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FROM THE EDITOR

Although this is the first issue of the *Journal of Individual Employment Rights* to appear under my editorship, it really is Kurt Decker's last issue. All of the articles in this issue, including mine, were submitted to Kurt; many of them came from his students and all of the accept/reject decisions were made during his tenure. My role has been one of shaping the issue and, with the assistance of Manuscript Editor Claire Mierowitz and the rest of the staff, getting the articles into final form.

The first three articles address employee privacy rights in the workplace. Paul Kovatch begins our study by examining constitutional and statutory considerations and Theresa Zechman reviews the case law on the topic. Zechman continues by examining four specific privacy issues in employment: urinalysis, search of desks, search of lockers, and video surveillance. Brandy Scott examines an employee's right to privacy in his/her e-mail.

The next two articles focus on the Americans with Disabilities Act. Mary Beth Hamilton traces the bridge between the concept of hostile environment, pioneered in Title VII cases, and the ADA, while Charles Coleman studies the impact of three 1999 Supreme Court decisions on that same law.

The issue closes with Theodora Haynes' compilation of subject and author indexes for the first eight years of the *Journal of Individual Employment Rights*—a summary of Kurt Decker's work.

**PRIVACY RIGHTS IN THE WORKPLACE:
CONSTITUTIONAL AND STATUTORY CONSIDERATIONS**

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ABSTRACT

The growth of surveillance in the workplace has increased at an alarming rate during the last decade. Various electronic and other surveillance techniques—including the use of video cameras, e-mail monitoring, telephone recordings, and searches of employee computers and cubicles—allow employers a seemingly unlimited ability to “keep tabs” on their employees. Such technological advances significantly affect the privacy rights of employees. This article examines how privacy rights at the workplace are treated constitutionally and statutorily. The author argues that employers’ growing abuse of this ability to monitor employees and violate their right to privacy requires an examination of current protections for employees and, possibly, new solutions.

Technological advancements have played a major role in the workplace by greatly enhancing the employers’ ability to monitor virtually every aspect of a worker’s activities. The American Management Association reports that nearly two-thirds of its members conduct some form of electronic monitoring or surveillance of their employees [1, p. 825]. Employees and job applicants are increasingly subject to monitoring, including office and cubicle searches, video surveillance, electronic mail monitoring, and health and psychological screening [1, p. 826; 2, pp. 989, 1017]. Because this technology allows surreptitious surveillance, the employee’s right to privacy may be almost entirely eliminated [1, p. 827; 3, pp. 1898, 1903]. The growing threat such surveillance poses to commonly accepted notions of privacy requires us to take a closer look at workplace privacy protections for private sector employees [1, p. 827; 4, pp. 102-104]. This article briefly traces the history of an employee’s right to privacy, examines some of the current privacy laws, and explores some new privacy proposals and solutions to this growing issue of workplace monitoring.

A distinction must be made between public and private employment. Because constitutional rights usually protect citizens from the government, employees can claim a constitutionally protected right only if a state action occurs. Therefore, constitutionally protected rights can usually be secured only when the government is the employer. Because of this dichotomy, public sector employees enjoy greater privacy rights than do private sector employees. Private sector employer action rarely constitutes state action, so the typical private sector employee can find legal protection from intrusive employer surveillance only through claims brought under various state statutes or the common law tort of invasion of privacy. These remedies vary widely from jurisdiction to jurisdiction, and in some cases have not protected employees against even the most outrageous forms of employer intrusion [1, p. 829; 5, at *7].

HISTORY OF THE RIGHT TO PRIVACY

It is very difficult to define the term privacy [1, p. 832; 6, pp. 10-12]. No single definition or theory can capture all the nuances of the concept. Privacy in this article means: freedom from unwarranted and unreasonable intrusions into activities that society recognizes as belonging to the realm of individual autonomy [1, p. 833; 7, p. 7].

While there is no “right to privacy” found in any specific guarantee of the Constitution, the U.S. Supreme Court has recognized that “zones of privacy” may be created by more specific constitutional guarantees [8]. For example, in *Roe v. Wade*, the Court pointed out that the guarantee of personal privacy must be limited to rights that are “fundamental” or “implied in the concept of ordered liberty,” such as matters relating to marriage, procreation, contraception, family relationships, child rearing, and education [8, 9]. As a result of *Roe* and many other cases, privacy has come to be regarded as a fundamental right. This country’s historic respect for privacy has helped creativity and individuality flourish [1, p. 834; 10, pp. 1434-1438; 11]. American culture has been built on its “rugged individualism,” diversity, and the willingness to accept challenges that test American creativity [12]. However, these traits may be sacrificed if privacy is not protected.

While individuals have a fundamental interest in privacy, they also have an obvious need to obtain and maintain employment [1, p. 834; 13]. Increasingly, however, a growing number of employers are resorting to intrusive monitoring techniques. These techniques force employees to sacrifice their privacy expectations because of their need to work. A very large number of cases have arisen from employer monitoring. Some of the alleged violations include videotaping changing rooms, timing bathroom breaks, random monitoring of phone conversations, or intercepting electronic mail [1, p. 826; citing 2, pp. 989, 1017]. Employers typically try to justify employee monitoring by citing increased worker productivity, better evaluation of work performance, deterrence of dishonesty, and limiting liability. But regardless of whether these interests are valid or are

done in good faith, employee monitoring creates increased stress, and often make employees feel demeaned.

A two-year study by the University of Wisconsin found that workplace monitoring causes physical and emotional health problems in employees [14, pp. 1256, 1262]. The study found a higher incidence of headaches and other physical ailments, such as backaches and wrist pain, among monitored workers [14, p. 1263]. Moreover, monitored workers also suffer greater fatigue. Psychological problems included a 12 percent increase in depression and a 15 percent increase in extreme anxiety [14, p. 1263].

CURRENT PRIVACY LAWS

What can employees do when they believe their privacy rights have been violated? In practical terms, the employee has little choice but to grin and bear it, or “simply” change jobs [15, p. 441]. However, people have certain expectations of privacy in their persons and effects. These expectations are protected to some degree by various legal provisions, including the U.S. Constitution, state constitutions or statutes where applicable, and common law [15, p. 728]. The extent of legal protection for a person’s privacy is governed, in large part, by what the law considers to be “reasonable.”

Privacy Under the U.S. Constitution

The Fourth Amendment to the U.S. Constitution protects privacy, in part, by prohibiting those acting under government authority from conducting unreasonable search and seizures. An unreasonable search is one in which an individual’s reasonable expectation of privacy in what is being searched outweighs the government’s need to conduct the search and obtain information. Typically, however, only public sector employees can invoke the Fourth Amendment protection against unreasonable searches and seizures to challenge employer searches of employees and property.

Private sector employees who wish to contest employer invasions of privacy must rely on a patchwork of federal and state statutes, common-law tort theories, and the public policy exception to the employment-at-will doctrine [15, p. 839]. Under these laws, the protection granted private sector employees is far less than the protection available to government employees. The courts have, however, applied a Fourth Amendment analysis to both public and private sector employees to determine whether the employee has a privacy right.

In 1987, the U.S. Supreme Court considered what constituted a reasonable search by a public employer under the Fourth Amendment [16]. In *O’Connor v. Ortega*, the Court analyzed whether the employer’s search of a publicly employed psychiatrist’s office and files was unreasonable [16]. The Court laid out an analytical framework to guide the lower courts when deciding whether a public

employer's justification for carrying out a search outweighs an employee's privacy interest in his/her offices and files [16].

The Court found that both public and private employees have a reasonable expectation of privacy [16, at 716]. However, one's expectation of privacy may be reduced by "actual office practices and procedures, or by legitimate regulation" [16, at 717]. In *O'Connor*, the target of the search was Ortega's office. The Court concluded that Ortega had an expectation of privacy because he did not share the office or files, he had occupied the office for seventeen years, and the employer did not discourage keeping personal items in the office [16, at 718-719].

The next element of the Court's analysis involved balancing "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace" [16, at 719-720]. The Court initially noted that requiring employers to obtain a search warrant before conducting a search would be unworkable [16, at 720-722]. The Court stated that, because work-related searches promote efficiency, employers should have greater latitude to conduct such searches [16, at 723].

When balancing an employers' interest in efficiency and regulating employee conduct against an employee's expectation of privacy, the Court identified two issues that should be addressed [17, pp. 695, 730]. First, a court must consider whether the search was initially justified by reasonable suspicion that the search would turn up evidence of what the searchers were seeking [17, p. 730]. Second, the scope of the search must not go beyond that justified by the initial reason for searching [17, p. 730].

Thus, under *O'Connor*, three primary considerations exist in determining whether a search of a public employee's workplace is permissible under the Fourth Amendment [17, p. 730]. First, does the employee have a reasonable expectation of privacy in the thing to be searched [17, p. 730]? Second, does the employer have a reasonable, work-related need or suspicion to search [17, p. 730]? Finally, the scope of the search must not exceed what is necessary to investigate the employer's need or suspicion [17, p. 730].

However, because Ortega was employed at a state hospital and was considered a state employee, he was permitted to bring a Constitutional claim. As mentioned above, this right is rarely extended to private sector employees. Only the California courts have clearly held that the state constitutional right to privacy applies with respect to both public and private employers [14, pp. 1256, 1265]. In other states, employees have successfully invoked the state constitutional right to private only after establishing that the government was the employer [14, pp. 1256, 1265].

Pennsylvania provides an example of the path more frequently taken by the states. Article I, section 8, of the Pennsylvania Constitution contains language almost identical to that of the Fourth Amendment. Similar to that amendment, Article I, section 8, extends to searches conducted by public officials or those acting on their behalf. However, the search-and-seizure clause of the Pennsylvania

Constitution may be more comprehensive than the Fourth Amendment. The courts have noted that the protection of individual privacy against reasonable governmental search and seizures under the Pennsylvania Constitution are more expansive than those afforded under the U.S. Constitution [18]. However, the courts have not afforded private sector employees any constitutional protection.

STATUTORY PROTECTIONS

Federal

The federal legislation most relevant to employee privacy is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act (ECPA) of 1986 [1, pp. 825, 839; 19]. The ECPA, with certain exceptions, prohibits any interception or disclosure of oral, wire, and electronic communications, or any entry into an electronic system to alter or obtain stored communications [1, p. 840]. However, because of the following exceptions, the ECPA provides very limited protection of employee privacy. The ECPA does not require prior notice to employees of monitoring. Consent to monitoring need not be expressly given, and it can be inferred from an employee's awareness of the monitoring [1, p. 840]. Among the factors relevant to establish awareness are whether the employee was generally informed that calls will be monitored and the manner in which the monitoring will take place. In addition, the business-extension exclusion of the ECPA exempts interceptions made by equipment "furnished to the subscriber or user by a communications carrier in the ordinary course of business and being used by the subscriber or user in the ordinary course of business" [1, p. 840]. The only limitation the law imposes on monitoring employee communication is that the surveillance be "within the ordinary course of business" [1, p. 841, citing 20]. It is difficult to imagine how any monitoring scheme that enhances productivity or efficiency would not be construed as "within the ordinary course of business" [1, p. 841; 21]. Finally, what limited protection the ECPA might afford employees has been greatly weakened because the statute quickly became outdated [1, p. 841; 22, pp. 345-347]. The ECPA does not apply to several modern monitoring techniques, such as electronic mail monitoring and video surveillance [1, p. 841].

Pennsylvania contains a wiretapping statute similar to the ECPA. However, Pennsylvania's Wiretapping and Electronic Surveillance Act is a criminal statute, and courts have recognized that it should be narrowly construed because it is designed to regulate surreptitious electronic monitoring of citizens by the government officials. However, the courts have also found that private individuals may be prosecuted for violating the Wiretap Act's provisions.

COMMON LAW PROTECTION

Under common law, a person's privacy may be invaded by an unreasonable intrusion upon his/her seclusion. Most plaintiffs use this tort to challenge employer monitoring and surveillance [1, pp. 825, 844]. The tort reads in part: "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person" [23]. The classic conception of this tort is that it is used to punish highly offensive privacy invasions [1, pp. 825, 844]. Recognized in virtually every state, there has been an attempt to apply the tort in the employment context as a way of challenging workplace-monitoring abuses by employers [1, pp. 825, 844; 24, §3.3, p. 108; §3.5, p. 123]. However, what is "highly offensive to a reasonable person" is a very subjective standard. Routine monitoring may appear harmless from some perspectives (especially that of a third party), and the negative effects of such monitoring may be gradual and incremental, so this subjective standard usually defeats an employee's claim based on typical workplace monitoring and surveillance [1, p. 845].

