that Title VII precludes any bawdy language in the workplace or any expression of

anger or frustration toward another employee. Has Title VII become a statute that governs all aspects of employee interpersonal interaction?

ANSWER: No. As the U.S. Supreme Court made clear in its 1998 decision *Oncale v. Sundowner*, Title VII is not a "general civility code." The Court emphasized that Title VII is not designed to ensure a completely pristine working environment and is not intended to regulate all aspects of employee interaction. On the other hand, give some thought to whether you would want the "bawdy" language you referenced to be part of the back-drop presented to a jury when a sexual harassment claim based on more substantial conduct is alleged. Consider whether you would like to defend a supervisory employee who has engaged in sexual harassment and also carries the baggage of routinely venting his anger or frustration at his subordinates.

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Punitive Damages in Sexual Harassment Cases

By: Cliff Anderson

In *Kolstad v. American Dental Ass'n*, 527 U.S. 534 (1999), the U.S. Supreme Court considered under what circumstances employers may be liable for punitive damages due to discriminatory conduct by their management-level employees under Title VII. By extension, the Supreme Court's holding also likely applies to other federal statutes, such as the Americans with Disabilities Act. In *Kolstad*, the Court rejected the holding of the *en banc* majority of the Court of Appeals for the District of Columbia that eligibility for punitive damages under Title VII requires proof of an employer's independent "egregious" misconduct. *Id.* at 534-35. Instead, the Court set a lower threshold and held that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages" under Title VII. *Id.* at 536. Significantly, however, the Court also recognized an affirmative defense by which employers can avoid liability for punitive damages of their managerial agents. The Court held that "in the punitive damages context [under Title VII], an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Id.* at 545 (citation omitted).

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QUESTION 2: It seems to me that behaviors that might be offensive in some circumstances might not constitute sexual harassment in other circumstances. Am I off base? Does “context” matter?

ANSWER: You are right on target – context does matter. Once again, in *Oncale*, the Supreme Court made this point explicit. The example used by the Justices was a comparison between a football coach or player smacking another player on the rear as he is sent into the game, versus the same type of conduct directed by an executive at his assistant. The context makes a difference. Keep in mind that behavior will be judged by both a subjective standard (was the employee offended by the conduct) and an objective standard (would a similarly situated employee also be offended by the conduct). Both tests must be met before concluding the behaviors were harassing.

QUESTION 3: Someone told me that, in the work environment, even repeating jokes heard on prime-time television sitcoms can lead to liability for sexual harassment? Say it ain't so.

ANSWER: In a case out of Wisconsin this is precisely what happened, at least initially. A worker shared a joke he had heard on *Seinfeld* which, he conceded, was crude and referenced certain parts of a woman's anatomy. This led to a multi-million dollar jury award which was highly publicized by the media as an example of the defects of our judicial system. Earlier this year, however, the Wisconsin Supreme Court reversed the jury award and rendered a decision for the employer. (This decision did not receive much, if any, media coverage.) Nevertheless, the bottom line is that it is not always appropriate to repeat in the work environment what is commonly heard on prime time television. The sensitivities of the audience should always be considered and a certain amount of common sense is a useful behavioral guide.

QUESTION 4: There are a lot of jokes flying around on our email system. Could someone claim sexual harassment on the basis of these email communications?

ANSWER: Simply put, yes. Whether the emails alone would be sufficient to support a sexual harassment claim is difficult to predict. But what company wants to have to defend this type of lawsuit? Computers at work should be used for the company's business, not for accessing pornographic Web sites or for circulating crude jokes. Keep in mind that more and more plaintiffs' lawyers are requesting electronic communications as part of their discovery requests. Remember too that even though an email may have been “deleted,” it still may be retrievable from the computer's hard drive or network server. As with

any other type of communication, employees should consider whether they would be comfortable if their email messages were widely publicized or made part of a lawsuit.

QUESTION 5: Can sexual harassment lawsuits be brought as a class action?

ANSWER: Yes. Although a class action sexual harassment lawsuit remains unusual, this type of litigation can be pursued by plaintiffs. One of the first class action sexual harassment lawsuits originated in Minnesota, at the Eveleth Mines, and had a long history in the courts before the plaintiffs ultimately prevailed. Another visible example of this type of litigation is the Equal Employment Opportunity Commission's (EEOC's) lawsuit against Mitsubishi in Ohio. While there may be difficult burdens for plaintiffs to overcome with regard to the Rule 23 class action requirements of numerosity, typicality and common questions of law and fact, if a sexual harassment class is certified, the potential exposure for defendants may be quite substantial.

QUESTION 6: I work in the HR Group at our company. If an employee reports harassment to me but tells me not to do anything because she will handle it, shouldn't I respect her wishes?

ANSWER: No, you should not. Once the employee has put you on notice of the harassment, you need to respond appropriately. Simply allowing the female employee to handle the situation herself, even if that is her request, is too risky. What if she is unable to address the situation successfully and further incidents occur? Would you be comfortable explaining your inaction to your boss or, worse yet, a jury, if she sued the company six months later? Another scenario that is even more problematic would be if another, different employee also experienced a problem with the same harasser. How would you respond to that plaintiff's attorney at your deposition when you were asked when you first learned that Mr. X had engaged in harassing behaviors at your worksite? How would you explain your inaction in these circumstances, especially if the second employee had been assaulted or subjected to other extreme conduct? The only prudent course is to explain to the first complaining employee that now that the company has been informed of the problem, it needs to conduct an appropriate investigation.

QUESTION 7: Under what circumstances is it “reasonable” for an employee not to take advantage of the harassment reporting mechanisms offered by the company?

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ANSWER: This is a tough question. It implicates the 1998 *Faragher* and *Ellerth* decisions, in which the Supreme Court established an affirmative defense for employers when an employee “unreasonably” fails to take advantage of the reporting mechanisms provided by the company. As the Supreme Court implied by its decisions, in some circumstances it is not “unreasonable” for an employee to fail to report the harassment. Although the judicial opinions on this topic do not provide clear guidance, a few principles are becoming evident. First, if the person engaged in the harassing conduct is a very senior executive (such as the CEO, CFO, or Vice President of Human Resources), courts may be receptive to the notion that it would have been futile for the affected employee to “report” the harasser. Second, if the company has not made a genuine effort to adopt and enforce its sexual harassment policies, the courts may conclude that the company only is paying lip-service to the issue and has not truly adopted a mechanism that employees are compelled to use. Third, if the company has not taken effective action in response to other complaints, and that fact is known throughout the company, the courts may conclude that the employee was not unreasonable in failing to report. As you can see, these situations are driven by the individualized facts each case presents. The bottom line for companies is to adopt an effective policy, publicize it to employees, and take appropriate action when a complaint is received. This is the best way to ensure that the affirmative defense will be available to your firm.

QUESTION 8: Is the “affirmative defense” available to employers in every case?

ANSWER: No. First, the affirmative defense created by the Supreme Court only is available where the affected employee has not suffered tangible economic harm. Thus, if the employee has been discharged, demoted, suspended, or experienced some other economic change in the terms and conditions of her employment, the affirmative defense disappears from the calculus. Second, keep in mind that the *Faragher/Ellerth* cases are federal cases. Although many state courts look to federal precedent when interpreting the parallel state law anti-discrimination statutes, this is not uniformly true. Moreover, some states have statutes or regulations that impose strict liability standards for sexual harassment committed by management-level employees. Even in the absence of “economic harm,” an employer in one of these states may not be able to convince a court to adopt the affirmative defense created by the Supreme Court.

QUESTION 9: Some women put themselves in harms way and when the situation goes awry, they sue. Is that

legitimate? Do employers have a defense to these types of claims?

ANSWER: This presents a very difficult question, about which there likely will be considerable litigation in years to come. On one hand, it is unfair to blame the victim of harassment. On the other, there is a reasonable expectation that employees will use common sense and take appropriate steps to avoid putting themselves at risk. One way to take advantage of the *Faragher/Ellerth* affirmative defense is to show that the person claiming harassment failed “to avoid harm otherwise.” One federal circuit court focused on this language in dismissing a sexual harassment lawsuit because the plaintiff, who allegedly had been assaulted by her boss in his hotel room following a business meeting, put herself in the same situation just a few months later. Like the earlier incident (which she had not reported), the plaintiff stayed behind after a business meeting had concluded. She then went out with her supervisor, dancing and drinking until the early morning hours. At that point, she returned to his hotel room with him, where he again allegedly assaulted her. In dismissing her case, the district and appellate courts held that she had failed to “avoid harm otherwise.”

QUESTION 10: Our company has been hiring an increasing number of employees from foreign countries. Some of these individuals come from locations where there is not an especially enlightened attitude toward women in the workplace. Sometimes these negative attitudes toward women spill over in our work setting. Does this present a problem from a sexual harassment perspective?

ANSWER: Yes. Employers will not be successful when defending harassment claims by arguing that employees who engaged in offensive behaviors come from countries where such conduct would be condoned. Although you may be able to explain to the affected female employees that certain conduct was not intended to be offensive or that there are cross-cultural explanations for the behavior, the simple (and legally correct) retort from the affected employees could be that “intent” does not matter in sexual harassment law. Title VII proscribes conduct which has the “purpose” or “effect” of creating a hostile or offensive working environment. Thus, it is important to educate adequately all of your employees regarding acceptable standards of conduct, including employees who may come from a different cultural background.

Roy Ginsburg, a Partner in Dorsey’s Minneapolis office, practices in the firm’s Labor and Employment Law Practice Group.

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This article addresses how the affirmative defense recognized in *Kolstad* has been treated by the courts in the past two years and, with that guidance, what employers can do to minimize their exposure to punitive damages awards in discrimination cases. A review of cases since *Kolstad* (as well as a few that preceded *Kolstad*) highlights the distinguishing features between those cases where punitive damages have been awarded and those where employers have successfully asserted the affirmative defense. Such cases suggest, not surprisingly, that exposure to punitive damages is largely within the control of employers and turns primarily on the degree to which employers: (1) promulgate anti-discrimination and anti-harassment policies effectively, (2) train their employees regarding the implementation and application of such policies, and, most importantly, (3) respond promptly and satisfactorily to employee complaints of discrimination or harassment when they occur. Employers can reduce their exposure to punitive damages for management-level discrimination if they take appropriate measures both before and after alleged discrimination or harassment occurs. Unfortunately, some employers fail to take such steps until it is too late.