In *Smyth v. Pillsbury Co.*, an employee was terminated after his employer intercepted an e-mail message from the employee to his supervisor via the employer's e-mail system and determined the e-mail contained "inappropriate and unprofessional comments" [17, pp. 695, 743; citing 25]. The employee sued for wrongful termination, claiming his termination violated the right to privacy "as embodied in Pennsylvania common law [17, p. 743; citing 25, at 100]. The court noted that although the plaintiff was an at-will employee who could generally be terminated with or without cause, no employee could be terminated if the discharge threatened or violated a "clear mandate of public policy" [17, p. 743; citing 25, at 99]. The court concluded, however, that the plaintiff's termination did not violate public policy [25].

The court began its analysis by holding there could be no "reasonable expectation of privacy" in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system [17, p. 743; citing 25, at 101]. The court also made clear it would reach the same conclusion even if an employer gives assurance that such communications would not be intercepted [17, p. 743; citing 25]. The court then stated that, even if an employee had a reasonable expectation of privacy in electronic communications, interception by an employer would not constitute "a substantial and highly offensive" invasion of privacy. The court concluded that an employer's interest in preventing inappropriate or illegal conduct outweighs any privacy interest an employee might have in his e-mail communications [17, p. 743; citing 25, at 101].

As this case demonstrates, courts have not been very receptive to employee claims of invasion of privacy. An employee's office, desk, or locker may be held to be the employer's property, and thus not private [1, pp. 825, 846]. Moreover, some

courts require an employee to demonstrate not only the occurrence of an invasion of privacy, but also that the employer subsequently disseminated or published the information obtained from that intrusion [1, p. 846]. The combination of these requirements typically defeats the employee's tort claim in all but the most egregious circumstances [1, p. 846; 26].

PROPOSED PRIVACY PROTECTIONS

Though many commentators have questioned the lack of workplace privacy protection for nongovernment employees, no consensus has emerged as to a solution to the problem [1, p. 847]. Recommendations include suggestions of new state laws or tort actions, amending current federal privacy protection statutes, and even Constitutional amendment.

In 1993, the Privacy for Consumers and Workers Act (PCWA) was introduced in the U.S. House of Representatives and the U.S. Senate. In February 1994, the House Education and Labor Subcommittee on Labor Relations approved the bill. However, the PCWA met with strong resistance in the Republican committee and thus remained inactive. [At press time, in 2001, the bill was still in committee.]

Generally, the PCWA would require employers to give specific written notice to their employees concerning: 1) the forms of monitoring to be used; 2) the use (if any) to be made of personal data collected; 3) interpretations of statistics or other records if the interpretations affect the employee; 4) existing production standards and work performance expectations; and 5) methods for determining production standards and work performance expectations based on electronic monitoring statistics [17, p. 737]. The PCWA would also require notice to job applicants and customers who may be electronically monitored pursuant to the PCWA [17, p. 737].

Under the PCWA, an employer could monitor any employee at the worksite without notice if the employer "has a reasonable suspicion" that the employee has violated or will violate criminal law or civil law, or has engaged in or will engage in gross misconduct and the conduct adversely affects the employer's economic or safety interests. The proposed PCWA does not delineate what types of monitoring may be inappropriate even with adequate notice, leaves employees subject to offensive nonelectronic monitoring, and fails to protect the employee against egregious privacy violations that meet the notice requirements [1, pp. 825, 851].

Although the PCWA may have its shortcomings, it is a major step toward adequate privacy protection for the employee in the private sector workplace.

Other scholars have suggested an expansion of the privacy tort to help deter workplace privacy invasions. Supporters of an expanded privacy tort argue that a new common-law cause of action applying to all workplace privacy invasions would provide the greatest protection to employees [1, pp. 825, 851]. Supporters theorize that the courts can fashion new common-law remedies to resolve the problems created by changes in technology and economic conditions. Because

legislation has not dealt adequately with these issues, supporters believe a new tort claim would provide the most immediate help to workers. The tort law approach of adjudicating claims on a case-by-case basis, examining the circumstances and balancing the equities of each case, would provide the best mechanism for protecting privacy rights [1, p. 852]. However, a judiciary expansion of current privacy doctrine would involve broadened rulings, which the courts seem unwilling to make. In addition, action by the courts would not provide uniform protection of workplace privacy rights. Employees who suffer similar intrusions might receive differing protection of their privacy rights, and the surveillance process may cross state lines [1, p. 853]. As a result, employees and employers may be uncertain as to which law governs their workplace rights.

CONCLUSION

Despite our historic commitment to privacy rights in the United States, it has become increasingly common for employers to monitor the actions and communications of their employees [1, p. 887]. As advances in technology are made, electronic monitoring in the workplace may well become even more prevalent. Abuses of these practices are bound to become more commonplace unless some guidelines are established. At present, Congress and state legislatures have recognized some limitations on the employer's ability to monitor employees [1, p. 887]. Current privacy law, however, is inadequate and inconsistent [1, p. 887]. The best solution would be to adopt a comprehensive federal statute based on broad constitutional principles of privacy. This seems to be the only way to address the lack of privacy protection that currently exists for private sector employees, while at the same time providing a uniform statute that would not vary from state to state and from jurisdiction to jurisdiction.

In addition to the need for legislative action, a balance must be struck between the employer's need for monitoring employee performance and the employee's legitimate privacy and productivity interests. Courts need to examine more closely the claims of business necessity for privacy intrusions and should recognize that less intrusive methods of determining employee productivity can achieve similar results. Employers must also recognize that electronic monitoring may not achieve the benefits they anticipate, since studies have indicated that electronic monitoring may lower work performance and productivity. Finally, employees must also recognize and accept some level of monitoring, for if employees demand the complete elimination of electronic surveillance, employers may invade employee's personal integrity through even more degrading means than those now occurring.

* * *

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ENDNOTES

1. Elizabeth Wilborn, Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace, 32 *Georgia Law Review*, pp. 825-887 (1998), citing Rosemary Orthmann, *Most Major Employers Monitor Workers Electronically*, American Management Association International Survey Questionnaire: Workplace Testing and Monitoring, University Publications of America, Bethesda, Md. (May 1997). The survey indicated 63 percent of its members conducted electronic monitoring or surveillance of employees.
2. Andrew Jay McClurg, Bringing Privacy Law Out of the Closet: Tort Theory of Liability for Invasions in Public Places, 73 *North Carolina Law Review*, pp. 989-1089, 1017 (1995). Noted startling increase in monitoring of employees and customers.
3. [No author cited], Addressing the New Hazards of the High Technology Workplace, 104 *Harvard Law Review*, pp. 1898-1916, 1903 (1991). Noted that employers can record length, time, and destination of calls with computerized telephone system technology.
4. U.S. Congress, Office of Technology Assessment, *The Electronic Supervisor: New Technology, New Tensions* (OTA-CIT-333), Washington, D.C.: U.S. Government Printing Office, September 1987. Described possible illegitimate uses of monitoring, such as frustration of union organizing efforts, circumvention of employment discrimination laws via intensified scrutiny of protected employees, and identification of whistleblowers.
5. *Harris v. Neff*, 55 Fair Employment Practices Cases, BNA 1019; 6 IER Cases 615 (D. Kan., March 25, 1991. [Not reported in Federal Supplement.] Finding: A memorandum circulated to 110 employees was not considered highly offensive to a reasonable person and did not constitute privacy invasion. The memorandum had stated that a worker was no longer employed and had voluntarily entered an alcohol and drug rehabilitation program.
6. Raymond Wacks, *The Protection of Privacy* (London: Sweet & Maxwell Publishing, 1980). The author noted: "The long search for a definition of 'privacy' . . . is often sterile and, ultimately, futile" [p. 10].
7. Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967). The author stated: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, and to what extent, information about them is communicated to others" [p. 7].
8. *Roe v. Wade*, 410 U.S. 133 (1973).
9. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).
10. Ken Gormley, One Hundred Years of Privacy, *Wisconsin Law Review*, pp. 1335-1441 (1992).
11. Gormley described how "the industrialization and urbanization of America in the late 1800s . . . threatened the ability of individuals to regulate . . . information concerning themselves, an essential function if they were to help mold the perceptions society would form of them, the essence of individuality" [10, p. 1434].
12. Gormley noted that fundamental-decision privacy, such as whether to have an abortion and how to raise one's family, has links to equality [10, pp. 1434-1438].
13. *Gay Law Students Association v. Pacific Telephone & Telegraph Company*, 595 P.2d 592, 599 (Cal. 1979). The ruling included: "An individual's freedom . . . to work and

earn a living has long been recognized as one of the fundamental and most cherished liberties enjoyed by members of our society. . . ." [at 599].

14. Julie A. Flanagan, Restricting Electronic Monitoring in the Private Workplace, 43 *Duke Law Journal*, pp. 1256-1281, 1262 (1994).
15. David Neil King, Privacy Issues in the Private Sector Workplace: Protection from Electronic Surveillance and the Emerging "Privacy Gap," *Southern California Law Review*, pp. 441-474 (1994).
16. *O'Connor v. Ortega*, 480 U.S. 709 (1987).
17. Thomas P. Klein, *Electronic Communications in the Workplace: Legal Issues and Policies*, Handbook: 563 (New York: Practising Law Institute/Pat., 1999), pp. 695-754.
18. *Commonwealth v. Parker*, 422 Pa.Super. 393 (1993).
19. Omnibus Crime Control and Safe Streets Act, Public Law No. 90-351, 82 Stat. 197, 211-225 (1968).
20. Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510(5)(a). The act exempts interceptions occurring "in the ordinary course of . . . business" from the definition of interceptions.
21. *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414 (1980). The court found the defendant employer had acted in the ordinary course of business when it monitored an employee's telephone calls to a competitor who was also a friend of the employee as well as a former employee of the defendant. According to the court, the employer had reason to suspect its employee was discussing confidential information with former employee.
22. Larry O. Gantt, An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace, 8 *Harvard Journal of Law and Technology*, pp. 345-425 (1995).
23. Restatement (Second) of Torts, § 625B (1977).
24. Kurt H. Decker, *Employer Privacy Law and Practice* (Amityville, N.Y.: Baywood Publishers, 1987; *Supplement*, 1997). The author discussed the lack of remedies available to most private sector workers for invasion-of-privacy claims.
25. *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996).
26. *Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1427 (8th Cir. 1991). The court held the security-guard firm liable for the invasion of privacy that occurred when guards videotaped models changing clothes in the dressing area at a fashion show.

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WHEN DOES AN EMPLOYER VIOLATE AN EMPLOYEE'S FOURTH AMENDMENT RIGHTS? CASE LAW AND APPLICATIONS

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ABSTRACT

This article will attempt to provide answers about the extent of an employee's 4th Amendment rights. The first section will provide an overview of the requirements of the 4th Amendment. The following sections will explore specific issues including urinalysis, the privacy of an employee's desk, video surveillance, and lockers.

Joe, a truck driver for Trucking Inc., arrives at work to begin his shift. Following normal protocol, he places his jacket and other personal belongings in his locker in the employees' locker room in the Trucking Inc. terminal. Joe talks with the other employees in the locker room who are changing their clothes as their shift has ended. Unbeknownst to Joe and his fellow employees, Trucking Inc. is watching. Placed in the smoke alarm above their lockers is a minuscule video camera which records the employees' every move. Has Joe's 4th Amendment right to be secure in his person and free from unreasonable search and seizures been violated? It depends.

THE FUNDAMENTAL CASE LAW

The 4th Amendment to the United State Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

There is a limit to the application of the 4th Amendment. The U.S. Supreme Court has “recognized that the principal object of the Amendment is the protection of privacy rather than property. . .” [1]. To violate the 4th Amendment, there needs to be: 1) state action; 2) search and/or seizure; and 3) a reasonable expectation of privacy. If any of these elements is absent there is no violation.

STATE ACTION

Initially the court must determine whether or not there has been state action. Fourth Amendment protection is only applicable when there has been state action, no matter how unreasonable and intrusive the search may have been. In determining whether a private party is acting as an agent for the state, the court will consider “1) the government’s knowledge and acquiescence, and 2) the intent of the party performing the search” [2].

In *U.S. v. Williams*, the defendant took his automobile to the shop to be repaired because the engine was frozen. The owner of the repair shop allowed him to leave his vehicle at the shop. After the defendant’s visit, the owner discovered money to be missing. The owner contacted the police and notified the police officer that he suspected the defendant stole the money. The police officer, without a warrant, searched the defendant’s vehicle and seized a number of items in an effort to ascertain the defendant’s identity. The officer left the items on the floor of the repair shop and departed. In an effort to clear the floor of the shop, the owner picked up the items and in doing so, looked through a sack which belonged to the defendant. The owner discovered contraband and notified the police. The *Williams* court held the owner’s search was conducted by his own choice and therefore was not acting as an agent for the state. However, the evidence was suppressed because the initial search conducted by the police which led the owner to discover the contraband was illegal.

Whether a private company was acting for the state was the core issue in *Jackson v. Metropolitan Edison Co.* [3]. In *Jackson*, the United States Supreme Court was asked to determine whether a customer of a private utility company should be afforded constitutional protection because a utility company is heavily regulated by the state and held a partial monopoly in the area. In analyzing the extent of state involvement, the Court determined that “acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be “state” acts than will acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself” [3, at 352].

In determining whether there was a sufficient nexus, the Court reviewed the state regulation which governed the utility company. The Court pointed out that where a private entity had been vested with the performance of a duty or action that

is normally reserved to the state, the Court will find state action. However, the Supreme Court held that: 1) utility service is generally not the responsibility of the state; 2) there is no sufficient nexus between the utility company and the state; 3) the state did not lease any property or facilities to the company; and 4) the company and state were not connected by any joint ventures [4]. The Court ruled that the action of the utility company was not state action and therefore no constitutional protection was provided to the customer.

In contrast to *Jackson*, state action has been found where the federal government has enacted extensive regulations which private companies are statutorily obligated to comply with such regulations. In *Skinner v. Railway Labor Executives' Association*, the Federal Railroad Administration promulgated regulations requiring drug and alcohol testing for any railroad employee involved in an accident. Although railroad companies are private companies, they must abide by the regulations of the Federal Railroad Administration. After reviewing the government's participation, the Supreme Court held that the railroad companies were obligated to comply with the regulations and there "are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment" [5, at 615-616]. But in *Kipp v. LTV Aerospace and Defense*, no state action was found where a private employer had a contract with the federal government and that contract required the company to implement a drug testing program for its employees [6]. The *Kipp* Court distinguished *Skinner* by the fact that the "federal government did not require them to bid for defense contracts; they freely entered into these defense contracts."

One could question the validity of the outcome of the *Kipp* case. The company was not forced into the contract, but an aerospace and defense company is undoubtedly limited in the number of customers they can attract. Additionally, the defense work contracted to Kipp was undoubtedly the domain of the government, and if the company did not implement the drug testing policy, it would not get the contract. In short, this could be considered a joint venture between the company and the government, thereby extending the concept of state action to the private company.

State action has been found where a regional transportation authority acquired a private mass transit system, and then contracted with a private firm to manage that transit system [7]. The regional transportation authority, despite relinquishing day-to-day control to a private entity, retained actual ownership of the assets of the transit system. Therefore, any action of the transit system would be considered state action even though the private entity would carry out the action.

HAS A SEARCH OR SEIZURE OCCURRED?

Upon finding state action, the court will determine whether or not a search has in fact occurred. "A search implies an examination of one's premises or person

with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest” [8]. If there is no search, the 4th Amendment does not come into play.

There is no search when someone simply looks into a car or home if they have a lawful right to be in that particular area. If someone allows an object to be subject to a public audience, then they cannot complain when someone in the public actually views that object. In *Haerr v. United States*, the defendants were in an automobile that was stopped by Immigration Patrol Inspectors at the border [8]. When one of the inspectors shined his light in the area of the backseat, the defendant leaned forward to hide boxes that were placed on the floor. Upon noticing the boxes, the inspector questioned the contents of the boxes. The defendants immediately drove away and threw the boxes out the window of the vehicle. The inspectors picked up the boxes and discovered contraband. The *Haerr* court held that there was no search because the inspectors are permitted to stop and question those who cross the border. Looking into a vehicle does not constitute a search and there is no seizure of the boxes because the inspectors were permitted to retrieve the boxes.

Additionally, in *Vega-Rodriguez v. Puerto Rico Telephone Co.*, a public employer subjected the employees to video surveillance [9]. The court stated that “the mere fact that the observation by a video camera rather than the naked eye, and recorded on film rather than in a supervisor’s memory, does not transmogrify a constitutionally innocent act into a constitutionally forbidden one” [9, at 181]. The employer was permitted to videotape the employees’ activities because the same conduct could have been observed through the hiring of a monitor to observe the employees. Therefore, no search had taken place because the activities were in plain view of the camera or a supervisor.

“A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property” [10]. There need not be a search for a seizure to occur [11]. In *Leshner v. Reed*, Leshner was a police officer who was assigned a dog which was to be part of the canine squad. The police department owned the dog; however, pursuant to an agreement with the Department, Leshner was responsible for its care and custody. In accordance with the agreement, if the dog was not accepted as part of the canine squad, Leshner could have custody of the dog or the police department could dispose of it. After the dog bit a child, the police department determined that the dog was not fit for the canine squad and planned to have it killed. Fellow police officers arrived at Leshner’s home to retrieve the dog. Leshner informed the police department that he wanted custody of the dog, and he released the dog only after being told he would be terminated if he did not do so. Subsequent to Leshner’s release of the dog, he was demoted. The *Leshner* Court held that there was a seizure of the animal and although Leshner was a public employee, he should have been afforded the same constitutional protection at his home as a private citizen.

EXPECTATION OF PRIVACY

Once it is determined that a search and/or seizure has occurred the next inquiry is as to the reasonableness of one's expectation of privacy. The United States Supreme Court has held that a person needs to have a reasonable expectation of privacy [10, at 114]. An expectation is reasonable if it is an expectation that society will recognize as reasonable. If someone has an unreasonable expectation of privacy, even though there may be a search and state action, there is no violation. It is only after an expectation is deemed reasonable that a court will determine whether a person's rights have been infringed.

APPLICATION OF THE CASE LAW

Urinalysis

Many employers have implemented urine testing of their employees to test for drugs and alcohol. Private employers have been permitted to engage in virtually unlimited testing of their employees as a means of an employee obtaining or retaining a job. A private employer was permitted to require applicants who were offered a position to partake in urine testing for drugs and alcohol. In *Wilkinson, et al. v. Times Mirror Corp.*, two applicants were offered the position of legal writer on the condition that they pass a medical examination and a urine test for drugs and alcohol [12]. The tests were performed at a medical clinic. The clinic would, after testing, give each applicant a numerical rating from one to five designating his or her suitability for employment. A rating of five indicated a failure of the drug and alcohol test or it could mean that the applicant failed due to a disqualifying medical condition. If an applicant received a five, they were permitted to reapply for employment in six months. The details of the medical testing were not released to the company. Because there was no state action, the company was free to implement this policy and have it validated by the courts.

In contrast, the legislature in Georgia enacted the Applicant Drug Screening Act which required all applicants for employment with the state to undergo urine testing to detect illegal drugs. In *Georgia Association of Educators v. Harris*, the court found that the state had "failed to specifically identify any governmental interest that is sufficiently compelling to justify testing *all* job applicants" [13]. The state's only justification was a "generalized governmental interest in maintaining a drug-free workplace" [13]. The court held that this generalized justification was not sufficient and found the Applicant Drug Screening Act violated the 4th Amendment of the United States Constitution.

Employees can be terminated by a private employer if they refuse to submit to a urine test. In *Kelly v. Mercoird Corporation* [14], the company manufactured and handled mercury. In order to determine whether any employees have been exposed

to the toxic mercury, all employees were required to take a urine test. The plaintiff employee was required to take the urine test, even though her position never required her to come in contact with mercury. The company fired the plaintiff employee when she refused to take the urine test. The court found no 4th Amendment violation because of the lack of state action.

If private employees are forced to undergo drug/alcohol testing pursuant to federal regulations, the 4th Amendment is applicable. In *Skinner*, discussed above, the Federal Railroad Administration promulgated regulations to address a drug/alcohol problem among railroad employees [5]. The rules required that in the event of an accident that involves a fatality, the release of hazardous material accompanied by an evacuation or a reportable injury, or damage to railroad property of \$500,000 or more, the employee is to undergo a urine test to detect the presence of drugs and alcohol [5, at 609]. The Supreme Court concluded that society does recognize that such testing intrudes upon a person's expectation of privacy and is to be considered a search and quite possibly a seizure within the parameters of the 4th Amendment, since a person would have a possessory interest in their bodily fluids [5, at 617].

In analyzing the constitutionality of the regulations, the *Skinner* Court held that the tests were reasonable because the government has a compelling interest in the health and safety of the public and the railroad employees; there was no need to obtain a warrant because the regulations defined when the testing was to occur; and because this was a special need beyond law enforcement, no warrant was needed prior to testing an individual. Perhaps most importantly, there was no need to have individualized suspicion prior to the testing because the government's interests were compelling and outweighed the employees' privacy expectations.

The leading case for urinalysis for public employers is *National Treasury Employees Union v. Von Raab* [15]. In this case, the U.S. Supreme Court reviewed the drug-testing program adopted by the Commissioner of the United States Customs Service. This program required all employees who sought a promotion to positions that required the employee to be in direct involvement in drug interdiction or carry firearms or handle "classified" material, to submit to a urine test to detect the presence of various illegal drugs. Any results were not to be used in a criminal prosecution without the consent of the employee.

The Supreme Court determined that since the employee is only tested when seeking a promotion into one of the specified positions, the drug test was automatic. The Service would not make a discretionary determination to search based on a judgment that certain conditions were present. Furthermore, there was no need for the search to be based on the criminal standard of probable cause because that standard is not used in administrative searches. The Court pronounced that "the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms" [15, at 668]. The Court also recognized that the employees would also have a

diminished expectation of privacy because of the nature of the positions covered by the regulations.

The Customs Service employees who sought a promotion into a position which would cause the employee to come in contact with classified information were also required to undergo urine testing. The Court concluded that the Customs Service failed to provide evidence as to why employees who had access to classified material were to be tested. The Court remanded to the Court of Appeals to determine “what materials are classified and in deciding whom to test under this rubric. . . . [t]he court should also consider pertinent information bearing upon the employees’ privacy expectations, as well as the supervision to which these employees are already subject” [15, at 678].

The Supreme Court held that “the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable. The Government’s compelling interest in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation’s borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions” [15, at 679].

In *American Federation of Government Employee, Local 1533 v. Cheney*, the *Von Raab* holding was applied to the U.S. Navy [16]. In *Cheney*, the court analyzed the Navy’s automatic drug testing program. The testing program required the Navy to test 80,000 civilian employees randomly in over 100 different jobs and test over 300,000 civilian Navy employees worldwide after an accident or based on reasonable suspicion.

In reviewing the random testing, the *Cheney* court held that the automatic testing of employees who hold top secret clearances is constitutional because these employees have access to information which pertains to national security and disclosure of this information poses a risk to the nation. Additionally, these employees are required to undergo extensive background checks in regular intervals and therefore these employees have a diminished expectation of privacy.

However, the Navy also would randomly test employees based on their job function. The court held that this type of testing was unconstitutional because the Navy failed to demonstrate any compelling government interest for testing employees holding the designated positions and the program allowed officials to have broad discretion in choosing employees for the testing.

The Navy had designated for testing a number of positions involving maintenance and operation of equipment, national security, protection of life and property, drug/alcohol rehabilitation, and law enforcement. The court found that the only category in which random testing is permitted would be law enforcement. The other categories were not so designated, particularly since the Navy failed to show a nexus between the dangers of intoxicated employees and a threat to the safety of the public as well as a compelling government interest.

The Navy regulations also required testing for any employee involved in an accident on the job or when the employee's supervisor had reasonable suspicion. The court held that the Navy failed to demonstrate a nexus between the post accident testing and public safety. However, the court also found that the Navy was permitted to test an employee where an employee's supervisor had a reasonable suspicion that the employee was either intoxicated or drug impaired.

In a similar vein, in *Taylor v. O'Grady*, the Seventh Circuit examined the urine testing requirements of the Department of Corrections employees. The court upheld the testing program, but not for employees who have: 1) no regular access to inmate population; 2) no reasonable opportunity to smuggle drugs into the inmate population; and 3) no access to firearms" [17].

In summary, a public employer may conduct suspicionless urinalysis testing for any one of three reasons: 1) maintaining the integrity of workers in executing their essential mission; 2) enhancing public safety; and 3) protecting truly sensitive information [16, at 1419]. The courts will look closely for a nexus between the testing and the purpose. There must be some connection between the purpose of the test and the harm that the test is to prevent.

Search of Desks

A public employee has a reasonable expectation of privacy in the contents of his/her desk or contents thereof. In *O'Conner v. Ortega*, Dr. Ortega, a psychiatrist employed by a state hospital, was placed on administrative leave while being investigated for a number of infractions [18]. The hospital's policy permitted an inventory search for terminated employees. An official of the hospital conducted a search of Ortega's desk, even though Ortega was only on leave and had not been terminated. Ortega was later terminated, partially because of some of the items found in his desk during the search, and the seized items were used against him at an administrative hearing.

The Supreme Court stated that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. . . . The employee's expectation of privacy must be assessed in the context of the employment relation" [18, at 733]. The Court determined that even though the office staff of the hospital may have had access to the office, Ortega had a reasonable expectation of privacy in his file cabinets as well as his desk. But the Court also stated that the employee's expectation of privacy does not require an employer to obtain a warrant whenever it wants to enter an employee's office or desk for work related purposes. Public employers have an interest in workplace efficiency and the employer is not in the business of seeking out criminal activity. Thus, it would be impractical to require the employer to articulate the probable cause standard required to obtain a warrant. The Supreme Court ultimately remanded the case to the District Court to "determine the justification for the

search and seizure, and evaluate the reasonableness of both the inception of the search and its scope” [18, at 729].