BACKGROUND

Punitive damages are limited to cases in which the employer has engaged in intentional discrimination and has done so “with reckless indifference to the federally protected rights of an aggrieved individual.” *Kolstad*, 527 U.S. at 529-30 (citing 42 U.S.C. § 1981a(b)(1)). The issue ultimately turns on the actor’s state of mind. *Id.* at 535. While egregious misconduct is evidence of the requisite mental state, § 1981a(b)(1) does not limit plaintiffs to this form of evidence, and the section does not require any specific showing of egregious or outrageous discrimination independent of the employer’s state of mind. *Id.* Rather, “[t]he terms ‘malice’ or ‘reckless indifference’ pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.” *Id.* Applying the above standard, “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.” *Id.* at 536.

The inquiry does not end with a showing of the requisite “malice or reckless indifference on the part of an individual; the plaintiff must impute liability for punitive damages” to the employer. *Id.* Accordingly, in a “Title VII case based on vicarious liability for the acts of a managerial employee, the employer cannot be liable for punitive damages if the managerial employee’s actions were ‘contrary to the employer’s good-faith efforts to

comply with Title VII.’” *Cadena v. The Pacesetter Corp.*, 224 F.3d 1203, 1209 (10th Cir. 2000) (citing *Kolstad*, 527 U.S. at 545). To avail itself of *Kolstad*’s good-faith-compliance standard, “an employer must at least adopt antidiscrimination policies and make a good faith effort to educate its employees about these policies and the statutory prohibitions.” *Cadena*, 224 F.3d at 1210 (citing *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999)). It also must make “good faith efforts to enforce” any antidiscrimination policies. *Id.* at 1210 (citing *Kolstad*, 527 U.S. at 546). Thus, assuming antidiscrimination policies are in place, a plaintiff generally will be able to recover punitive damages under Title VII for discriminatory conduct of a managerial employee only if the evidence shows “the employer failed to adequately address Title VII violations of which it was aware.” *Cadena*, 224 F.3d at 1210.

RECENT CASE LAW

To illustrate the line between employer exposure to punitive damages for managerial discrimination and the safe harbor created by *Kolstad*, a review of *Cadena* is instructive. In *Cadena*, the defendant, Pacesetter Corporation, failed in its effort to establish the *Kolstad* affirmative defense and was hit with a \$250,000 punitive damages award. Plaintiff Lynn Cadena’s supervisor, Charles Bauersfeld, subjected her to severe sexual harassment for four months. *Id.* at 1205. Among other things, Bauersfeld told Cadena that he had a “wet dream” about her, and he engaged in unwanted physical touching including massaging her lower back, putting his arms around her, and touching her hair and the front of her body. On one occasion, Bauersfeld told Cadena that she should “flash” her breasts to another employee. When Cadena reported these incidents to other supervisors and managerial personnel, she was told that officials at the company’s headquarters were aware of Bauersfeld’s behavior but tolerated it because he made so much money for the company. When she resigned because of Bauersfeld’s conduct, a company official told Cadena that she should view Bauersfeld’s conduct as a compliment to her attractiveness, and he offered her a raise if she agreed to return to work and drop her sexual harassment complaint. Ultimately, the only action taken against Bauersfeld was a written reprimand.

Not surprisingly, the Tenth Circuit rejected Pacesetter’s efforts to come within the safe harbor of the *Kolstad* affirmative defense. First, it found “there was evidence presented at trial undermining Pacesetter’s claim that it made good faith efforts to educate employees about sexual

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harassment.” *Id.* at 1210. For example, the manager in charge of sexual harassment training at the company testified that “she believed that a male supervisor would not commit sexual harassment if he either exposed his genitalia to a female subordinate or grabbed her breasts, so long as he apologized after the incident.” *Id.* Second, the Tenth Circuit found that there was substantial evidence demonstrating the company’s knowledge of Bauerfeld’s sexually harassing conduct and its failure to take any meaningful action to stop it.

Numerous other recent cases reveal that when employers ignore serious allegations of sexual harassment or other discrimination and fail to respond appropriately, punitive damages are often awarded. For example, in *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000), the court upheld a \$260,000 punitive damages award where the employer minimized the plaintiff’s sexual harassment complaints, performed only a cursory investigation that focused on the plaintiff’s rather than the harasser’s conduct, and forced the plaintiff to resign while imposing no discipline on the harasser. 214 F.3d at 1010. Similarly, in *Baty v. Willamette Industries, Inc.*, 172 F.3d 1232 (10th Cir. 1999), the Tenth Circuit affirmed a \$300,000 compensatory and punitive damages award where the employer, despite knowledge of serious incidents of harassment in its plant, conducted only a “sham investigation” to appease the plaintiff (and other women working at the plant) and otherwise seemed to condone the harassing behavior. 172 F.3d at 1444-45. See also *Cush-Crawford v. Adchem Corp.*, 2001 WL 1453904 (2d Cir. Nov. 16, 2001) (affirming \$100,000 punitive damages award even where jury awarded no compensatory damages); *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 384-85 (2d Cir. 2001) (affirming \$300,000 punitive damages award where employer failed to establish *Kolstad* affirmative defense); *Kimbrough v. Loma Linda Development, Inc.*, 183 F.3d 782, 785 (8th Cir. 1999) (upholding \$50,000 compensatory and punitive damages award for each of two plaintiffs); *Blackmon v. Pinkerton Security & Investigative Services, Inc.*, 182 F.3d 629, 635-36 (8th Cir. 1999) (reinstating \$100,000 punitive damages award).

In stark contrast to the above cases, when employers respond appropriately and promptly to complaints of sexual or other harassment, punitive damages are seldom awarded. See, e.g., *Woodward v. Ameritech Mobile Communications, Inc.*, 2000 WL 680415, *15-16 (S.D. Ind. March 20, 2000) (granting summary judgment to employer on punitive damages claim pursuant to *Kolstad* because defendant promulgated sexual harassment policy and trained its employees, and plaintiff failed to follow the policy’s reporting mechanism); *Dhyne v. Meiners Thriftway,*

Inc., 184 F.3d 983, 988 (8th Cir. 1999) (upholding trial court’s decision not to submit punitive damages to the jury in case of co-worker sexual harassment where management acted responsibly following plaintiff’s complaints); *Splunge v. Shoney’s Inc.*, 97 F.3d 488, 491 (11th Cir. 1996) (pre-*Kolstad* sexual harassment case finding insufficient evidence to hold employer liable for punitive damages where the defendant “had a general policy against sexual harassment and did investigate the complaints it received”); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 944 (5th Cir. 1996) (pre-*Kolstad* racial harassment case reversing punitive damages award based on evidence that defendant had anti-discrimination policy and there was nothing “in the record which would show that PHP Healthcare had knowledge of Kennedy’s [the harasser’s] malicious or reckless conduct, or authorized, ratified, or approved Kennedy’s actions.”).

CONCLUSION

The following practice pointers can help employers avoid potential exposure to punitive damages in cases alleging discriminatory conduct of managers:

- Do implement and promulgate anti-harassment and anti-discrimination policies to all your employees and re-distribute them on a periodic basis at least annually (e.g., with payroll checks or W-2s, etc.);
- Do train your employees on how to make a complaint under your anti-harassment and anti-discrimination policies and repeat such training periodically;
- Do train your management employees on how to respond properly to a discrimination or harassment complaint so that no complaints are overlooked;
- Do train your management employees who will actually conduct discrimination and harassment investigations on how to properly undertake such investigations; and
- Do respond to all complaints of discrimination and harassment promptly, meaningfully, and seriously.

Implementing the above steps should enable most employers to be well positioned to take advantage of the *Kolstad* affirmative defense to avoid punitive damages should complaints involving allegations of management-level discrimination arise.

Cliff Anderson, a Senior Attorney in Dorsey’s Minneapolis office, practices in the firm’s Labor & Employment Law Practice Group.

Post-Termination Obligations in the Absence of Restrictive Covenants

By: Edward B. Magarian

The most common type of suit arising out of competitive employment activities of a current or former employee is based upon an alleged breach of one of the following contractual provisions: (1) covenant not to compete and/or nonsolicitation of customers; (2) confidentiality clause; or (3) nonsolicitation of employees.

The absence of such contractual language, however, does not leave the employee completely free to engage in competitive activities against a current or former employer. Nor does it leave the employer defenseless to protect its legitimate business interests. In fact, in the absence of a written agreement containing a restrictive covenant, an employer still can assert a claim under one or more legal theories, including: (1) the fiduciary duty of loyalty owed by an employee to an employer; (2) the fiduciary duty not to raid fellow employees; and (3) the fiduciary duty of confidentiality owed by an employee to an employer.

This article will discuss these theories. (There are other theories that employers may pursue depending on the facts and circumstances of each case including, for example, a cause of action under the Uniform Trade Secret Act and under the Computer Fraud and Abuse Act, the latter of which also carries with it criminal penalties.)

FIDUCIARY DUTY OF LOYALTY: NONSOLICITATION

The general rule in most states, including Minnesota, is that an employee owes a fiduciary duty of loyalty to his employer during the term of his employment. *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. Ct. App. 1987). This applies to all employees, not merely corporate officers and directors. Under this common law duty, an employee may not solicit the employer's customers for himself or a rival business prior to the termination of his employment. *Id.* (citing *Sanitary Farm Dairies, Inc. v. Wolf*, 112 N.W.2d 42 (Minn. 1961)). However, this duty of loyalty does not prevent an employee from taking "steps to insure the continuity in his livelihood in anticipation of resigning his position." *Sanitary Farm Dairies, Inc.*, 112 N.W.2d at 42. The line between acceptable and prohibited behavior is a "matter of degree," and is often "a question of fact to be determined based on all the circumstances of the case." *Rehabilitation Specialists*, 404 N.W.2d at 305. In determining whether an employee's behavior is consistent with the duty of loyalty, the behavior generally is

scrutinized under three broad categories: timing, level of participation and context. *See id.*

Timing

In *Sanitary Farm*, the Minnesota Supreme Court held that a driver/salesman who solicited his employer's customers for his own planned new business violated his duty of loyalty. *Sanitary Farm*, 112 N.W.2d at 48. The plaintiff, Sanitary Farm Dairies, Inc., produced and sold dairy products. *Id.* at 43. In December 1955, Sanitary Farm hired the defendant, Donald Wolf, to solicit customers and sell products along a milk route. *Id.* On March 24, 1961, Wolf gave notice of resignation as of April 7, 1961, intending to start a private business selling products for Maple Island, a competitor of Sanitary Farm Dairies. *Id.* at 44. Prior to his separation date, Wolf discussed his move with approximately 12 of Sanitary Dairy's customers and advised half of them that he would solicit their business after his employment with Sanitary Farms ended. *Id.*