The Supreme Court of Louisiana was later required to apply the law of *Ortega* in *State v. Ziegler* [19]. In *Zeigler*, supervisors from the State Bureau of Vital Statistics conducted a search of forty workstations after business hours after receiving evidence that fraudulent birth certificates had been issued from their office. The supervisors did not have any warrants or reasonable suspicion of any particular employee. The supervisors searched desks, drawers and shelves, but not personal items such as purses or briefcases. No desks or drawers were equipped with locks. The search located evidence which incriminated an employee.

In reviewing the constitutionality of the search, the Louisiana Supreme Court utilized the two-prong test laid out in *O’Conner v. Ortega*: 1) “the employee must have a reasonable expectation of privacy in the area searched, or in the item seized; and 2) if a reasonable expectation of privacy exists, the search should be reasonable under all the circumstances. ‘Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable.’”

The *Zeigler* court determined that the openness of the office space and lack of locking mechanisms limited the defendant’s reasonable expectation of privacy. The search was also deemed to be justified at its inception because the evidence indicated clearly that the fraudulent birth certificates came from this office. Moreover, the scope of the search was permissible because: 1) it was conducted after work when employees would have taken home any personal items; 2) no purses or briefcases that remained in the office were searched; and 3) the search was limited to a particular department. The Court held that the search was “reasonable despite the absence of individualized suspicion.”

In summary, public employees should be aware that their employer may search the contents of their desks and workspace. If the employee is the only person to have access to the desk or particular property, this would demonstrate evidence that the employee would have an expectation of privacy in that particular property. Once an employee has an expectation of privacy, the search that is conducted must be reasonable under the circumstances. An employer does not need to obtain a warrant to search the employee’s workspace if the search is for a work related purpose.

Video Surveillance

Since employers cannot personally monitor every move of the employees, some have opted to employ the use of video surveillance. In *Thompson v. Johnson County Community College* [20], the employer installed a video surveillance camera in an employee locker area. The locker area was also a storage area, was not locked, and many employees of the college had access to the area. The camera was installed because of allegations of theft and of employees bringing weapons onto campus. During the period of time the surveillance camera was in operation, the college did not uncover any evidence of theft or any violations of the college’s weapon policy.

After noting that silent video surveillance is subject to 4th Amendment prohibitions against unreasonable searches, the court addressed two questions: 1) whether the plaintiffs had a reasonable expectation of privacy, and 2) whether the search was reasonable [20, at 507]. The *Thompson* Court concluded that the plaintiffs could not have a reasonable expectation of privacy because the area was not enclosed, not locked, and many people had access to the area. In addition, the Court concluded the college's purpose for video surveillance was work related and reasonable.

In contrast, in *State of Hawaii v. Bonnell*, the post office received anonymous information that employees were gambling on the premises [21]. Working with local police, the postal officials had video surveillance cameras installed in smoke detectors and a burglar alarm in the employee break room. Over 1200 hours of footage was taken during the workday over the course of a year. As a result of the surveillance, six employees were charged with gambling, promoting gambling, and possession of gambling records, all misdemeanor charges.

The Court concluded that there was "no special or exigent circumstances that would have justified a warrantless search in this case; it can hardly be said that the [police department] was faced with any sort of 'emergency'" [21, at 1273]. The Court also concluded that the employees had a reasonable expectation of privacy in their break room. Only postal employees and invited guests were allowed in the room. Accordingly, the defendants were in a position to regulate their conduct. "When seated in the break room, the defendants could see anyone approaching and could avoid being surprised by an untrusted intruder" [21, at 1276]. The Court suppressed the video surveillance at the defendants' criminal trial.

The analysis that the Court used in the *Bonnell* case differs from that used in *Thompson*. In *Thompson*, other employees could enter the locker area and the employees did not have a reasonable expectation of privacy. The *Bonnell* Court pointed out that only employees or their guests were permitted in the break room. When someone the employees were not familiar with entered the break room, they could change their actions and speech. Therefore, the employees had a reasonable expectation of privacy. Of note, the employees in *Thompson* changed their clothes in the locker area and they still did not have a reasonable expectation of privacy, yet the employees in *Bonnell* were in a break room which was not an area where the employees changed their clothes or stored personal belongings, and these employees had a reasonable expectation of privacy.

In summary, if an employer has a work related justification for the video surveillance, the employer will generally be allowed to do so. However, it would be best to avoid areas where the employees have an obvious expectation of privacy. Despite the outcome in *Thompson*, an employer should be extremely hesitant about installing video surveillance in a locker area or restroom where the employees could be in various stages of undressing or engaging in extremely private acts.

Lockers

Since many employees lead hectic lives, at times they are required to bring personal items to work in order to run errands or go directly to a personal appointment. And, of course, many employees have lockers where they can place these personal belongings. In *Dawson v. State of Texas*, the defendant was an exotic dancer who worked at the Showtime Club [22]. The police received an anonymous tip that someone had stored illegal drugs in the locker room of the club. The police went to the club and informed the club's manager of the allegation, and the club's manager conducted a search of the lockers. Since the defendant's locker was locked, the manager, with the police present, requested that the defendant remove the lock. The manager searched the locker as well as the defendant's purse and found drugs in her purse. The manager later testified that he had worked at many clubs and the dancers were all aware that their lockers were subject to be searched, however, he had not told the same to the defendant.

The Court determined that the manager of the club was working as an agent of the police and therefore the 4th Amendment was applicable. Initially, the Court had to determine whether the defendant had a reasonable expectation of privacy in her locker. Even though the defendant did not own the locker, the Court ruled that she had a reasonable expectation of privacy because she had a possessory interest and had a legal right to be on the premises. In addition, the Court held that "where an employee who is hired to dance or perform has been issued a private locker by her employer on which she has placed a lock, it is reasonable to expect that her belongings will be stored without being subject to search unless she has been placed on notice of the possibility of such a search" [22, at 370].

Next, the Court analyzed whether the defendant consented to the search and whether the manager could provide the requisite consent for a warrantless search. The Court determined that the defendant's submission to authority did not amount to voluntary consent. In addition, "one who has an equal right of control or possession of premises generally does not thereby have authority to consent to a search of an area on the premises which is set aside for the exclusive use of the other." The manager "did not have common authority over appellant's locker and could not validly consent to the search." Therefore, the search of the defendant's locker violated the defendant's 4th Amendment rights [22, at 368, 372].

However, where rules are promulgated which authorize random locker searches, the employees' expectation of privacy is reduced. In *Chicago Fire Fighters, Local 2 v. Chicago*, the Chicago Fire Department announced to the firefighters that semi-annual locker inspections would be conducted [23]. Because the working conditions at the fire houses were strictly regulated and controlled, the individual fire fighter's expectation of privacy was diminished. Accordingly, the locker searches did not infringe on a valid expectation of privacy." The court dismissed the plaintiffs' claim they had no knowledge of the regulation. The Court acknowledged that the fact that even though they may not have been aware of the

regulation, they were “charged with constructive knowledge of the rules and orders . . .” [23, at 974]. In assessing the reasonableness of the search, the Court held that the search was lawful and that “[t]he substantial interest of the CFD, on behalf of the public . . . in assuring that all fire fighters are able to perform their jobs safely and effectively greatly outweighs the fire fighters’ expectation of privacy in their station house wall lockers” [23, at 976].

In summary, an employee has a reasonable expectation of privacy in their locker. Some factors which help to establish that there is a reasonable expectation of privacy are the employee has exclusive possession or control of the locker; the employee has the only key or combination; and the employer does not have a locker search policy. If the employer wants to be able to search the employees’ lockers, there should be a policy to inform the employees the lockers could be searched at any time.

CONCLUSION

The courts are gradually cutting away employees’ 4th Amendment rights. As a private employer, it is important to notify all employees that the desks, lockers and other company issued property are subject to search at any time and for any reason or no reason at all. The courts also have allowed private employers much discretion in the use of urine testing, but some protection may be afforded employees through state legislation. (Please see discussion of this topic by Kovatch in this volume.)

However, public employers are controlled by the Constitution. As the questions arise as to the reasonableness of the searches conducted by the employer, the courts are finding the government’s interests to be more compelling than the privacy interests of the employees. This is quite disturbing because the U.S. Supreme Court clearly expressed concern that the government must have a compelling reason and not an arbitrary or generalized interest reason.

Of additional concern is when the employer, private or public, conducts a search and uses the information found in the search for a subsequent criminal prosecution. This is important because when an employer conducts a search it should be out of work related concerns, not to seek out criminal activity. If an employer believes criminal activity is afoot, then the proper authorities should be contacted, especially if the employer is the government. The employer’s job is to maintain efficient operations of their companies, not to deputize themselves as crime fighters.

The best advice for employees is to not take anything into the work place that they are not willing to have the employer see. Even if the search is found to be unlawful, thereby violating the 4th Amendment, the chances are good that the employee will be without a job.

* * *

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ENDNOTES

1. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967).
2. *U.S. v. Williams*, 827 F.Supp. 641, 645 (D. Org. 1993).
3. 419 U.S. 345, at 351 (1974).
4. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court found sufficient nexus where a restaurant, accused of racial discrimination, leased parking space from the state.
5. 489 U.S. 602.
6. 838 F.Supp. 289, 8 IER 1565 (N.D. Tex. 1993).
7. *Craft v. Pace of South Holland*, 803 F.Supp. 1349 (N.D. Ill. 1992).
8. *Haerr v. U.S.*, 240 F.2d 533, 535 (5th Cir. 1957).
9. 110 F.3d 174 (1st Cir. 1997).
10. *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984).
11. *Leshner v. Reed*, 12 F.3d 148 (8th Cir. 1994).
12. 4 IER 1579 (1st Cir. 1989).
13. 5 IER 1377, 1380 (N.D. Ga. 1990) (emphasis in the original).
14. 776 F.Supp. 1246 (N.D.Ill. 1991).
15. 489 U.S. 656.
16. 754 F.Supp. 1409 (N.D. Cal. 1990).
17. 888 F.2d 1189 (7th Cir. 1989).
18. 480 U.S. 709.
19. 637 So.2d 109 (1994).
20. *Thompson v. Johnson County Community College*, 930 F.Supp. 501 (D. Kan. 1996) (*affirmed* 108 F.3d 1388).
21. 856 P.2d 1265 (Hawaii 1993).
22. 868 S.W.2d 363 (Tex. App. 1993). Petition for discretionary review denied.
23. 717 F.Supp. 1314 (N.D. Ill. 1989), 4 IER 970.

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EMPLOYEE E-MAIL: A PROTECTED RIGHT TO PRIVACY?

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ABSTRACT

This article examines the constitutional, statutory, and common law protection given to employee e-mail that is either transmitted or stored on the employer's communication system. The article looks at the protection given to employee e-mail by the U.S. Constitution, a number of federal and state statutes, and recent court decisions and it provides a policy exemplar for companies to consider. While the law is not fully settled, rarely have employee e-mail communications been accorded protection under concepts of privacy.

Currently no federal laws regulate electronic surveillance in the workplace, and most states do not have laws restricting electronic monitoring at work [1]. This article discusses the law as it pertains to employees' right to privacy regarding the use of workplace e-mail for personal reasons. The article outlines constitutional law, common law, and Electronic Communication Act of 1986, and the Omnibus Crime Control and Safe Streets Act of 1968 (OCCSSA), as well as recognizing current case law dealing with an employee's right to the use of e-mail for personal use.

CONSTITUTIONAL LAW

The general right of privacy is implicitly rooted in the Fourth Amendment to the United States Constitution. That amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." [2]. The United States Supreme

Court has explicitly recognized the right of privacy pursuant to the Fourth Amendment in cases such as *Griswold v. Connecticut* [3] and *Katz v. United States* [4]. However, the Fourth Amendment applies only to governmental participants, thereby protecting employees in the public sector workplace, but not in the private sector.

Supreme Court's landmark ruling in *O'Connor v. Ortega* defines the extent to which the Fourth Amendment protects employee privacy in the public employment [5]. In *Ortega*, a psychiatrist charged state hospital officials with violating his Fourth Amendment rights after they searched his office and seized various items from his desk and file cabinets. The Court held that the propriety of a workplace search, at its inception and in its scope, "should be judged by the standard of reasonableness under all circumstances" [5, at 725-726]. The Court concluded that under this standard, the Fourth Amendment is violated only if public employees have "an expectation of privacy that society is prepared to consider reasonable [5, at 715, citing 11]. This standard requires balancing the employer's need for control and supervision of the workplace against the privacy interests of employees [5, at 719-720].

COMMON LAW

An employee could bring a common law cause of action against a *private employer* when the employer obtains access to the employee's workplace e-mail. There are two common law causes of action in this situation: the privacy tort of intrusion upon seclusion and intentional infliction of emotional distress.

The intrusion upon seclusion tort is defined as follows: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person" [6, at 652B]. If an employee is to succeed in bringing this action s/he has to prove that an employer's access to the e-mail communications was a highly offensive intrusion to a reasonable person. One commentator has stated that "if an employer obtains information about the employee through the employer's . . . computer system . . . the employee will have much greater difficulty in winning an invasion of privacy lawsuit." As a result, employees usually do not succeed when bringing an intrusion upon seclusion claim against their employer for e-mail monitoring.

Second, employees may bring a claim against their employers for intentional infliction of emotional distress resulting from e-mail monitoring in the workplace. In defining the tort of intentional infliction of emotional distress, the Restatement (Second) of Torts states that "one who by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to another results from it, for such bodily harm [6, at 46]. Although this tort could be available to an employee, it is unlikely that a court would characterize an employer's access to an

employee's e-mail to be extreme and outrageous conduct [7]. Therefore, except in the most "extreme and outrageous" circumstances, an employee's intentional infliction of emotional distress cause of action would most likely fail.

THE CALIFORNIA APPROACH

Possibly foreshadowing the future, in September 1999, the California Legislature sent Gov. Gray Davis a bill that would prohibit employers from secretly monitoring the electronic mail or other personal computer records of their employees, unless the employees have been notified of company policies allowing such monitoring [9]. The proposed bill did not pass, but it set forth new privacy rights for public and private sector employees by giving employees the right to know whether they may be monitored. Employers would be required to prepare and distribute copies of their policies and practices on workplace privacy and electronic monitoring to all employees. Affected employees would be required to sign or electronically verify the notices to acknowledge they have read the policies and understand them. If an employee declined to sign the policies, an employer still would comply with the law if the person who provided the policies to the employee signed a statement that the employer received the policies.

The bill would have given employees the right to have access to records their employer collects through electronic monitoring, and the right to dispute and correct that information. The bill would define "secret monitoring" as inspecting, reviewing, or retaining personal electronic mail or any other computer records generated by an employee when an employer has not notified the employee of the employer's workplace privacy and electronic monitoring policies and practices.

THE ELECTRONIC COMMUNICATION ACT OF 1986

The United States Congress enacted the Electronic Communications Privacy Act of 1986 (ECPA) [10] to amend the technologically out-of-date Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [11]. By 1986, Congress realized that the existing laws protecting business and personal communications had not kept pace with the development of communications and computer technology or with the changes in the structure of the telecommunications industry [12]. In amending Title III of OCCSSA, Congress sought to "bring it in line with technological developments and changes in the structure of the telecommunications industry" [12, p. 3]. In its discussion of technological advancements, Congress specifically mentioned that e-mail required additional protection [12, pp. 3-4]. The Senate Report described electronic mail in the following manner:

Electronic mail is a form of communication by which private correspondence is transmitted over public and private telephone lines. In its most common form, messages are typed into a computer terminal, and then

transmitted over telephone lines to a recipient computer operated by an electronic mail company. If the intended addressee subscribes to the service, the message is stored by the company's computer "mail box" until the subscriber calls the company to retrieve its mail, which is then routed over the telephone system to the recipient's computer. If the addressee is not a subscriber to the service, the electronic mail company can put the message onto paper and then deposit it in the normal postal system. Electronic mail systems may be available for public use or may be proprietary, such as systems operated by private companies for internal correspondence [12, p. 8].

Access to Stored E-Mail: Title II of the ECPA

Cases involving employer access to stored e-mail messages are governed by 18 U.S.C. 2701 [13]. Under 2701, a person or entity violates the Stored Wire and Electronic Communications and Transactional Records Access (Stored Communications). If someone "intentionally accesses without authorization a facility through which an electronic communication service is provided, courts must sanction a violation of the Stored Communications Act for "commercial advantage, malicious destruction or damage, or private commercial gain" with more severity than other violations [13, at 2701(b).]

But the Stored Communications Act provides two exceptions for e-mail communications: the provider exception and the user exception. First, under the provider exception, the Stored Communications Act does not apply to conduct authorized "by the person or entity providing a wire or electronic communications service" [13, at 2701(c)(1)]. According to many commentators who interpret the provider exception broadly, private employers who maintain a computer system have the ability to peruse and disclose employee e-mail communications without violating the Stored Communications Act [14, p. 925]. Second, under the user exception, the Stored Communications Act does not apply to conduct authorized "by a user of that service with respect to a communication of or intended for that user" [13, at 2701(c)(2)].

Interception of E-Mail: Title III of the OCCSSA as Amended by Title I of the ECPA

The interception of an e-mail communication is governed by Title III of OCCSSA [17, at 2510-2521; 39-40]. Through Title I of the ECPA, Title III of OCCSSA was amended to extend interception protection to "electronic communication." Under 18 U.S.C. 2511, an individual violates Title III of OCCSSA if s/he "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communications [11, at 2511(1)(2)]. Damages for a violation of Title III of OCCSSA are more severe than damages for a violation of the Stored Communications Act. Penalties may include punitive damages, attorneys fees, and litigation costs.

Title III of OCCSSA has exceptions that create allowable interceptions of wire, oral, or electronic communications. Section 2520(d) of 18 U.S.C. provides three good faith defenses to liability: 1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization; or 2) a request of an investigative or law enforcement officer under section 2518(7) or this title; or 3) a good-faith determination that section 2511(3) of the title permitted the conduct.

The ordinary course of business exception is found in Title III's definition section. Under this exception, an employer may intercept an employee's e-mail communications in the ordinary course of its business if it uses "equipment or a facility, or any component thereof" furnished by the provider of the electronic communication service in the ordinary course of its business [11, 2511(1)(1) 1994]. One commentator has separated cases dealing with employer liability under the ordinary course of business exception of Title III of the OCCSSA into two distinct branches: "legitimate business purpose" cases and "subject of the call" cases [15, p. 239]. Cases involving the legitimate-business-purpose exception focus on whether the employer had a legitimate business purpose to justify the interception of the employee's communication. Courts have held that telephone monitoring to ensure better quality control and to reduce personal use was an allowable interception under Title III's ordinary-course-of-business exception [16].

RECENT CASE LAW INVOLVING E-MAIL IN THE WORKPLACE

As mentioned above, few cases exist involving an employee's right to privacy concerning e-mail communications. In 1996, two federal district courts and one state court addressed the issue of e-mail privacy in the employment context. The U.S. District Court for the District of Nevada decided the most recent employment e-mail privacy case in *Bohach v. City of Reno* [17]. In *Bohach*, the plaintiffs, two Reno, Nevada, police officers claimed the city of Reno had violated the federal wiretapping statutes and their constitutional right to privacy when it 1) stored messages sent over an "Alphapage" message system and 2) accessed the stored messages from police department computer files. Their suit attempted to halt the city's investigation into their alleged misuse of communication equipment.

The district court held, first, that the plaintiffs suffered no constitutional injury under the Fourth Amendment because they had no reasonable expectation of privacy when using the Alphapage message system [17, p. 1234]. The court noted that any subjective expectation of privacy was unreasonable because 1) the police department notified all Alphapage users that their messages would be stored on the network; 2) the department prohibited certain types of messages from being broadcast via Alphapage; and 3) the Alphapage system was easily accessible to anyone with access to the department's computer system [17, p. 1235].

Second, the district court held that the plaintiffs did not have a claim under federal wiretapping statutes because no interception of electronic communications occurred, and the city, as the provider of computer service under the ECPA, could lawfully access any stored electronic communication on its Alphapage system. The district court denied the plaintiff's motion to prevent access to the stored Alphapage messages [17, pp. 1236, 1237].

The U.S. District Court of the Eastern District of Pennsylvania addressed an employee's e-mail privacy rights in *Smith v. Pillsbury Co.* [18]. In *Pillsbury*, the district court sought to determine whether an employee had a claim for wrongful discharge after Pillsbury accessed the employee's work-related e-mail communications [18, p. 98]. The plaintiff had sent e-mail messages to his supervisor that the company concluded were "unprofessional." Smith was then terminated. The plaintiff relied on *Borse v. Piece Goods Shop, Inc.* [19] to support its proposition that a tortious invasion of privacy may be a sufficiently clear mandate of public policy to bar an at-will employment discharge. The district court noted, however, that the *Borse* decision supported such a proposition only if an employer's invasion of privacy was substantial and highly offensive to the 'ordinary reasonable person.' Applying this standard, the court first determined that the plaintiff did not have a reasonable expectation of privacy in workplace e-mail communications.

The court distinguished the present privacy intrusion from those in which a person has a reasonable expectation of privacy, namely, urinalysis and personal property searches. In addition, the court further differentiated this case because the Pillsbury executives did not require the plaintiff to disclose any personal information, as would have been the case in the urinalysis and personal property search cases. The court determined the e-mail communications did not enjoy a reasonable expectation of privacy even though Pillsbury had made assurances to its employees that employee e-mail would not be intercepted. Once the plaintiff had voluntarily transmitted the communication to another individual, his supervisor, the court concluded that any reasonable expectation of privacy was lost [20].

The court concluded that no reasonable person would find Pillsbury's actions to be a substantial and highly offensive invasion of an employee's privacy interest. Pillsbury's interest in "preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweighs any privacy interest the employee may have" [18, at 100]. In addition, the court noted that Pillsbury did not force the plaintiff to disclose personal information; nor did it invade the plaintiff's person, as would be the case with a urinalysis or a personal property search. The court therefore granted Pillsbury's motion to dismiss.

In another case, a Massachusetts appellate court ruled on a trial court's grant of summary judgment in favor of the employer in *Restuccia v. Burk Technology, Inc.* [21]. In *Restuccia*, an employer discharged two employees after reading their e-mail messages stored in the employer's backup computer files. The

employees' stored e-mail messages included messages containing nicknames for the employer and messages detailing the employer's extramarital affair with another employee.

The trial court granted summary judgment for the employer on most counts, including violations of the state wiretap law, intentional infliction of emotional distress, tortious interference with contractual relations, wrongful termination, invasion of privacy, negligent infliction of emotional distress, and loss of consortium. The superior court reversed the trial court's summary judgment in regard to all but one of the judgments. The court held the employer was entitled to summary judgment only on the claims under the state wiretap statute [21].

In a more recent case, *United States v. Simons*, the defendant, a CIA employee, was charged with violating 18 U.S.C. §2250(A) by using the Web to receive and possess child pornography [22]. This 1998 case began with the observations of an operations center manager. The manager noted that its Internet access log was very large. When he searched on the word "sex," he found a significant number of hits, later traced back to the defendant's work station. This led to a remote examination of the defendant's files, which management determined were pornographic. A search warrant was issued and executed.

When indicted, Simons moved to suppress the evidence as an illegal search and, therefore, a violation of the Fourth Amendment. Judge Cacheris denied the motion, ruling that Simons had no expectation of privacy, particularly since the office in which he worked had previously published an official policy on "Permitted and Prohibited Official Use of the Internet." In light of the policy, the court did not find that the defendant had any reasonable expectation of privacy with respect to any of his Internet activity. Accordingly, the searches of his computer and his e-mail did violate the Fourth Amendment.

E-MAIL POLICIES IN THE WORKPLACE

An employer may provide employees with advance knowledge of how e-mail will be treated in their employment context by creating an e-mail monitoring policy [23]. The policy should clearly explain to employees the employer's intentions regarding workplace privacy [23]. Currently, it is estimated that only one-third of U.S. businesses utilizing e-mail systems have e-mail policies. E-mail monitoring policies serve multiple purposes. The policies create clear standards to prevent employment disputes and insure consistent supervisory administration of employment relations. In addition, an e-mail monitoring policy will provide proof to the employee, or to a court in the event of litigation, that the employer seeks to protect company property and resources and does not seek to invade the employee's privacy rights.