In holding that Wolf's behavior constituted a breach of the duty of loyalty, the *Sanitary Farm* court emphasized timing. The court adopted comment (e) of the *Restatement of Agency*, which stated that an employee "may not ... before the termination of his employment, solicit customers for such rival business, nor may he do other similar acts in direct competition with the employer's business." *Id.* at 49 (emphasis added) (quoting *Restatement of Agency* § 393 cmt. (e) (2000)). Therefore, the court held, the duty of loyalty required Wolf to "refrain from soliciting any customers on his own behalf prior to the termination of his employment." *Id.* (emphasis added). Moreover, the duty of loyalty required Wolf to give "sufficient notice of his intention to quit . . ." *Id.* The timing of Wolf's solicitations, and his inadequate notice of termination, were thus determining factors in the court's ruling. *Id.*

Level of Participation

In addition to issues of timing, the employee's level of participation in the behavior at issue may determine whether the duty of loyalty was violated. *See Blackburn v. Erickson*, 366 N.W.2d 640 (Minn. Ct. App. 1985). In *Blackburn*, the Minnesota Court of Appeals held that the defendants' solicitation of their employer's

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customers – after the customers clearly stated that they would not re-enroll in future services with the employer – was not a breach of the duty of loyalty. *Id.* at 645. The defendants, Erickson and Larsen, terminated their employment with the plaintiff, Blackburn, Nickels and Smith, Inc., and formed a company to compete with the plaintiff. *Id.* at 642. This information was “common knowledge” to the locals. *Id.* Prior to the defendants’ termination date, several of the plaintiff’s customers expressed dissatisfaction, and asked to transfer their business to Erickson and Larsen’s new organization. *Id.* at 644.

The *Blackburn* court reasoned that although the defendants enrolled their employer’s clients prior to their termination date, they “neither urged customers to breach contracts in effect nor improperly urged customers not to renew expiring contracts.” *Id.* at 645. Therefore, the defendants’ passive participation in acquiring their employer’s customers was consistent with “taking steps to insure continuity in [their] livelihood in anticipation of resigning [their] position,” the standard of acceptable behavior laid out in *Sanitary Farm*, 112 N.W.2d at 48.

However, passive participation does not necessarily protect an employee from violating a duty of loyalty if that employee competes with the former employer. *Rehabilitation Specialists*, 404 N.W.2d at 305 (citing *Cnty. Counselling Serv., Inc. v. Reilly*, 317 F.2d 239, 244 (4th Cir. 1963)). In *Rehabilitation Specialists*, the Minnesota Court of Appeals held that an employee breached her duty of loyalty *by securing new contracts with a customer and thereafter soliciting the customer’s business.* *Id.* The court held that, “[t]he fact that RSI (plaintiff) did not have contracts with the five facilities Koerning (defendant) contracted for does not preclude a finding that she was competing with her employer in violation of her duty of loyalty.” *Id.* (citing *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 183 A.2d 374, 379 (Md. 1962)). The *Rehabilitation Specialists* court reasoned that as an employee of the plaintiff, the defendant was under a duty to secure business for her employer, not for herself. *Id.*

Context

In another case decided by the Eighth Circuit Court of Appeals, the court similarly analyzed an employee’s duty of loyalty, citing all three factors: timing, level of participation, and context. See *Eaton Corp. v. Giere*, 971 F.2d 136 (8th Cir. 1992). In *Eaton*, the court held that Giere, the employee, breached his fiduciary duty to Eaton Corp., by soliciting business from one of Eaton’s customers for his own venture prior to his termination.

Id. at 141. Further, Giere’s participation was active in that he approached the customer about buying his product, and had several meetings regarding the sale. This conduct was all in the context of his employment with Eaton. *Id.*

What Does This Mean?

The law can be read generally to discourage the following examples of conduct by a departing employee:

- (1) Solicitation of clients, copying customer files, downloading company computer files, copying confidential information for use in the employee’s new business enterprise and sharing that confidential information with a prospective employer.
- (2) However, depending on the specific facts of the case, the law generally would not prohibit an employee from making plans to set up a competing business, negotiating the terms of future employment, setting up or signing a lease, and arranging for the purchase of equipment.

Rehabilitation Specialists, 404 N.W.2d at 304.

FIDUCIARY DUTY OF LOYALTY: CORPORATE RAIDING

An employee’s fiduciary duty of fidelity also may limit that employee’s ability to recruit co-workers to leave their employer. *Lowndes Prods. Inc., v. Bower*, 191 S.E.2d 761, 767 (S.C. 1972) (per curiam). However, the distinction between proper and improper behavior is not well defined. The Restatement (Second) of Agency states:

An employee is subject to liability if, before or after leaving the employment, he causes fellow employees to break their contracts with the employer. On the other hand, it is normally permissible for employees of a firm . . . to agree among themselves, while still employed, that they will engage in competition with the firm at the end of their employment contracts. However a court may find that it is a breach of duty for a number of key officers and employees to agree to leave their employment simultaneously and without giving the employer an opportunity to hire and train replacements.

Restatement (Second) of Agency § 393 cmt (e) (1958).

In *Lowndes*, for example, the South Carolina Supreme Court held that a plant manager violated his duty of

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fidelity to his former employer, even though he did not have a written nonsolicitation agreement with his former employer. He violated this duty by, among other things, luring away three “valued” employees to work for a competing business while still on the company payroll. *Loundes*, 191 S.E.2d at 763, 767-68. The three employees included a manager, a production and installment employee and a sales promoter. *Id.* The *Loundes* court explained that “[w]hen the plant manager came to know that key employees were going to leave, it became his duty to notify his employer; instead, he lured them away and kept it secret.” *Id.* at 768. As a result, the court found that the defendant had breached his duty of fidelity, leaving his former employer without sufficient opportunity to hire and train new employees. *Id.*

Although the lines are not clear, an employer can assert a good faith claim that a former employee has breached duty of loyalty especially where that employee successfully lures away valuable coworkers while he or she is still under contract to the plaintiff.

FIDUCIARY DUTY OF LOYALTY: CONFIDENTIALITY

In addition to the duty of loyalty, an employee also owes his employer a fiduciary duty of confidentiality. This requires the employee to protect the secrecy of confidential information even without a confidentiality agreement. *Rehabilitation Specialists*, 404 N.W.2d at 304. The general rule is that upon learning of the existence of confidential information, the employee thereafter owes a duty of confidentiality. *Aries Info. Sys., Inc. v. Pacific Mgmt. Sys., Inc.*, 366 N.W.2d 366, 369 (Minn. Ct. App. 1985), *see also Jostens*, 318 N.W.2d 691, 701 (Minn. 1982) (“even without the employment agreements . . . employers have a common law duty not to wrongfully use confidential information or trade secrets obtained from an employer”). Some courts hold that the employee’s duty of confidentiality continues after termination of employment. *Compare Jostens*, 318 N.W.2d at 701 (duty continues) *with Clinkenbeard v. Central Southwest Oil Corp.*, 526 F.2d 649, 653 (5th Cir. 1976) (fiduciary duty ends when agency relationship ends).

What is Confidential Information?

This duty of confidentiality applies to trade secrets and information otherwise determined to be confidential. *Saliterman*, 361 N.W.2d at 178. In defining “confidential information,” the Minnesota Supreme Court distinguished between knowledge derived from generally known sources and specialized knowledge developed through the employer, “which takes on the characteristics

of a trade secret and which would be unfair for the employee to use elsewhere.” *Cherne Indus., Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81 (Minn. 1980).

In *Cherne*, the Minnesota Supreme Court established a four-pronged test to determine whether information is confidential:

- (1) the protected matter is not generally known or readily ascertainable;
- (2) it provides a demonstrable competitive advantage;
- (3) it was gained at expense to the employer; and
- (4) it is such that the employer intended to keep it confidential.

Id. at 90.

Applying these elements, the *Cherne* court first held that a listing of names of consulting engineers was not generally known or readily ascertainable, and was therefore confidential information. *Id.* On the list were names of customers (i.e., consulting engineers working on projects). *Id.* Although the names were also publicly available from the city clerk *id.*, this fact was insufficient in the context of this case to establish that the information was “readily ascertainable.” *Id.* Why? The reason is relatively straightforward: The company spent time and effort compiling a list of names from over 10,000 consulting engineers working on projects, who were potential customers. The selection by the companies of the engineers on their list was itself valuable information which retained its confidential status. *Id.* Moreover, the fact that information about the identity of engineers could be obtained from the city clerk was of little significance since the employer’s listings provided more information than could be obtained from the city clerk. *Id.* As a result, the mere public availability of information did not necessarily strip the selectively collected information of its confidential status. *Id.*

The Second Circuit Court of Appeals has also held that specific information obtained in the course of employment, and used by a former employee “to deprive his ex-employer of customers,” was a breach of the employee’s fiduciary duty of confidentiality. *Abbott v. Redmont*, 475 F.2d 85, 89 (2nd Cir. 1973). In so doing, the *Abbott* court distinguished between general information “concerning the method of business” from “specific information [defendant] obtained during his employment. *Id.*”

[see No Restrictive Covenant on page 9](#)

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Regarding the test's second element, the *Cherne* court held that competitive advantage was established by inference; the defendant would not have taken the list (a list of potential customers), but for its considerable value. *Id.* at 90. The court reasoned that:

[T]here is also the fact that 624 documents were taken from plaintiff's business by the defendants. There would be little purpose in taking such a quantity of documents if defendants did not believe the information was valuable. Plaintiff was the first entrant into the O & M manual business and had compiled a great deal of experience and information. The lists and materials defendants took could only work to enhance their business. Consequently, the information would afford one a demonstrable competitive advantage.

Id.

The third element, information gained at the employer's expense, was satisfied by evidence relating to the cost of soliciting, obtaining and hiring individuals in order to compile the list, the court held. *Id.* at 90-91. Finally, the plaintiff satisfied the fourth element by presenting evidence of their efforts at not publicizing the information. *Id.* at 91.

What Does This Mean?

The law generally discourages or prohibits employees from taking with them and using confidential information in competition with their former employer whether or not a signed confidentiality agreement exists. However, to prevail, the company will have to establish that the information at issue is in fact confidential, and was treated as such by the company.

CONCLUSION

Written agreement or not, employers are not without protection from the conduct of their employees who unfairly seek to lure customers or fellow employees to a competing venture while still employed; or who divert for their own use confidential information or trade secrets. That said, it is advisable for a company to have its employees sign a written agreement containing restrictive covenants tailored to protecting legitimate business interests. Such an agreement may provide considerably stronger protections than currently offered by state and federal law.

Ed Magarian, a Partner in Dorsey's Minneapolis office, divides his time between white collar crime litigation and employment litigation.