Attorney Adam Conti has posted a sample employer e-mail and electronic usage policy on his Internet Law Office Web page. Some extracts from this policy are:

1. The following procedures apply to all electronic media and services which are:
 - accessed on or from company premises,
 - accessed using company computer equipment, or via company-paid access methods, and/or
 - used in a manner which identifies the individual with the company.
2. Electronic media may not be used for knowingly transmitting, retrieving, or storage of any communications of a discriminatory or harassing nature, or which are derogatory to any individual or group, or which are obscene or X-rated communications, or are of a defamatory or threatening nature, or for “claim letter,” or for any other purpose which is illegal or against company policy or contrary to the company’s interest.
3. Electronic media and services are primarily for company business use. Limited, occasional, or incidental use of electronic media (sending or receiving) for personal, nonbusiness, purposes is understandable and acceptable—as is the case with personal phone calls. However, employees need to demonstrate a sense of responsibility and may not abuse the privilege.
4. Electronic information created and/or communicated by an employee using e-mail, word processing, utility programs, spreadsheets, voice-mail, telephones, Internet/BBS access, etc. will not generally be monitored by the company, and we respect our employees’ wish to work without “Big Brother” looking over their shoulder.
5. The company routinely monitors usage patterns for both voice and data communications (e.g., number called or site accessed; call length; times of day calls. Reasons include cost analysis/allocation and the management of our gateway to the Internet.
6. The company also reserve the right, in its discretion, to review any employee’s electronic files and messages and usage to the extent necessary to ensure that electronic media and services are being used in compliance with the law and with this and other company policies.
7. Each employee who uses any security measures on a company-supplied PC or MAC must provide his/her group administrative assistant with a sealed hard copy record (to be retained in a secure location) of all of his/her PC or MAC passwords and encryption keys (if any) for company use if required. (Example: there may be a need for the company to access an employee’s system or files when s/he is away from the office.) There is no need to provide UNIX passwords since the UNIX system administrator can access all e-mail and files via “root” passwords if necessary.
8. Any messages or information sent by an employee to one or more individuals via an electronic network (e.g., bulletin board, on-line service, or Internet) are statements identifiable and attributable to our company. While some users include personal “disclaimers” in electronic messages, it should be noted that there would still be a connection with the company, and the statement might still be legally imputed to the company. All communications sent by employees via a network must comply with this

and other company policies, and may not disclose any confidential and proprietary company information.

9. Any employee found to be abusing the privilege of company-facilitated access to electronic media or services will be subject to corrective action and/or risk having the privilege removed for him/herself and possible other employees [24].

CONCLUSION

The current law regarding employees' right to privacy in their workplace e-mail usage is not entirely settled, but, for the most part, the employee claims of privacy in their e-mail have not been supported. The only sure-fire method an employer can use to avoid legal liability for monitoring employees is to obtain their consent in advance. In doing so, an employer should establish and explain clear written policies for employee monitoring and educate supervisors when monitoring is permissible. All employers should reserve the right to access e-mail and monitor computer usage for the purpose of retrieving documents, troubleshooting, security, and complying with legal and regulatory requirements. Each employer needs to decide what the appropriate level of monitoring should be for its workplace.

Employers should caution supervisors to refrain from discussing or disclosing any personal non-work-related information about an employee that is discovered from employee monitoring. Employees should be explicitly informed that their e-mail and Internet usage is being monitored by computer software. Employees should be required to sign an acknowledgment that they have read the policy on electronic monitoring and understand that their e-mail and Internet usage may be monitored and recorded. The acknowledgment should also explain that the employer may disclose any information obtained as a result of such monitoring to law enforcement officials and regulators.

Obtaining written consent or acknowledgment is essential because the courts have been reluctant to make a finding of implied consent. To reinforce the policy and strengthen their position in any potential liability lawsuit, employers should circulate periodic reminders of the policy to every employee and supervisor. Finally, any policy adopted should be reviewed from time to time. In addition, such a policy should be reviewed by legal counsel if an employer expands operations to a new state or internationally. If employers take these steps, they can legally use software to monitor employees' e-mail and computer usage.

ENDNOTES

1. Connecticut is the exception, where electronic monitoring is not permitted in areas designated for the personal health or comfort of employees.

2. United States Constitution, Amendment IV.
3. 381 U.S. 479 (1965). Addressing the issue of contraception.
4. 389 U.S. 487 (1967). Holding that warrantless electronic surveillance violated the Fourth Amendment.
5. 480 U.S. 709 (1987).
6. Restatement (Second) of Torts, 652B (1965).
7. J. A. Flanagan, Note, Restricting Electronic Monitoring the Private Workplace, 43 *Duke L. J.*, 1256, at 1267.
8. “The employer’s conduct must be extreme in degree, outrageous in character, and ‘atrocious’ and utterly intolerable in a civilized community,” *Kaminsky v. United Parcel Serv.*, 501 N.Y.S. 2d 871 (873) (App. Div., 1986).
9. *Individual Employment Rights: Labor Relations Reporter*. Washington: Bureau of National Affairs, Vol. 15, No. 9, p. 34.
10. Pub. L. No. 99-508 100 Stat. 1848 (codified into scattered sections of 18 U.S.C.).
11. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520 (1994). Title II of the OCCSSA was enacted by Congress in response to the Supreme Court’s decision in *Berger v. New York*, 388 U.S. 41 (1967) which granted Fourth Amendment protection to oral conversations from electronic eavesdropping.
12. Senate Rep. No. 99-541 at 2.
13. 18 U.S.C. 2701-2711 (1994). See *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F. 3d, 457, 462-463 (5th Cir. 1994) holding that seizure of stored electronic communications is governed by Title II of ECPA.
14. J. T. Baumhart, The Employer’s Right to Read Employee E-Mail: Protecting Property of Personal Prying, 8 *Lab. Law. J.* 923, 925 (1992). Baumhart argues that when the employer owns the e-mail system, it has been given the right to read employee e-mail messages, no matter how personal, and disclose the contents.
15. T. R. Greenberg, Comment, E-Mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute, 44 *Am. U. L. Rev.* 219.
16. *James v. Newspaper Agency Corp.*, 591 F. 2s 579 (10th Cir. 1979); *Simmons v. Southwestern Bell Tel. Co.*, 452 F. Suppl. 392. Both cases supported the employer’s right to monitor telephone communications and exercise discipline after giving notice to employee that they could be monitored.
17. 932 F. Supp. 1232 (Nev. 1996).
18. 914 F. Supp. 97 (E.D. Pa. 1996).
19. 963 F. 2d 611 (3d Cir. 1992).
20. A Pillsbury senior executive named DeOcejo challenged Smyth’s claim that Pillsbury assured its employees of privacy on the Pillsbury computer system. He claimed the existence of a signed waiver that showed Smyth consented to e-mail monitoring.
21. No. 95-2125 (Mass. App. Ct. 1996), reprinted in *The Week’s Opinions: Superior Court, Massachusetts Lawyers Weekly*, Dec. 16, 1996, at 16.
22. 29 F. Supp. 2d (E.D. Va. 1998).
23. For discussion, please see B. C. Glassberg, W. J. Kettinger, and J. E. Logan, Electronic Communication: An Ounce of Policy is Worth a Pound of Cure, *Business Horizons*, Vol. 39, No. 4, pp. 74-80 (July 1996); or E. Brown, *The Myth of E-Mail Privacy*, *Fortune*, Vol. 135, No. 2, pp. 69-71 (February 3, 1997).

24. A. Conti, *Employment Policies and Employee Handbooks*, Internet Law Office, www.contilaw.com.

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THE AMERICANS WITH DISABILITIES ACT AND THE HOSTILE WORK ENVIRONMENT

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ABSTRACT

To date the appellate courts have not explicitly recognized the hostile work environment as a cause of action under the Americans with Disabilities Act. They have not done so even though the language in Title VII that created the hostile work environment is identical to language found in the Americans with Disabilities Act. This article reviews the hostile work environment under Title VII and proposes the elements for a hostile work environment under the Americans with Disabilities Act.

Title VII of the Civil Rights Act of 1964 established a cause of action not only for discriminatory acts with tangible employment consequences, but also one for hostile work environment [1]. Title VII provides “[i]t shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin” [2]. The hostile work environment was first established as a cause of action in race discrimination cases [3]. The Supreme Court in *Meritor Savings Bank v. Vinson* recognized that a hostile work environment was also actionable in sex discrimination cases [4, at 73]. In establishing this rule the Court borrowed from race-based hostile environment cases [3; 4, at 65-66; 5-8].

The Americans with Disabilities Act (ADA) was passed in 1990 [9]. One of Congress’ purposes in passing the ADA was to eliminate discrimination against persons with disabilities in employment, as such people had historically been discriminated against in the employment area [9]. Hence, Title I of the act provides

that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions or privileges of employment” [9, § 12112(a)].

Both Title VII and the ADA use the words “terms, conditions or privileges of employment.” This indicates, and some courts have implicitly acknowledged, that both Title VII and the ADA created a cause of action for discrimination based on the hostile work environment [10]. Although the elements for a cause of action for hostile work environment based on sex or race are well established, the elements for hostile work environment based upon the ADA are not. Many of the elements for both should be the same; therefore, while some courts have implicitly acknowledged that such a cause of action exists, no case to date has explicitly adopted the hostile work environment and the elements for it. The following sections focus on the ADA, the hostile work environment as defined by race and sex, and the hostile work environment under the ADA.

AN OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

The ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions or privileges of employment” [10].

The ADA covers employers, employment agencies, labor organizations, or joint labor-management committees [9, § 12111(2)]. Employee is defined as “an individual employed by an employer,” and an employer is a person or company who employs 15 or more people for 20 or more weeks out of the year [9, § 12111(4)&(5)(A)]. The term employer under the ADA excludes the federal government [9, § 12111(5)(B); 11; 12].

An applicant or employee is a qualified individual under the ADA if s/he has a disability but can perform the essential functions of a job, with or without reasonable accommodation [9, § 12111(8)].

Disability

The *Equal Employment Opportunity Commission (EEOC) Guidelines* define disability as “[a] physical or mental impairment that substantially limits one or more of the major life activities of [an] individual” [12, § 1630.2(g)]. A physical or mental impairment is “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory

(including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities” [12, § 1630.2(h)]. Major life activities are defined as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” [12, § 1630.2(l)].

”Substantially limits” encompasses one who is either unable to perform or significantly restricted in performing a major life activity. The determination of the limitation is affected by the nature and severity of the impairment; the duration or expected duration of the impairment; and its permanent or long-term impact [12, § 1630.2(j)].

In *Sutton v. United Air Lines, Inc.*, (discussed elsewhere in this volume) the Supreme Court restricted the meaning of disability, stating that “substantially limits” requires a person actually, at the time, to be substantially limited in a major life activity, not hypothetically or potentially limited [13].

Essential Function

In determining an essential function, the ADA gives some deference to the employer’s definition. According to the EEOC, an essential function is a fundamental job duty of the position. Evidence that establishes a function as essential includes the employer’s definition of the position and a written job description, how much time is devoted on the job to that function, the consequences if that function is not performed, and the work experience of past and current incumbents in that or similar jobs [12, at 1630.2(n)].

Discrimination

The term “discriminate” includes “limiting, segregating, or classifying . . . an employee in a way that adversely affects the opportunities or status of . . . [the] employee because of the disability of [that] employee” [9, § 12112(b)]. Furthermore, the employer may not use “standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability; or that perpetuate the discrimination of others who are subject to common administrative control” [9, § 12112(b)]. Any qualification standard, employment test, or selection criteria that screen out persons with disabilities is discrimination, unless the standards, tests, or criteria are demonstrated as job-related for the position and are “consistent with business necessity” [9, § 12112(b)]. For example, failing to accommodate for a disability when administering tests is discriminatory; in other words, a test may not be given in a way that measures only the disability and not the skills and aptitude of the person taking the test.

While the employer may not exclude or deny jobs or benefits to a person who is qualified because of disability, an employer is not required to hire or promote an

individual with a disability unless that person is otherwise qualified for the job [9, § 12112(b)].

Reasonable Accommodation

It is also discrimination if the employer fails to make reasonable accommodations, or denies employment opportunities because of the need to make reasonable accommodation, unless to do so would impose an undue burden on the business operations of the employer. The EEOC regulations define reasonable accommodation as “modification or adjustment to the work environment,” or to the way in which work in that position is usually performed, that would enable a person with a disability to perform the job [12, § 1630.2(o)]. The regulations also state that the modifications or adjustments must encompass access by a disabled employee to the benefits and privileges of the position that nondisabled employees are able to access [12, § 1630.2(o)]. Examples of reasonable accommodation include making existing buildings and offices accessible to, and usable by, persons with disabilities, “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities” [9, § 12111(9)].

In determining the appropriate reasonable accommodations, the employer may be required to “initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation” [12, § 1630.2(o)]. During this process the employer may enquire as to the “precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations” [12, § 1630.2(o)]. In *Hendricks-Robinson v. Excel Corporation*, the court stated the employer must work with the employee in a flexible way to determine what accommodations can be made in the existing job or, if necessary, what jobs are available for employee reassignment [16]. Reassignment, the court stated, may be required if reasonable accommodations do not allow an employee to perform the essential functions of the job. Reassignment, however, does not require creation of a job, bumping a person out of a job, making a temporary job permanent, or promotion of the disabled employee [16, at 693; 17]. It does require the employer make a reasonable effort to work with the employee to determine an appropriate reassignment. The employee with the disability, moreover, must be capable of performing the essential functions of the new position with or without reasonable accommodations [16, at 694-695].

The employee also has a duty under the ADA to work with the employer to determine what a reasonable accommodation would be [18]. In *Templeton v. Neodata Services, Inc.*, an employee who refused to provide an employer with documentation to enable the employer to determine the appropriate reasonable accommodations was found to be out of compliance with the ADA.