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Supreme Court Says No Statutory Limit on Front Pay Awards

By: James D. Kremer

On June 4, 2001, the U.S. Supreme Court handed down its opinion in *Pollard v. E.I. duPont de Nemours & Company*, 121 S. Ct. 1946 (2001), concluding that front pay awards – *i.e.*, damages awarded for future lost compensation and benefits where reinstatement is not appropriate – are not subject to the cap on compensatory damages established under the Civil Rights Act of 1991. The Court's decision establishes that there are no statutory limitations on such awards.

STATUTORY BACKGROUND

The enactment of § 706(g) of the Civil Rights Act of 1964, damages available to plaintiffs alleging discrimination were generally limited to injunctive relief, reinstatement, backpay, lost benefits, and attorneys' fees. See 42 U.S.C. § 2000e-5(g)(1). Aggrieved plaintiffs were not able to seek recovery for punitive damages, mental anguish and emotional distress, and other similar nonpecuniary losses.

With the Civil Rights Act of 1991, Congress expanded the available remedies by permitting the recovery of compensatory and punitive damages. The 1991 Act provides that "the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(a)(1). However, at the same time it expanded the remedies available for violation of federal discrimination laws, Congress limited the amount that could be awarded in compensatory damages. The 1991 Act provides that compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages, may not exceed the statutory cap set forth in § 1981a(b)(3) – \$300,000 in the case of employers with more than 500 employees.

POLLARD V. DUPONT

Pollard presented the question of whether front pay awards are an element of compensatory damages subject to the statutory cap. In *Pollard*, the District Court (Western District of Tennessee) found that the plaintiff had been the victim of co-worker sexual harassment, causing the plaintiff to take a medical leave for psychological treatment and resulting in her termination

when she refused to return to work. The plaintiff was awarded \$107,364 in backpay and benefits, \$263,000 in attorneys' fees, and \$300,000 front pay. The District Court stated that \$300,000 in front pay was "insufficient to compensate plaintiff," but it felt constrained to award additional damages by Sixth Circuit precedent holding that front pay is subject to the statutory cap set forth in the 1991 Civil Rights Act. In *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), the Sixth Circuit had concluded that the phrase "compensatory damages for future pecuniary losses" in the 1991 Civil Rights Act would be meaningless if it did not encompass "front pay." 130 F.3d at 1203-04.

On appeal, *Pollard* argued that *Hudson* was wrongly decided because front pay is not an element of compensatory damages, but rather a replacement for the remedy of reinstatement in situations in which reinstatement would not be appropriate. *Pollard* also argued that the Civil Rights Act of 1991, by its very terms, explicitly excludes from the statutory cap remedies that traditionally were available under Title VII, including front pay. 121 S. Ct. at 1948-49. The Sixth Circuit panel hearing the appeal agreed with *Pollard*, but felt bound by *Hudson* and therefore affirmed the decision of the District Court to limit the front pay award to the \$300,000 cap. *Id.*

THE SUPREME COURT'S ANALYSIS

In a unanimous opinion written by Justice Thomas, the Supreme Court rejected the Sixth Circuit's analysis in *Hudson* and held that front pay awards are not subject to a statutory cap. The Court concluded that construing front pay as an element of compensatory damages subject to the statutory cap was inconsistent with the fundamental purpose and plain language of the 1991 Act. The Court noted that Congress enacted that legislation for the express purpose of expanding the remedies available to persons aggrieved by discrimination, "without giving any indication that it wished to curtail previously available remedies." 121 S. Ct. at 1951. To the contrary, the 1991 Act expressly provided that "compensatory damages awarded under [§ 1981a] shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." *Id.*

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The Court's decision thus turned on the issue of whether front pay is a form of relief authorized under § 706(g) of the 1964 Act. The Supreme Court had little difficulty concluding that it is. The Court noted that § 706(g) tracks the language of § 10(c) of the National Labor Relations Act, which (at the time of the enactment of the 1964 Act) had been construed to permit an award of wages up to the date of an employee's reinstatement, even if occurring after the judgment – in today's parlance, front pay. 121 S. Ct. at 1949-50. The Court also noted that prior to the 1991 Act, front pay awards had evolved and been recognized as a “necessary part of the make whole relief mandated by Congress and by this Court” for Title VII and other violations under the Civil Rights Act of 1964 in cases where, because of animosity between the parties, reinstatement was not a viable option. 121 S. Ct. at 1949-51. The Court thus concluded that § 706(g) of the 1964 Act authorizes front pay awards, excluding such awards from the statutory limitations found in the Civil Rights Act of 1991. *Id.* at 1952.

CONCLUSION

Pollard does not reflect a fundamental change in the law concerning front pay awards. Most courts, including the Eighth Circuit, had concluded prior to *Pollard* that front pay damages are not subject to the cap on compensatory damages under the 1991 Civil Rights Act. The greater impact of *Pollard* may well lie with the Supreme Court's reaffirmation of front pay awards as an essential component of “make whole” relief in discrimination cases, and the effect this has on the willingness of courts to award significant front pay covering extended periods as a routine part of damages. Time will tell whether plaintiffs are able to extend the reach of *Pollard* beyond its seemingly limited scope.

Jim Kremer, a Partner in Dorsey's Minneapolis office, practices in the firm's Labor and Employment Law Practice Group.

Managing Retaliation Claims

By: Matthew Klein

Most employers know that they cannot discriminate against employees and applicants on the basis of their race, gender, age, disability, or other protected class status, and they take great care to ensure that their employment decisions are not based on these kinds of improper motivations. Many employers, however, are not as aware of the anti-retaliation statutes in Minnesota and federal law, and sometimes make employment decisions without considering the ramifications of those statutes.

For example, suppose that a manager stops by your office and says, “We are letting Al go today. He missed too much work. Plus, he is a chronic complainer. That phony discrimination complaint last week was the last straw, so we are firing him.” Which sentence first triggered alarm bells? If you are attuned to anti-retaliation law, you probably recognized potential retaliation problems starting with the second sentence and growing with each successive sentence.

Al's attendance problems could be the result of a leave of absence under the Family and Medical Leave Act, jury duty, or military service. Employers generally are

prohibited from retaliating against employees who miss work as a result of any of these situations.

Similarly, depending on the circumstances, Al's chronic complaints could trigger anti-retaliation protections under federal and state labor, workplace safety and health, or wage and hour laws. Finally, Al's “phony” discrimination complaint could be protected under the Minnesota Human Rights Act, Title VII of the Civil Rights Act of 1964, or other federal anti-discrimination statutes.

This does not necessarily mean that Al should not be terminated. It does mean, however, that further investigation is needed, along with a full analysis of the anti-retaliation risks involved. Employers that do not investigate these situations run the risk of turning meritless and easily-defended employment discrimination claims into difficult-to-defend retaliation claims.

PROTECTED ACTIVITY

Virtually every federal or state statute that establishes employee rights also contains a provision prohibiting retaliation against any employee who exercises those

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rights. This means that employers must be aware of a myriad of anti-retaliation provisions in such areas as employee complaints, employee leave rights, and others.

Protection for Employee Complaints

The most common lawsuits involve employees who claim retaliation after they have alleged complaints that their employers are discriminating against them, violating wage and hour laws, or are requiring them to engage in illegal activities. Federal anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the Equal Pay Act all prohibit employers from retaliating against an employee who has: (1) complained to her employer about discrimination prohibited by these laws; (2) filed a charge of discrimination, or (3) participated in an investigation into discriminatory conduct. State anti-discrimination statutes such as the Minnesota Human Rights Act contain similar provisions.

Federal and state wage and hour law protects employees who complain about violations of minimum wage laws, overtime laws, or other improper wage practices. These laws also provide protections for employees who file suits claiming that an employer's wage practices are illegal. Similarly, federal and state workplace safety law protects employees who report occupational safety and health violations.

Like many states, Minnesota has enacted a "whistleblower" act to protect employees who report illegal activities, or who refuse to participate in those activities. This statute prohibits employers from discharging, disciplining, penalizing, or discriminating against an employee who reports or refuses to participate in conduct that the employee objectively believes is illegal. The Federal False Claims Act provides similar protections to employees who allege fraud against the United States government.

Protection for Leave-related Rights

Although employee attendance is often vital to the success of an employer's business, federal and state lawmakers have established several forms of protected leaves of absence; employers are prohibited from discharging or disciplining employees who use leave under these laws. For example, the federal Family and Medical Leave Act prohibits employers from discharging or disciplining employees who: (1) use leave or attempt to use leave; (2) complain about employer interference with

leave rights; or (3) participate in investigations into complaints about employer interference with leave rights. Minnesota's Parental Leave Act provides similar rights.

State workers' compensation acts also provide retaliation protection. These statutes often prohibit employers from taking adverse employment action against an employee who files a workers' compensation claim or misses work due to a workers' compensation-related injury.

Minnesota has enacted several other anti-retaliation provisions in connection with employee-leave statutes. These include prohibitions against retaliating against employees who miss work due to jury duty, certain military service, school conferences involving their children, voting, and bone marrow donation.

Protection for Other Activities

Several additional federal and state laws provide protection against retaliation. For example, the federal National Labor Relations Act and Minnesota law prohibit employers from discriminating against or discharging an employee for participating in union organizing activity or collective bargaining. The federal Employee Retirement Income Security Act prohibits employers from obstructing employee rights to pension or welfare benefits, and from retaliating against employees for asserting their rights to such benefits.

Minnesota's drug testing statute provides protection for employees who invoke procedural protections and rights to retesting of samples, and Minnesota's personnel records statute protects employees who ask to review their personnel records and submit written statements disputing information in those records. Minnesota law also provides protection from retaliation for employees who refuse to submit to polygraph tests, or who are subject to a wage garnishment order from a court.

MANAGING POTENTIAL RETALIATION CLAIMS

The most effective way to defend successfully against retaliation claims is to avoid them altogether. To do this, employers should have a good understanding of the analytical framework that courts use to evaluate retaliation claims.

Generally speaking, courts permit employees to prove illegal retaliation using two methods. The first involves direct evidence of a retaliatory motive. The manager's statement above is a good example of direct evidence – it

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shows that the manager wanted to discharge AI for engaging in conduct that might be protected. The second method involves indirect evidence. Because most employers are sophisticated enough to avoid creating direct evidence of a retaliatory motive, most retaliation cases involve indirect proof.

Proving retaliation through the indirect method of proof involves three stages. First, the employee or applicant must show: (1) that he engaged in “protected activity,” that is, that he exercised certain rights available to him under federal or state law; (2) that his employer took adverse employment action against him after he engaged in that protected activity; and (3) that a causal connection exists between the protected activity and the adverse action. Second, if the employee provides the evidence required to meet the first stage, the employer must provide a legitimate, non-retaliatory reason for the adverse employment action. Third, if the employer provides that legitimate, non-retaliatory reason, the employee must prove that the employer’s reason is pretext and that the real motive is retaliatory.

When evaluating the risk that a personnel decision might lead to a retaliation claim, employers should consider several factors, including: (1) whether the employee has engaged in protected activity; (2) whether the personnel decision would be considered “adverse action;” (3) whether an employee could show a causal connection between his protected activity and the personnel decision; and (4) whether there are legitimate, well-documented reasons for making the personnel decision, or, by contrast, whether the employee could show that the employer’s reasons are pretext for a retaliatory motive.

Protected Activity

Generally speaking, employees engage in protected activity when they exercise rights that they believe in good faith are protected. For example, an employer is prohibited from taking adverse action against an employee who, in good faith, complains that she is being

discriminated against on the basis of her race. It is important to note that the employee is protected even if no discrimination is occurring, as long as there is a *good faith* basis for her to believe that she was being discriminated against. *See, e.g., Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989). With some very limited exceptions, employers should treat any employee complaint about discriminatory treatment as protected activity.

Adverse Action

No retaliation claim can stand unless the employee can identify an adverse employment action. As one court has noted, “[n]ot everything that makes an employee unhappy is an actionable adverse employment action.” *LaCroix v. Sears, Roebuck, and Co.*, 240 F.3d 688, 691 (8th Cir. 2001). Courts generally require employees to show that they have suffered a material employment disadvantage, such as termination or a change in salary, benefits, or responsibilities. Courts have held that poor performance reviews are not adverse employment action where they do not directly affect salary or benefits; one court has held that a forced transfer from one city to another was not an adverse employment action where there was no change in job title, responsibilities, or pay. *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997).

Causal Connection

The most common factor used by courts to decide whether there is a causal connection between protected activity and adverse action is timing. Courts are highly suspicious when adverse employment action comes close on the heels of protected activity. At least for purposes of summary judgment, many courts consider protected activity and an adverse action separated by as much as two months to raise an inference of a causal connection. *See Mathews v. Trilogy Communications, Inc.*, 143 F.3d 1160, 1166 (8th Cir. 1998). On the other hand, courts are willing to dismiss retaliation claims where the adverse

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employment action occurred before the protected activity, where the employer can show that it was planning the adverse employment action before the protected activity occurred, or where the adverse action occurred six or more months after the protected activity. *See, e.g., Feltmann v. Sieben*, 108 F.3d 970 (8th Cir. 1997).

Pretext

Like employment discrimination cases, many retaliation cases turn on whether the employee can produce evidence that the employer's legitimate, non-discriminatory reason for an adverse action is a pretext for a retaliatory motive. This means that adverse employment action must be based on well-documented business reasons, such as employee performance, a business downturn, or other legitimate concerns. It is also very important that the

employer treat its employees consistently in addressing such concerns; the retaliation claimant will argue that any inconsistent treatment of other employees is evidence of pretext and a retaliatory motive with respect to him.

Retaliation claims can be dangerous because employers often overlook them in evaluating the risks associated with discipline or discharge decisions. When considering proposed discipline or discharge, determine whether the employee has recently engaged in protected activity and, if so, whether the proposed personnel action can be adequately defended from a retaliation claim.

Matthew Klein, an Associate in the firm's Minneapolis office, practices in the Labor and Employment Law Practice Group.

“Inevitable Disclosure” Doctrine in Trade Secret and Non-compete Litigation: Inevitably Pleaded, Rarely Understood

By: Michael Iwan

“Inevitable disclosure” has become a familiar component of trade secret and non-compete litigation, but, despite its growing ubiquity, little consensus has emerged regarding the scope and proper application of this legal theory. Inevitable disclosure often is asserted as a means to obtain injunctive relief in the absence of an actual showing that a former employer has misused confidential or trade secret information. A claim of inevitable disclosure may emanate from an existing confidentiality or non-compete agreement, or from state laws prohibiting the misappropriation of trade secrets.

Its recent popularity aside, inevitable disclosure was recognized as a legal principle as early as 1919, in the New York case of *Eastman Kodak Co. v. Powers Film Prods.*, 189 A.D. 556, 179 N.Y.S. 325 (4th Dep't 1919). The doctrine appeared in scattered court opinions over the next 75 years, but it was not until the mid-1990s, and specifically the decision of the Seventh Circuit Court of Appeals in *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995), that the inevitable disclosure doctrine achieved wide recognition.

Aside from the *Redmond* decision, at least two other factors have contributed to the resurgence of the inevitable disclosure doctrine. As “information” (however one wishes to define that term) becomes more and more

the currency of the new economy, companies have implemented greater measures to maintain the confidentiality of their proprietary information and systems. The use of confidentiality agreements, non-compete agreements, and other restrictive covenants has grown commonplace in today's workplace, and companies have demonstrated a readiness to enlist the aid of the courts to enforce such agreements, notwithstanding the time and expense involved.

The growth of the inevitable disclosure doctrine undoubtedly also owes something to the widespread adoption of the Uniform Trade Secrets Act, which at least 44 states have adopted in some form since 1980. The Act expands protection to types of confidential information that traditionally had not been viewed as trade secrets, including non-technical data such as marketing plans and budget and pricing information. Also, the Uniform Trade Secret Act clearly provides for injunctive relief merely upon the showing of a *threatened* misuse of a trade secret. In light of these developments, it is easy to understand why employers have taken the position that most, if not all, of their proprietary information is protected from not only actual or threatened disclosure but also the mere possibility of misuse.

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Broad application of the inevitable disclosure doctrine, however, would permit employers to expand the scope of existing non-compete agreements or, more significantly, convert confidentiality agreements (which tend to be viewed with less judicial skepticism) into *de facto* non-compete agreements, thereby inhibiting employee mobility. Use of the doctrine to convert a confidentiality agreement from a shield into a sword is potentially more troubling because confidentiality agreements tend to have perpetual durations, and often are signed by employees without the same scrutiny or negotiation that would attend a non-compete agreement.

In fact, this was precisely the conclusion reached by the United States District Court for the Southern District of New York in *EarthWeb, Inc. v. Schlack*, 71 F. Supp.2d 299 (S.D.N.Y. 1999). The court refused to apply the inevitable disclosure doctrine to a confidentiality agreement, which would have precluded the former vice president of a website hosting company from going to work for the internet subsidiary of a printing company. The court noted that “[w]hile the inevitable disclosure doctrine may serve the salutary purpose of protecting a company’s investment in its trade secrets, its application is fraught with hazards When that [employment] relationship ends, the parties’ confidentiality agreement may be wielded as a restrictive covenant, depending on how the employer views the new job its former employee has accepted. This can be a powerful weapon in the hands of an employer; the risk of litigation alone may have a chilling effect on the employee.”

This statement captures the ambivalence with which other courts have approached the inevitable disclosure doctrine. As a result, it is truly the exceptional case in which a court finds that disclosure of a former employer’s confidential or trade secret information is the inevitable by-product of subsequent employment, such that the individual should be prevented or severely limited from pursuing his livelihood with the employer of his choice.

**REVIVAL OF THE INEVITABLE DISCLOSURE DOCTRINE:
REDMOND AND SUBSEQUENT CASES**

The decision of the Seventh Circuit in *Redmond* sparked a renewed interest in the inevitable disclosure doctrine. Redmond was an employee for PepsiCo from 1984 to 1994, where he had access to inside information and trade secrets related to PepsiCo’s marketing strategies for its All-Sport sports drink. As a condition of his employment, he had signed a confidentiality agreement. Redmond was approached by Quaker Oats, a competitor

in the sports drink market, and offered and accepted a position as vice president of field operations for the Gatorade division. After Redmond accepted the offer from Quaker, he allegedly misstated the situation to both his boss and coworkers at PepsiCo, making statements to the effect that he had been offered a job “but had not yet accepted it.” Redmond resigned shortly thereafter.

PepsiCo quickly brought suit in an attempt to enjoin Redmond from working for its competitor, arguing that Redmond was privy to a number of trade secrets, including PepsiCo’s strategies for manufacturing, production, marketing, packaging, and distribution of All-Sport for the next three years. PepsiCo argued that, given Redmond’s knowledge of this information, he “would inevitably disclose that information to Quaker in his new position, at which he would have substantial input as to Gatorade . . . pricing, costs, margins, distribution systems, products, packaging, and marketing.”

The district court agreed and enjoined Redmond from working for Quaker for six months, and also permanently enjoined him from using any PepsiCo confidential information or trade secrets in his employment with Quaker. The court found that “*Redmond’s lack of forthrightness on several occasions before accepting his job with Quaker and questions regarding the credibility of his testimony before the district court demonstrated that he could not be trusted to protect PepsiCo’s trade secrets.*” Redmond appealed the decision, insisting that he had no intentions of disclosing any of PepsiCo’s trade secrets in his employment with Quaker, and that he already had signed a confidentiality agreement with Quaker promising not to disclose any trade secrets.

The Court of Appeals for the Seventh Circuit affirmed the lower court’s ruling. Notwithstanding Redmond’s claim that he had not and would not use PepsiCo’s confidential information in his new position, the court held that “a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant’s new employment will inevitably lead him to rely on the plaintiff’s trade secrets.” The court found it very likely that Redmond would be put in a position to use PepsiCo’s confidential information on behalf of Quaker. In addition, the court ruled that Redmond’s testimony and prior actions demonstrated that he could not be trusted to adhere to the terms of his confidentiality agreement.

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It is important to recognize the distinguishing features of this case. First, Redmond accepted a job that placed him directly and undeniably in competition with his former employer in a narrowly defined consumer market that contained only a few major brands. As such, Redmond probably could not fulfill his duties to his new employer without allowing his strategic decision-making to be influenced by what he knew about his former employer's planned activities. Second, Redmond had engaged in activity both before and after his change in employment that severely undercut his credibility and trustworthiness in protecting confidential information.

**SUBSEQUENT DECISIONS ANALYZING REDMOND
AND THE INEVITABLE DISCLOSURE DOCTRINE**

California

In *Bayer Corp. v. Roche Molecular Sys., Inc.*, 72 F. Supp.2d 1111 (N.D. Cal. 1999), the United States District Court for the Northern District of California concluded that recognition of the inevitable disclosure doctrine conflicted with California's public policy against restrictive covenants in employment in restraint of trade. The court noted that as many as 21 states allow plaintiffs to proceed on a claim for trade secret misappropriation or wrongful disclosure of confidential information on an inevitable disclosure theory. Nonetheless, after conducting an extensive review of existing case law, the court declined to add California to that list, concluding that "[t]o the extent that the theory of inevitable disclosure creates a *de facto* covenant not to *compete without a nontrivial showing of actual or threatened disclosure*, it is inconsistent with California policy and case law." (Emphasis added.) Rather, to proceed on a theory of trade secret misappropriation in California, a plaintiff must show actual use or an actual threat to use such confidential information.