Undue Burden

The following factors determine whether an accommodation is an undue hardship: 1) the net cost of the accommodation after any tax credits, deductions, or outside funding; 2) the overall financial resources of the employer; 3) the type of operation the employer has, including “the composition, structure and functions of the workforce,” and the geographic location and association of the facilities; and 4) “[t]he impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business” [12, § 1630.2(p)].

Medical Examination

The ADA also prohibits an employer from conducting a medical examination before a decision to hire is made, and from inquiring whether an employee has a disability. A medical examination and inquiry is permitted, nonetheless, if it is “shown to be job related and consistent with business necessity” [9, § 12112(d)]. Voluntary medical examinations, moreover, are permitted as part of an employee health program available to all employees. It is important to note that the information from these examinations must be treated confidentially. The information may be given to supervisors and managers only when they need to know an employee’s work restrictions in order to make reasonable accommodations [9, § 12112(d)].

AN OVERVIEW OF THE HOSTILE WORK ENVIRONMENT

Relying on the phrase “terms, conditions or privileges of employment” [20], the Supreme Court concluded that Congress intended to establish more than an action for discrimination based on tangible loss of an economic character [21] for sex discrimination [20, at 64; 22]. Citing the *EEOC Guidelines*’ definition of actionable workplace conduct to include “[unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” [20, at 65; 23], the Court found harassment leading to noneconomic injury could violate Title VII in sexual harassment cases [20, at 65-66; 24].

Elements

The elements for hostile environment cases are unwelcome conduct, requests for “sexual favors, and other verbal or physical conduct of a sexual nature,” and conduct must be “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive work environment” [20, at 65-67]. In *Harris v. Forklift Systems, Inc.*, the Court stated the conduct must be

“severe and pervasive enough to create an objectively hostile or abusive work environment—[one] a reasonable person would find hostile or abusive;” and one the victim subjectively found to be hostile or abusive [25, at 21]. In *Harris*, the Court held that psychological harm to the victim was not a necessary element, but a factor to be considered. Other factors include “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance” [25, at 23]. The *Meritor* opinion further stated that courts must consider the totality of the circumstances in determining whether sexual harassment based on a hostile work environment has occurred; including the “nature of the sexual advances and the context in which the alleged incidents occurred” [12, § 1604.(b); 20, at 69].

The Court also relied on race and national-origin cases to define the level of offensive conduct necessary to qualify as a hostile work environment [20, at 64]. It found the conduct must go beyond mere teasing or “isolated incidents” (unless extreme) to rise to the level of altering the “conditions of employment” [20, at 67; 26]. In *Faragher v. City of Boca Raton*, Justice Souter stated that the Court developed these severe standards to ensure that “Title VII [would] not become a ‘general civility code,’” and that generally the courts of appeals have heeded this message [27, at 2283-2284; 28].

Employer Liability Supervisory Harassment

If the supervisor harassing the employee is the owner, or so high up in the business as to be treated as the employer’s proxy, the employer has been held strictly liable for the hostile work environment [25, at 17, 19; 27, at 2284; 29; 30]. Moreover, an employer is held strictly liable for supervisory harassment of employees, if the harassment results in a tangible employment action. A tangible employment action is one that affects the hiring, firing, promotion, compensation, or work assignment of an employee. The above are not subject to the affirmative defense [20, at 70-71; 27, at 2284; 31-34].

In *Faragher*, the Court held employers are strictly liable for the hostile work environment created by supervisors, subject to an affirmative defense. The defense consists of two necessary elements: “That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, [and] that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” [29, at 2290-2293; 31, at 2270]. The Court stated that evidence of reasonable care under the first element of the defense could include an anti-harassment policy coupled with a complaint procedure [29, at 2293]. The antiharassment policy, moreover, must allow the employee to bypass a harassing supervisor [29, at 2293].

Employer Liability for Co-Worker Harassment

An employer is liable for co-worker harassment only if the employer either knew about the harassment or should have known about it, and if the employer failed to remedy the situation. This standard is universally accepted by courts for both race and sex-based co-worker created hostile work environments [27 (approving standard for co-worker harassment); 35; 36].

THE HOSTILE WORK ENVIRONMENT AND THE ADA

In addition to the requirement that a person be a qualified individual with a disability, the principal element for a cause of action for a hostile work environment under the ADA is discrimination in terms, conditions, or privileges of employment. This element requires showing that: 1) the individual was subjected to unwelcome harassment; 2) the harassment was based on the individual's disability; and 3) the harassment was sufficiently severe or pervasive to alter the conditions of the individual's employment and created an abusive working environment. The environment must be shown to be both subjectively and objectively hostile. To demonstrate the severe and pervasive nature of the harassment, the following factors should be considered: 1) psychological harm to the victim; 2) the frequency of the discriminatory conduct; 3) the severity of the discriminatory conduct; 4) whether the conduct was physically threatening or humiliating or a mere offensive utterance; 5) whether the conduct unreasonably interfered with an employee's work performance; and 6) whether the employee was harassed by administrative procedures based on his/her disability.

Employer liability should be determined exactly as the Court laid out in *Faragher*. If the supervisor who was harassing the employee is the owner, or so high up in the business to be treated as the employer's proxy, the employer would be held strictly liable for the hostile work environment [27, at 2284, citing 25, at 19; 29; 30]. An employer would also be held strictly liable for supervisory harassment of employees, if the harassment results in a tangible employment action. A tangible employment action is one that affects the hiring, firing, promotion, compensation, and work assignment. These two situations are not subject to the affirmative defense [27, at 2284, citing 20, at 70-71; 31-34].

Employers would be strictly liable for the hostile work environment created by other supervisors subject to an affirmative defense. The defense consists of two necessary elements: "That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, [and] That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" [27, at 2290-93; 31]. The Court stated evidence of reasonable care under the first element of the defense could include an antiharassment policy coupled with a complaint

procedure [27, at 2293]. The antiharassment policy, moreover, must allow the employee to bypass a harassing supervisor [27, at 2293].

An employer is liable for coworker harassment only if the employer either knew about the harassment or should have known about it and the employer failed to remedy the situation [27, at 2275, 228_; 35; 36].

APPLICATION OF THE HOSTILE WORK ENVIRONMENT UNDER THE ADA

While no appellate court has yet explicitly recognized a cause of action for hostile work environment under the ADA, arguably three have done so implicitly, and others have assumed a cause of action without deciding. In *Keever v. City of Middletown*, the Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment for the city [40]. Keever was a city police officer who suffered injury on the job to his neck, back, shoulders, and legs while arresting criminal suspects. As a result of his injuries, Keever missed between 17 to 26 days of work a year, and the city refused to allow him to use injury leave for these absences. After confrontations with the department over his absences, Keever retired and was awarded a 45 percent disability pension. Keever then sued claiming he was harassed because of his disability and his disability related absences. He also claimed the police department failed to accommodate his disability when it refused to assign him to the "less stressful" 11 p.m. to 7 a.m. shift [40, at 810-811]. The appellate court stated that Keever failed to establish "any facts concerning whether the harassment he claims took place was severe enough to create an objectively hostile work environment" [40, at 813]. By applying the facts to the element of a severe and pervasive work environment and applying the objective-person standard, the Sixth Circuit implied that a cause of action exists for hostile work environment under the ADA.

In an unpublished decision, *Williams v. Boeing Co.*, the Court of Appeals for the Ninth Circuit also applied the facts to the elements and found no hostile work environment [41, at *2]. Williams suffered from diabetes. He alleged he was terminated from Boeing because management was dissatisfied with the disability requirements that he eat at his workstation and that he use the bathroom frequently. In this case the court found Williams failed to provide specific dates and instances of harassment and so did not prove the harassment was severe and pervasive. Again, the court implied that a cause of action exists for hostile work environment under the ADA. It should be noted that this is an unpublished decision; there is no definitive rule in this circuit.

Moreover, the Ninth Circuit, in *Baumgart v. State of Washington*, assumed without deciding that a claim for harassment or hostile work environment was cognizable under the ADA [42, at *1]. This was also an unpublished table opinion and was decided seven months after *Williams* [41]. Baumgart, a

social worker, requested accommodation for her disability of allowance to work part-time instead of full-time. The court determined that this accommodation would be an undue burden on the employer. The court found the plaintiff failed to establish a hostile work environment by failing to show that “particular statements or incidents of harassment [were] ‘sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment’” [42, at *1].

The Court of Appeals for the Eighth Circuit also presented contradictory holdings. In *Cody v. Cigna Healthcare, Inc.*, the court again indicated a hostile work environment existed under the ADA by simply applying the facts without stating it did not endorse this cause of action [43]. Cody, a nurse, worked for Cigna reviewing records at various doctor’s offices in St. Louis. She claimed she suffered from anxiety and depression and that the requirement that she go into “dangerous” areas of the city exacerbated her condition. After a meeting with the executive director, Cody’s supervisor confronted her and threatened that “she would suffer the consequences” of going over her head. Cody also found a cup labeled “alms for the sick” on her desk. Coworkers later reported incidents of bizarre behavior by Cody, such as sprinkling salt to keep away evil spirits to references about guns. The executive director met with Cody and observed a noticeable bulge in her purse. He then requested she take a leave with the requirement that she undergo a psychiatric evaluation and counseling. Cody’s security access card was then deactivated and confiscated. Upon departure Cody could not open any of the doors [42, at 596-597]. The Court stated “[i]n all constructive discharge and *harassment* cases under the ADA . . . the plaintiff must first make out a prima facie case of discrimination or face dismissal of her claim” [43, at 598, emphasis added]. In determining that Cody did not suffer a hostile work environment, the court stated that Cody failed to establish that she was disabled under the ADA [43, at 598-599].

The implied finding of hostile work environment in *Cody* was short-lived. The Eighth Circuit just five months later decided another hostile work environment case brought under the ADA. In *Wallin v. Minnesota Department of Corrections*, the court stated it would assume without deciding that a cause of action existed for hostile work environment under the ADA [44, at 687-688]. The court concluded that harassment under the ADA must be based on the disability [44, citing 45]. In this case the court found the conduct complained of was not so severe and pervasive to rise to the level of a hostile work environment [44, at 688]. In justification of his claim, however, Wallin pointed “to numerous incidents of friction between himself and his coworkers” [44, at 688]. The court, however, found only three of these incidents of alleged harassment related to Wallin’s disability of depression and alcoholism. The first was the suggestion that Wallin’s seeing a psychologist was a good method to get vacation; second was a series of drawings of psychiatrist’s beds on Wallin’s calendar on the days he was on leave for depression; and third was an obscene comment from a coworker about

Wallin's alcoholism. The court found these incidents were isolated and did not rise to the level of being severe and pervasive. Thus, Wallin's hostile work environment claim failed [44, at 688].

The Eighth Circuit stated in *Cannice v. Norwest Bank* that the "ADA provides that an employer covered by the act 'shall not discriminate against a qualified individual with a disability because of the disability in regard to . . . terms, conditions and privileges of employment.'" Cannice suffered from depression. The alleged harassment consisted of close monitoring by supervisors, including moving his desk closer to the supervisor, and close monitoring of bathroom breaks. Cannice also related an incident when a group leader tossed a tissue onto his desk labeled "crying towel" [46, at *1-2]. The court noted, however, that the ADA says nothing explicit about the hostile work environment cause of action, and the court declined to decide the issue on this case [46, at *1]. Once again the court found the plaintiff did not meet the requirement that the offensive conduct be based on the disability. In other words, the court did not find the harassment so severe and pervasive that it rose to the level necessary for a hostile work environment [46, at *1-*2].

The Eighth Circuit again stated it was unsure whether a cause of action existed under the ADA for a hostile work environment in *Moritz v. Frontier Airlines, Inc.* [47]. In this case the plaintiff failed to establish that she was a qualified individual under the ADA. The court held that one must establish as a prerequisite a prima facie case that the person is both disabled and qualified to perform the essential functions of the job, with or without reasonable accommodation, and suffered adverse employment action as a result of the disability. Only after this is established may an individual move on to the additional elements of a hostile work environment [47, at 786]. Part of Moritz' duties as a station agent for Frontier included working the ticket counter and gate. Moritz was diagnosed with multiple sclerosis and had weakness in her left leg. This prevented her from adequately performing the gate duty of assisting passengers on and off the plane [47, at 785-786]. The court found the gate duties, including assisting the passengers on and off the plane, were an essential function of the position. Moritz could not perform this duty without the assistance of another employee. Applying the undue burden defense to reasonable accommodation, the court concluded that, as Frontier was a start-up airline, it could not reasonably accommodate Moritz. The court found that the cost of providing an employee to assist Moritz would not be reasonable. Therefore, because Moritz could not perform the essential functions of the position, with or without reasonable accommodation, she was not a qualified individual under the ADA. The court then dismissed her complaint for failure to establish the element of a qualified individual with a disability [47, at 787-788]. The differing applications by the Eighth Circuit under the ADA—one decision applying the ADA hostile work environment and the other three disavowing and at the same time applying it—does not leave the attorneys or lower courts with a clear path to follow.