Interestingly, just seven months prior to this decision, the United States District Court for the Southern District of Texas, in a case where it was called upon to interpret California law, concluded that California likely would recognize the inevitable disclosure doctrine. In this case, *Maxxim Medical, Inc. v. Michelson*, 51 F. Supp.2d 773 (S.D. Tex. 1999), the court set forth a multi-factor test for determining whether disclosure of confidential or trade secret information is likely to occur:

- (1) Is the new employer a competitor?
- (2) What is the scope of the employee's new job?
- (3) Has the employee been "less than candid" about the new position?

- (4) Has the former employer clearly identified the trade secrets or confidential information at risk?
- (5) Has actual disclosure already occurred?
- (6) Did the employee sign a confidentiality or non-compete agreement with the former employer?
- (7) Did the employee enter into an agreement with the new employer not to disclose another's confidential information and/or does the new employer have a policy against the use of such information?
- (8) Is it possible to "sanitize" the employee's new job so that the employee will not be put in a position of having to use confidential information?

Utilizing this test, the court ruled that disclosure of confidential or trade secret information was inevitable in the case at hand, and enjoined the employee from working for the new employer for one year. The court particularly took note of the fact that the employee (as in *Redmond*) had not been candid regarding his new employment. Among other things, the court reprobated the employee for covering up the fact that he was involved in employment discussions with a competitor. More serious, however, was evidence suggesting that the employee ordered a large batch of confidential information printed the day before his departure under false pretenses, and destroyed confidential information on his work computer after possibly making a portable back-up copy. Although, post-*Bayer Corp.*, the *Maxxim Medical* decision no longer offers an accurate assessment of California law, it is noteworthy for the multi-factor analysis set forth by the court and also for its potential application to cases arising in Texas.

Indiana

In *Bridgestone/Firestone, Inc., v. Lockhart*, 5 F. Supp.2d 667, 681 (S.D. Ind. 1998), the United States District Court for the Southern District of Indiana acknowledged the inevitable disclosure doctrine, but held that the misappropriation of trade secrets was not inevitable under the facts of the case. As vice president of sales for Firestone, Lockhart was responsible for sales of all company products. He had direct contact with many customers, and built goodwill with those customers for Firestone's benefit. After resigning from his position, Lockhart began working as the vice president of national accounts for GAF, Firestone's competitor. Firestone sought a permanent injunction prohibiting Lockhart from working for GAF for 18 months and prohibiting disclosure of trade secrets.

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The district court held that there was no serious threat of misappropriation and listed several factors supporting its decision. The court noted that Lockhart took no documents or other confidential information with him when he left Firestone. While Lockhart had a thorough understanding of the Firestone business, the court accepted his testimony that he could not “remember with precision the financial information that [was] so sensitive.” The court remarked that a “general familiarity with [Firestone’s] financial data has limited and diminished potential value.” Also, unlike *Redmond*, the court found nothing in the record to indicate that Lockhart personally could not be trusted to live up to his obligation to keep Firestone’s confidential information secret. Finally, the court noted that GAF and Lockhart had developed a work arrangement to accommodate Lockhart’s obligations under his non-compete agreement with Firestone, including keeping Lockhart from assignments involving any direct competition with Firestone products.

Minnesota

Minnesota courts first confronted the concept of inevitable disclosure as early as 1986, nearly 10 years before *Redmond* brought the doctrine to prominence. In *Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661 (D. Minn. 1986), the United States District Court for the District of Minnesota discussed the role of inevitable disclosure in the context of non-compete cases. Since that case, Minnesota has adopted the vernacular of “inevitable disclosure,” but in application has taken a more narrow view of the doctrine than elsewhere. In other words, while Minnesota courts claim to consider inevitable disclosure in determining whether to grant injunctive relief, they tend to require a standard of proof beyond a simple showing that an employee possesses a former employer’s confidential information and is working in a similar position for a direct competitor. In fact, only one case from Minnesota federal or state court has even referred to the *Redmond* decision, and that case, *Lexis-Nexis v. Beer*, 41 F. Supp.2d 950 (D. Minn. 1999), merely assumed for the sake of argument that Minnesota law recognized the inevitable disclosure doctrine as set forth in *Redmond*.

For example, in *NewLeaf Designs, LLC v. BestBins Corp.*, ___ F. Supp.2d ___ (D. Minn. 2001), the court noted that the test for injunctive relief under the Minnesota Uniform Trade Secrets Act requires a showing that “there is a high degree of probability of inevitable disclosure.” The court made a similar observation in *International Bus. Machine Corp. v. Seagate Tech., Inc.*, 941 F. Supp. 98 (D. Minn. 1992). This language is a bit confusing, however,

in that if the disclosure is “inevitable,” then the probability of it happening is not just “high,” it is certain. Rather, Minnesota seems to have adopted a slightly different (and perhaps higher) standard than that posited by the inevitable disclosure doctrine *a la Redmond*. It is not sufficient for a party seeking injunctive relief merely to point to circumstances that would suggest disclosure of confidential information would be hard to avoid. Instead, a plaintiff in Minnesota must show that that such a disclosure has happened, has been threatened, is “reasonably” certain to happen, or will happen with a “high degree of probability.”

New York

In the *EarthWeb* case discussed above, the United States District Court for the Southern District of New York concluded that New York law recognizes the inevitable disclosure doctrine “only in the rarest of cases.” The court conceded that the doctrine had been applied by other New York courts, but noted that in those cases there was affirmative evidence that the employees had surreptitiously obtained confidential information from their former employer before leaving. The court remarked that “in cases that do not involve the actual theft of trade secrets, the court is essentially asked to bind the employee to an implied-in-fact restrictive covenant based on a finding of inevitable disclosure. This runs counter to New York’s strong public policy against such agreements and circumvents the strict judicial scrutiny they have traditionally required.”

On the facts of the case before it, the *EarthWeb* court declined to allow the former employer to convert a confidentiality agreement into a *de facto* non-compete agreement. The two companies in question were involved in similar, but not directly competitive businesses, the employee’s new position was not identical to his previous one, and the alleged confidential information would not have direct application for the new employer. Accordingly, there was no indication that the employee would inevitably disclose such information in the course of performing his duties, and no need, on that basis, to prevent him from working for his new employer.

Other Jurisdictions

Florida, Michigan, Pennsylvania, and Rhode Island seem to disapprove of the inevitable disclosure doctrine. The doctrine seems to have found at least limited acceptance in Ohio, Arkansas, Texas, Utah, Washington, Iowa, Wisconsin, and North Carolina.

[see Inevitable Disclosure on page 18](#)

Inevitable Disclosure from page 17*Asserting a Claim Based on Inevitable Disclosure*

Even those courts that have allowed inevitable disclosure claims to proceed are sensitive to the possibility of abuse and to the difficult interpretive problems that inhere in questions of “inevitability” and “confidentiality.” In fact, as the New York federal court noted in the recent *EarthWeb* decision, “Another drawback to the [inevitable disclosure] doctrine is that courts are left without a frame of reference because there is no express non-compete agreement to test for reasonableness . . . Clearly, a written agreement that contains a non-compete clause is the best way of promoting predictability during the employment relationship and afterwards.” By preventing (at least for a period of time) the opportunity for interaction between a former employee possessing sensitive proprietary information and a competitor, an employer is more likely to stave off unfair competitive attacks.

It also must be remembered that the majority of cases where courts have recognized inevitable disclosure claims presented extenuating circumstances. In *Redmond*, for example, the evidence suggested that the employee had been untruthful regarding his employment situation in the past, causing the court to disbelieve his promise not to use confidential information in the future. Similarly, in *Maxxim*, the evidence suggested that the employee had obtained confidential information under false pretenses and attempted to cover his tracks. Inevitable disclosure, therefore, ought to be viewed only as an imperfect, last line of defense.

Defending Against a Claim Based on Inevitable Disclosure

The cases also provide some guidance to employers hoping to avoid a claim based on the inevitable disclosure doctrine. In *Redmond* and other decisions courts have looked for the existence of an agreement between the employee and the new employer designed to prevent the use or disclosure of another company’s confidential information. Therefore, employers should consider including language in their own confidentiality or non-compete agreements that (a) binds the employee not to divulge confidential information obtained from former employers, and (b) affirms the new employer’s resolve not to ask employees to disclose such information in the course of performing their duties. Employees also should be asked before hire about any agreements they have with third parties that might limit their ability to perform fully all the duties of their position, so that appropriate precautions can be taken. Such discussions should be documented for future reference. Lastly, employees should be encouraged to raise any concerns they have, at any time during the course of their employment, regarding third-party confidential information they may possess, without, of course, actually disclosing the potentially confidential information.

Michael Iwan, an Associate in Dorsey’s Minneapolis office, practices in the firm’s Labor and Employment Law Practice Group.

New Minneapolis Office Location



In October 2001, Dorsey & Whitney LLP moved into its new Minneapolis location at 50 South Sixth Street. Even though the street address has changed, the main telephone numbers and attorney telephone numbers remain the same.

DORSEY & WHITNEY LLP

Suite 1500

50 South Sixth Street

Minneapolis, Minnesota 55402-1498

Telephone: (612) 340-2600

Facsimile: (612) 340-2868

www.dorseylaw.com

Foreign Labor Certification

By: Sara Springmeyer

Employers, after receiving H-1B approval for a foreign worker in a temporary position, often ask how that employee can obtain permanent residency (a “green card”). There are several routes to obtaining permanent residence, one of which is through employment. Most employers that wish to assist their employees in obtaining a green card through employment will need to go through a three-step process. The first and most employer-intensive step is the labor certification process. Steps two and three of the process involve the Immigration and Naturalization Service (INS).

This article is confined to the first step of the process, foreign labor certification. Labor certification is granted by the U.S. Department of Labor (DOL). The process involves two findings by the DOL: (1) at the time the application is filed, there are no U.S. workers in the area of intended employment who are available, willing, and qualified to fill the position offered to the foreign worker; and (2) employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

For a job to be qualified for foreign labor certification, an employer-employee relationship must exist. Positions that are classified as “self employment” or “independent contractor” are inappropriate for labor certification. There must be a bona-fide job opening for which the employer is ready and willing to hire an available, qualified U.S. worker. The job must be located in the United States and be classified as a full-time, permanent position. To avoid complications, the job should have duties consistent with those defined for the job in the *Dictionary of Occupational Titles* (DOT) or in the *Standard Occupational Classification* (SOC), and be duties normally required for the job in the United States.

A permanent application for foreign labor certification may be filed as either a “traditional” application or as a Request for Reduction in Recruitment (RIR) application. An application filed under the traditional processing regulations may take from 16 months to 4 years (depending upon the jurisdiction) from initial filing with the State Employment Service Agency (SESA) until final determination by the U.S. Department of Labor. SESA guides the processing of a traditional permanent application and is responsible for taking the employer through a number of steps before the application is

transmitted to the DOL regional office for determination. In some instances, it may be possible for a traditional application to be designated for “Limited Review.” An application is so designated if there are no or few applicants for the position, if the application does not contain unduly restrictive job requirements, and if the employer meets the prevailing wage for the position. SESA has sole authority, at the conclusion of its processing, to designate an application for Limited Review.

The Reduction in Recruitment permanent application processing may take from 2 weeks to 12 months from initial filing through to final determination. RIR processing is an available option if the employer can provide evidence that it has conducted a pattern of recruitment for the position within the six months immediately preceding filing of the application. RIR is appropriate for occupations which meet the following requirements: (1) there are few or no available U.S. workers; (2) there are no restrictive job requirements; and (3) the rate of pay listed on the application meets the prevailing wage for the occupation in the area of intended employment.

Following are the recognized guidelines for the filing of a RIR application:

- The employer must show evidence of prior recruitment that is considered to be normal for the occupation and industry. The recruitment must occur within the six-month period immediately prior to the submission of the application to the SESA.
- The evidence of prior recruitment must consist of general newspaper or trade journal employment ads. The employer must submit copies of “real” ads or tearsheets of the ads. These must show the date of publication, the name of the publication, and, of course, the ads. A minimum of two to four ads should accompany a RIR application; the ads must be a minimum of a month apart. The more ads included with the application, the stronger the RIR case.
- Other supporting documentation that can be used as evidence of prior recruitment (in addition to newspaper or trade journal advertising) includes:

see **Foreign Labor** on page 20

Foreign Labor from page 19

- Internet employment listings for the position (a print copy of the job listing and the date the listing appeared);
 - Evidence of job fair participation (copies of marketing information or invoices documenting participation);
 - College recruitment (locations, dates, and interview schedules);
 - Professional recruiters (a copy of the contract between the employer and the recruiting agency, any ads placed by the recruiters for the position, and a letter from the recruiter regarding the results of the search);
 - Employee referral program (a copy of the company's employee referral policy);
 - Copies of state employment job service orders; and/or
 - Other appropriate documentation of recruitment efforts.
- The employer must provide a copy of a 10-day job posting which adheres to federal regulations.
 - The employer must provide a letter detailing its recruitment efforts and the results of these efforts. The employer does not need to list each applicant for the job, but should provide lawful, job-related reasons for why applicants were rejected. The reasons for rejection must be consistent with the requirements of the labor certification application.
 - The employer must request that the application be processed as a Reduction in Recruitment at the time the application is filed with the SESA.

It has been our experience that whenever possible, the RIR process is the most efficient method to obtain an approved labor certification. The employer has more control of the process and it is usually more cost effective. Dorsey & Whitney's immigration practitioners are highly experienced in this area and ready and willing to provide assistance and advice.

Sara Springmeyer, the former Foreign Labor Certification Coordinator for the State of Minnesota (SESA), is a paralegal in Dorsey's Immigration Group.

UPCOMING SEMINARS

First Quarter 2002

During the first quarter of 2002, the Labor & Employment Law Group will be sponsoring two seminars. In addition, various members of the group will be speaking for other continuing legal education groups. The dates of these seminars are set forth below. We hope you will be able to attend the seminars in your area.

DORSEY SPONSORED SEMINARS:

March 5, 2002 – Washington State Council 2002 Legislative & Employment Law Conference; co-sponsored with the Society for Human Resources Management/ Washington State Council (Seattle, Washington)

March 14, 2002 – Biannual Employment Law Seminar (Bloomington, Minnesota)

DORSEY LAWYERS PARTICIPATING IN CLES SPONSORED BY OTHER ORGANIZATIONS:

February 7, 2002 – Sarah Herman: North Dakota Safety & Health Conference, Understanding OSHA for Long-Term Care Facilities (Fargo, North Dakota)

February 15, 2002 – Rob Reinhart: Mistakes Plaintiffs' Lawyers Most Often Make in Employment Cases (Minneapolis, Minnesota)

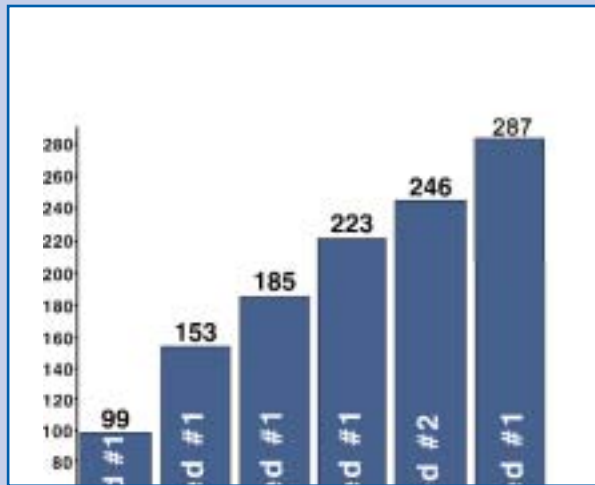
February 22, 2002 – Roy Ginsburg: Winning Closing Arguments; Seminar on Trial and Evidence, Problems and Solutions (Minneapolis, Minnesota)

March 7, 2002 – Mike Iwan: Litigating Emotional Distress Claims (Minneapolis, Minnesota)

March 7, 2002 – Bill Evans: Workplace Privacy Issues (Anchorage, Alaska)

DORSEY NEWS

M&A Group Ranks No. 1: Thomson Financial Securities Data again has ranked Dorsey & Whitney's Mergers & Acquisitions Group number one in the United States for the number of deals completed through the third quarter of 2001. Dorsey is one of only two top-ten firms that saw an increase in M&A activity compared to the same period in 2000. Thomson Financial reported that Dorsey & Whitney closed 210 deals, up from 179 deals in the first nine months of 2000 – a 17% increase!



Dorsey Health Strategies: Dorsey is pleased to announce the formation of Dorsey Health Strategies, a health consulting practice offering business and financial consulting services that are integrated with the legal services our Health group currently offers clients in the industry. Major projects routinely involve the services of health care business consultants for business strategy and financial advice, and lawyers to ensure compliance with complex regulatory requirements. By combining health care business consultants and strategists with health care lawyers, Dorsey now offers a complementary array of professional services to the marketplace that is comprehensive and anticipates a client's needs across a spectrum of business, financial and legal issues.

Paul Klaas: Dorsey partner Paul Klaas has become a Fellow of the American College of Trial Lawyers. The American College of Trial Lawyers is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, and only after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality. Lawyers must have a minimum of 15 years' trial experience before they can be considered

for Fellowship. Currently Chair of the Firm's 135-member Trial group, Klaas has been a partner of Dorsey since 1983 and was an associate from 1977 to 1982.

With this induction, Klaas becomes the eighth Dorsey & Whitney lawyer inducted as a Fellow of the American College of Trial Lawyers. Other Dorsey trial lawyers who have become Fellows are:

Richard M. Clinton	Seattle
Peter S. Hendrixson	New York
John D. Levine (of counsel)	Minneapolis
Kirke C. Quinn	Des Moines
Evan L. Schwab	Seattle
Richard B. Solum	Minneapolis
Keith Strong	Great Fall

New Partners at Dorsey: Dorsey has named 10 lawyers as new partners to the firm as of January 1, 2002. They are:

Steven A. Adducci	Washington, D.C.	Environmental
Timothy A. Arends	Minneapolis	Corporate
David D. Gossklaus	Des Moines	Public Finance
Mary E. Honess	Minneapolis	Real Estate/ Corporate
Matthew J. Knopf	Minneapolis	Corporate
Rita V. Latsinova	Seattle	Trial
Chris E. O'Brien	Tokyo	Corporate
Barry J. Newman	Minneapolis	Estate Planning
Andrew Rimmington	London	Corporate
Dannette L. Smith	Minneapolis	Corporate

Dorsey's Tokyo Office: Effective January 1, 2002, five Japanese licensed lawyers (*Bengoshi*) will join Dorsey's Tokyo office to serve our growing client base in Japan. We are very excited about the Japanese lawyers' special knowledge and experience in a wide variety of areas, including international business transactions, corporate restructuring, M&A, general corporate law, E-commerce, telecommunications and international business litigation.

The Tokyo office now will have full Japanese legal capabilities to augment our U.S. legal capabilities. Operating closely with our other offices, Dorsey's Tokyo office will serve as an important gateway to providing service to our clients worldwide. Dorsey attorneys have been working with these *Bengoshi*, three partners – Kozo Toyama, Noriko Higashizawa, Osamu Higuchi – and two associates – Takahiro Tsumagari and Kunihiro Sumida – on a number of transactions over the last two years. Due to requirements of Japanese law, the *Bengoshi* who will be affiliated with Dorsey's Tokyo office will practice under the name, Kyo Sogo Law Offices.

CASES TO WATCH

Update: Court Affirms Extension of Weingarten Right to Non-Union Employees

In the September 2001 edition of the *Employment Law Update*, we addressed the National Labor Relations Board's decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (July 10, 2000), extending the right of an employee to request the presence of a co-worker at an investigatory interview which the employee reasonably believes might result in disciplinary action – the so-called *Weingarten* right – to nonunion workplaces.

In *Epilepsy Foundation*, the NLRB concluded that the employer committed an unfair labor practice by refusing the request of an employee to have a co-worker present during a meeting to address alleged insubordinate conduct, then terminating the employee when he thereafter refused to meet with management. The NLRB directed that the employee be reinstated with full back pay. *Epilepsy Foundation* is significant because it recognized that employees in nonunion workplaces are entitled to invoke the *Weingarten* right and to seek remedies – including reinstatement and backpay – for violations of the right.

In a November 2, 2001 decision in *Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board*, 268 F.3d 1095 (D.C. Cir. 2001), the U. S. Court of Appeals for the District of Columbia affirmed the NLRB's decision in *Epilepsy Foundation*. The court held that the NLRB's determination that an employee's request for a co-worker's presence at an investigatory interview is concerted action for mutual aid and protection and thus within the realm of Section 7 of the National Labor Relations Act is a reasonable interpretation of the statute entitled to deference. *Id.* at 1100. The court agreed that the act of requesting another's presence at an investigatory interview enhances the employees' opportunities to act in concert to address their concern "that the employer does not initiate or continue a practice of imposing punishment unjustly," and that nonunion employees may have a shared interest in preventing the imposition of unjust punishment. *Id.* (quoting *NLRB v. J. Weingarten Inc.*, 420 U.S. 251, 260-61 (1975)).

Although it affirmed the NLRB's decision to extend the *Weingarten* right to nonunion employees, the D.C. Circuit concluded that the NLRB erred in applying this holding retroactively and directing the reinstatement of the affected employee in *Epilepsy Foundation* because at the time of the employment action in question the NLRB's decision in *E.I. Dupont De Nemours*, 289 NLRB 627 (1988) – which refused to extend the *Weingarten* right to nonunion employees – was still effective. 268 F.3d at 1102-03.

Unless and until the conclusion in *Epilepsy Foundation* is revisited and rejected by a reconstituted NLRB, employers subject to the NLRA will need to pay heed to the *Weingarten* right regardless of the union status of their workforce.

For additional information on the *Weingarten* right and its practical implications, see the article entitled "NLRB Extends *Weingarten* Right to Non-Union Employees" in the September 2001 edition of the *Employment Law Update*.

Cases to Watch

Adams v. Florida Power Corp., 255 F.3d 1322 (11th Cir. 2001), cert. granted, 2001 WL 1240797, 70 USLW 3280 (Dec. 3, 2001) (No. 01-584): The Supreme Court will resolve a split between the Circuit Courts of Appeal on the issue of whether a plaintiff may use the disparate impact method to prove an age discrimination case under the ADEA.

US Airways, Inc. v. Barnett, 228 F.3d 1105 (9th Cir. 2000), cert. granted, 121 S. Ct. 1600 (Apr. 16, 2001) (No. 00-1250): The Supreme Court will decide whether the Americans with Disabilities Act requires an employer to reassign a disabled, but otherwise qualified, employee to a position as a "reasonable accommodation" even though another employee is entitled to hold the position under the employer's bona fide seniority system.

Toyota Motor Mfg. v. Williams, 224 F.3d 840 (6th Cir. 2000), cert. granted, 121 S. Ct. 1600 (Apr. 16, 2001) (No. 00-1089): The Supreme Court will decide whether an employee, suffering from carpal tunnel syndrome and tendonitis, qualifies as disabled under the Americans with Disabilities Act based on her inability to perform a limited number of tasks associated with a specific job due to physical difficulties using her hands, arms and shoulders.

EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999), cert. granted, 121 S. Ct. 1401 (Mar. 26, 2001) (No. 99-1823): The Supreme Court will decide whether an employee's agreement to arbitrate employment-related disputes with an employer bars the EEOC from obtaining individual remedies such as backpay, reinstatement and damages for discrimination in an enforcement action against the employer.

Bass v. Board of County Comm'rs, 256 F.3d 1095 (11th Cir. 2001), reh'g denied, No. 97-10579-JJ (Sept. 4, 2001): The Eleventh Circuit held that an affirmative action program may constitute direct evidence of discrimination even when a defendant denies having acted pursuant to its stated plan.

Attorney Profile: Edward B. Magarian



As a Partner in Dorsey & Whitney's Labor and Employment Law Practice Group (and the Professional Responsibility Partner for the firm's White-Collar Crime and Civil Practice Group), Ed Magarian concentrates his practice in the areas of employment litigation, white-

collar crime and civil fraud – and in the growing intersection between those practice areas. Ed has been with Dorsey & Whitney for more than 11 years and has been a Partner for nearly five.

Ed's employment-related work is focused on noncompete litigation, employment discrimination, class-action defense and other complex civil litigation. "Being prepared and aggressive in representing a client's interests is important," Ed explains. "Yet, it is also important to keep in mind what is and is not significant. After all, when lawyers fight about every issue in the lawsuit and discovery gets bogged down in endless motion practice, clients pay the price but do not necessarily receive top value for their money. By working cooperatively with opposing counsel on issues where it is appropriate to do so, and being aggressive on issues that truly matter, we can best serve our client's interests."

In noncompete and confidentiality cases, for example, Ed explains that "whether you represent the plaintiff or defendant, the key is preparation and quick action." In one such matter, Ed was retained by clients accused of violating their noncompetes and disclosing trade secrets. He worked cooperatively with opposing counsel on certain issues but was able, through a series of motions designed to educate the judge, to convince the court that the action was without merit. Ed's clients were awarded (as a sanction) over \$65,000, representing attorney's fees and costs incurred in defending the suit.

Ed's white-collar crime practice has focused on defending companies and individuals involved in

federal and state investigations, and representing clients before grand juries and prosecutorial questioning. In one recent case, Ed represented a client targeted by the federal government for criminal prosecution. After a four-year investigation, the prosecutor handling the matter informed our client that he was closing the criminal investigation and largely credited Ed's work in leading to that decision. Ed also has represented clients in matters involving alleged false claims, theft, kickbacks, welfare fraud, antitrust violations and in connection with whistleblower lawsuits. When the Office of Independent Counsel in Washington, D.C., opened an investigation into President Clinton's Secretary of the Interior, Ed represented several of the witnesses involved.

Ed's areas of interest – employment law, white-collar crime, fraud – frequently intersect. For example, he has provided advice to clients who uncover possible embezzlement. "There are more cases of employee theft than one might imagine," Ed says. "These cases of theft oftentimes range from just a few thousand dollars up to millions, with most ranging from \$20,000 to \$300,000." He has assisted clients in obtaining reimbursement of stolen funds, with or without litigation, and in helping to persuade prosecutors to pursue such matters. Ed has also lectured on the problem of shoplifting in retail establishments and how retailers can take appropriate measures, with minimal liability, to safeguard their assets.

Prior to joining Dorsey & Whitney, Ed clerked for Judge Frank Magill on the U.S. Court of Appeals for the Eighth Circuit. He graduated *magna cum laude* from Georgetown University with a Bachelor of Arts in 1986, and *magna cum laude* from the Georgetown University Law Center in 1989. Ed currently serves on the board of directors of two nonprofit organizations: Prevention Alliance and The Innocence Project of Minnesota.

See "Post-Termination Obligations in the Absence of Restrictive Covenants" on page 6 of this newsletter.

Labor and Employment Law Practice Group

Minneapolis, Minnesota

Robert R. Reinhart, Jr.(612) 340-7835
 Robert L. Hobbins(612) 340-2919
 J David Jackson(612) 340-2760
 Janice M. Symchych(612) 340-6336
 Roy A. Ginsburg(612) 340-8761
 Mark Ginder(612) 340-8780
 David J. Lauth(612) 343-7940
 Stephen P. Lucke(612) 343-7947
 Joseph W. Hammell(612) 340-7897
 Edward Magarian(612) 340-7873
 Douglas R. Christensen.....(612) 340-8875
 Melissa Raphan(612) 343-7907
 James D. Kremer(612) 340-7859
 Holly Eng(612) 343-2164
 David Y. Trevor(612) 340-8718
 Clifford Anderson(612) 340-2631
 Matthew Klein(612) 340-5666
 Julie Meany(612) 343-2175
 Todd Schnell(612) 343-2199
 Judith Williams-Killackey(612) 340-7950
 Mike Iwan(612) 340-5613
 Eric Nelson(612) 752-7317
 Ruon Sawyer(612) 343-7839
 Laura Ferster(612) 340-2785
 Eric C. Sjoding(612) 340-7881
 Jennifer Dellmuth(612) 343-8244

Immigration

Elaine M. Kumpula(612) 340-8890
 Saiko McIvor.....(612) 340-8872
 Kathleen A. Moccio(612) 343-7975

Anchorage, Alaska

Susan Wright Mason(907) 257-7815
 John Treptow.....(907) 257-7820
 William J. Evans(907) 257-2871

Costa Mesa, California

Juan C. Basombrio(714) 662-1530

Denver, Colorado

Steven Merker(303) 628-1514

Billings, Montana

Robert L. Sterup(406) 238-7613

Great Falls, Montana

Keith Strong(406) 771-6806

New York, New York

Richard H. Silberberg(212) 415-9231
 James M. Bergen(212) 415-9241
 David C. Singer(212) 415-9262
 Stewart D. Aaron(212) 415-9252
 Laura M. Lestrade(212) 415-9227
 Moon Sun Kim(212) 415-9296

Fargo, North Dakota

Sarah Herman(701) 271-8883
 Adele Hedley Page.....(701) 271-8885
 Kristy L. Albrecht(701) 271-8888
 Cheryl L. Eia.....(701) 271-8894
 Lynn Block(701) 271-8895

Seattle, Washington

Michael Droke (206) 903-8709
 Gwynne Skinner (206) 903-8783
 Gregory Hendershott (206) 903-8729
 Lisa S. Guterson..... (206) 903-5445
 Amy Jordan-Friedland (206) 903-8802
 Vanessa Power (206) 903-5447

Employee Benefits

Minneapolis, Minnesota

Don D. Carlson(612) 340-2894
 Robert A. Burns(612) 340-8788
 Stephen E. Gottschalk(612) 340-2941
 Bruce J. McNeil(612) 340-5640
 Leslie J. Anderson(612) 343-7960
 John W. Haine(612) 340-2786
 Katherine M. Mattson.....(612) 343-8219
 Melinda A. Maher.....(612) 340-2990
 Timothy Arends(612) 343-2165
 Kristyn M. W. Mullin(612) 343-8237
 Christine
 Peterson-Stromgren.....(612) 340-6329
 Terry-Lynne Lastovich.....(612) 340-8778
 David Overstreet(612) 343-7928
 Michael J. Voves(612) 343-8266
 Timothy Goodman(612) 340-2825

Seattle, Washington

Marianne O'Bara (206) 903-8843
 Nancy Gallup..... (206) 903-8826
 Alan Ross (206) 903-5446

DORSEY & WHITNEY LLP

50 SOUTH SIXTH STREET, SUITE 1500
 MINNEAPOLIS, MINNESOTA 55402-1498

EDITORS

Roy A. Ginsburg
Joseph W. Hammell
James D. Kremer

DESKTOP PUBLISHER

Jeannie Smith
 Dorsey & Whitney LLP
 Graphics Department

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The Employment Law Update is ON THE WEB.
 Find it at www.dorseylaw.com/firm_news.asp.