The Court of Appeals for the Fifth Circuit also failed to either recognize or disavow the hostile work environment under the ADA as a cause of action. In *McConathy v. Dr. Pepper/Seven Up Corporation*, the court stated it would proceed as if the hostile work environment cause of action existed [48], but that “[t]his case should not be cited for the proposition that the Fifth Circuit recognizes or rejects an ADA cause of action based on hostile environment harassment” [48, at 563]. In *McConathy*, the plaintiff suffered from temporomandibular joint disease and had two surgeries as a result. McConathy’s supervisor told McConathy she used too much of her health care benefits and she should not take any more time off. After a third, but unrelated, surgery, the supervisor began excluding McConathy from meetings and instructed her staff not to inform her of business projects. McConathy was eventually laid off due to a restructuring at Dr. Pepper. Here the court found it unnecessary to establish the hostile work environment because the plaintiff failed to establish conduct so severe or pervasive as to alter the conditions of her employment and create an abusive work environment [48, at 563].

Stating it did not find the current case an appropriate one in which to find hostile work environment as a cause of action, the Court of Appeals for the Tenth Circuit followed the long line of circuit courts that did not either affirm or disaffirm this as a cause of action [49]. In *Anthony v. City of Clinton*, the plaintiff, a police officer, suffered from depression. Prior to his diagnosis in 1996, Mr. Anthony’s performance was rated as “very good” or “satisfactory” on his annual reviews. After Anthony returned to work after a hospital stay for depression, his supervisor increased supervision of him, subjected him to “verbal abuse,” and criticized his work. The *Anthony* court found the plaintiff failed to establish the conduct was sufficiently severe or pervasive to alter the conditions of employment and make the work environment abusive [49, at *3].

The Court of Appeals for the Third Circuit likewise did not recognize a cause of action for a hostile work environment based on the ADA. In *Walton v. Mental Health Association of Southeastern Pennsylvania*, the court noted that the language in Title VII that created a cause of action for a hostile work environment was virtually the same as that found in the ADA [50, at 666, relying on 51]. Walton suffered from depression, had been hospitalized many times for it, and missed from 21 to 50 days of work a year. Walton was terminated due to her most recent absence, which began on October 26, 1993 and was scheduled to end on January 10, 1994. Walton alleged harassment by her supervisor, claiming he required she perform nonessential duties she could not perform, repeatedly calling her when she was hospitalized to see when she would return to work, and informing Walton’s co-workers not to give Walton information about her job while she was gone. The Third Circuit stated:

In the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose—to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner

of proof under one statute should inform the standards under the others as well. Indeed, we routinely use Title VII and ADEA caselaw interchangeably, when there is no material difference in the question being addressed [50, at 666, quoting 52].

Moreover, the court asserted “[t]his framework indicates that a cause of action for harassment exists under the ADA” [50, at 666]. Nevertheless, the court concluded it would assume without deciding that the cause of action exists. The court did note that a district court in the Third Circuit had recognized this cause of action [50, at 667, referring to 53]. Moreover, it referred to the Sixth Circuit’s decision in *Keever* as recognition by a circuit court of the existence of the hostile work environment cause of action under the ADA. In application, the court concluded Walton had failed to show the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment [50, at 667].

The Court of Appeals for the Seventh Circuit, in *Silk v. City of Chicago*, also assumed (without deciding) that a cause of action existed under the ADA for a hostile work environment [54, at *1]. The court found Silk had failed to show the environment was so severe or pervasive that it constituted a hostile work environment [54, at *12-*13]. The court also referred to the affirmative defense as set out by *Faragher* and implied Silk also did not sufficiently inform his superiors of the alleged harassment. There was no mention of whether the first element of the affirmative defense, that the employer exercised reasonable care to prevent and acted promptly to correct any harassment, was met [54, at *11-*12]. It appeared from the facts, however, that the hostile environment in this case may have been severe and pervasive enough to avoid summary judgment and justify submission to a jury. Silk suffered from severe sleep apnea, which condition required he be assigned to a stable shift. For example, Silk, who was a police officer, alleged that after accommodation for his disability limited him to working the day shift he was subjected to constant derogatory and hostile comments from coworkers and supervisors. He complained his employment ratings fell, he was forced to quit his second job, and he was harassed administratively by not being assigned patrol cars to supervise. This resulted in increased coworker and supervisory hostility. Moreover, he was physically threatened by a coworker on one occasion, and by a supervisor on another. And, after the report of the threat, the other harassment continued unabated [54, at *2-*3]. In this case many material facts appear to be in dispute; however, the Seventh Circuit did not remand the case for further proceedings. This could be due to the confusion over the status of an ADA hostile work environment cause of action, or perhaps it is the reluctance of the Seventh Circuit to be the first to definitively find such a cause of action.

Additionally, the court noted that at least two other circuits had accepted a cause of action for hostile work environment under the ADA, referring to the Sixth- and Eighth-circuit cases cited above [54, at *9]. It is interesting to note that the Eighth

and Ninth circuits have handed down conflicting decisions on the existence of the hostile work environment under the ADA. This exemplifies the confusion among the circuits and even within a circuit on this issue.

CONCLUSION

The courts should clear up this confusion by establishing a hostile work environment as a cause of action under the ADA. As the Third Circuit noted, Title VII of the Civil Rights Act of 1964 also does not explicitly establish a cause of action for hostile work environment. The language, however, on which the hostile work environment is based under Title VII is identical to that in the ADA: it shall be unlawful to discriminate based upon the “terms, conditions, or privileges of employment.” This indicates Congress intended to create a cause of action for a hostile work environment under the ADA. Congress knew this cause of action existed under Title VII when it passed the ADA. This is exemplified by the Court when it stated in *Faragher* that “the force of precedent here is enhanced by Congress’s amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding” [27, at 2275, 2286]. This demonstrates that Congress approved this cause of action before the ADA was passed. This is further evidenced by the fact that the *Meritor* decision came out in 1986 [20], while the ADA was not passed until 1990 [9]. It is probable, considering these facts, that Congress deliberately used the same language in the ADA to effect the same result.

The appellate courts, however, are either unwilling to follow this reasoning or are waiting for the right case. In the meantime, the district courts and attorneys are assuming this is a cause of action, as is evidenced by the number of cases at the appellate level [55]. The hostile work environment factors outlined above, as well as the Supreme Court decision restricting disabilities, will ensure the ADA does not become “a general civility code” [27, citing 20, at 70-71]. Therefore, the appellate courts should take this opportunity to recognize this cause of action.

* * *

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ENDNOTES

1. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (1994); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) cert. denied, 406 U.S. 957 (1972). It is important to note that a hostile work environment can result in tangible acts if a person is constructively discharged as a result of the harassment.
2. 42 U.S.C. § 2000e-2(a)(1).
3. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) cert. denied, 406 U.S. 957 (1972).

4. 477 U.S. 57 (1986).
5. *Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506 (8th Cir.) cert. denied, sub norm.
6. *Banta v. United States*, 434 U.S. 819 (1977).
7. *Gray v. Greyhound Lines, E.*, 545 F.2d 169 (D.C. Cir. 1976).
8. The Court also looked to *EEOC Guidelines* on sex discrimination, 29 C.F.R. § 1604.11(a) (1985).
9. The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(b) (1994).
10. See *Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723 (8th Cir. 1999); *Baumgart v. Wash.*, 189 F.3d 472 (9th Cir. 1999) (unpublished table decision); *Anthony v. City of Clinton*, 185 F.3d 873 (10th Cir. 1999) (unpublished table decision); *Williams v. Boeing Co.*, 166 F.3d 1219 (9th Cir. 1999) (unpublished table decision); *Walton v. Mental Health Ass'n of S.E. Pa.*, 168 F.3d 661 (3rd Cir. 1999); *Wallin v. Minn. Dpt't of Corrections*, 153 F.3d 681 (8th Cir. 1998); *Silk v. City of Chicago*, 1999 WL 804008 (7th Cir. 1999).
11. The federal government is covered by the Vocational Rehabilitation Act, which provides virtually the same protections as the ADA. Moreover, Congress intended the case law developed under the Vocational Rehabilitation Act to be applicable to cases under the ADA.
12. Regulations to Implement the EEOC Provisions of the ADA, 29 C.F.R. § 1630.2(g) App. (1999).
13. *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999).
14. It should be noted that EEOC guidelines are regulations passed by a federal agency (EEOC) and thus they do not have the force of law, but are generally given deference by the courts.
15. *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 674 (7th Cir. 1998).
16. *Hendricks-Robinson v. Excel Corporation*, 154 F.3d 685 (7th Cir. 1998).
17. See also *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998) (holding that an employer may designate light-duty positions as temporary and reserve them for temporarily disabled employees); *Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997) (stating an employer is not required to create a job for a disabled employee).
18. *Templeton v. Neodata Serv., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) (quoting *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996)).
19. *Hankins v. Gap, Inc.*, 84 F.3d 797, 801 (6th Cir. 1996) (quoting 12, § 1630.2(d)).
20. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63 (1986) (citing 42 U.S.C. § 2000e-2(a)(1)).
21. Referred to as quid pro quo harassment, see 20, at 65.
22. (20, citing *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 700, 797, n. 13 (1978) quoting *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).
23. (20, citing EEOC Guidelines on Discrimination because of Sex, 29 C.F.R. § 1604.11(a) (1985)). The Court state that EEOC guidelines “while not controlling upon the courts . . . constitut[ed] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” [20, (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976))].
24. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) cert. denied 405 U.S. 957 (1972).
25. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).
26. *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

27. *Faragher v. City of Boca Raton*, 119 S. Ct. 2276 (1998).
28. *Oncale v. Sundowner Offshore Serv. Inc.*, 118 S. Ct. 75 (1998).
29. *Burns v. McGregor Electronic Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992).
30. *Torres v. Pisano*, 116 F.3d 625, 634-35 (2nd Cir.) cert denied, 118 S. Ct. 563 (1997).
31. *Burlington Indus., Inc. v. Ellerth*, 119 S. Ct. 2257, 2269 (1998).
32. *Anderson v. Methodist Evangelical Hosp.*, 464 F.2d 723, 725 (6th Cir. 1972).
33. *Kotcher v. Rosa and Sullivan Appliance Ctr.*, 957 F.2d 59, 62 (2nd Cir. 1992).
34. *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).
35. *Torres v. Pisano*, 116 F.3d 625, 633 (2nd Cir. 1997).
36. *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2nd Cir. 1994).
37. Employer liability is treated as a separate element for ease of understanding.
38. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2152 (1999).
39. *Murphy v. United Parcel Serv. Inc.*, 119 S. Ct. 2133 (1999).
40. *Keever v. City of Middletown*, 145 F.3d 809 (6th Cir. 1998).
41. *Williams v. Boeing Co.*, 166 F.2d 1219, No. 97-36098, 1999 WL 50882, *1 (9th Cir. Jan 15, 1999) (unpublished table decision).
42. *Baumgart v. State of Washington*, 189 F.3d 472, No. 98-35172, 1999 WL 535795, *1 (9th Cir. July 23, 1999) (unpublished table decision).
43. *Cody v. Cigna Healthcare, Inc.*, 139 F.3d 595 (8th Cir. 1998).
44. *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681.
45. *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997).
46. *Cannice v. Norwest Bank*, Nos. 98-2230, 98-2305, 1999 WL 608644 (8th Cir. Aug. 13, 1999).
47. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784.
48. *McConathy v. Dr. Pepper/Seven Up Corporation*, 131 F.3d 558 (5th Cir. 1998).
49. *Anthony v. City of Clinton*, 185 F.3d 873, No. 98-6188, 1999 WL 390927, at *3 (10th Cir. June 15, 1999).
50. *Walton v. Mental Health Association of Southeastern Pennsylvania*, 168 F.3d 661 (3rd Cir. 1999).
51. *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989).
52. *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157 (3rd Cir. 1995).
53. *Vendetta v. Bell Atlantic Corp.*, No. 97-4838, 1998 WL 575111 (E.D.PA. Sept. 8, 1998) (not reported in F.Supp. 2d).
54. *Silk v. City of Chicago*, No. 98-1155, 1999 WL 804008, *1 (7th Cir. Oct. 8, 1999).
55. See also *McClain v. Southwest Steel Co.*, 940 F.Supp 295 (N.D. Okla. 1996); *Gray v. Ameritech Corp.*, 937 F.Supp. 762 (N.D. Ill. 1996); *Fritz v. Mascotech Automotive Sys. Group*, 914 F.Supp. 1481 (E.D. Mich. 1996).

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**THE SUTTON TRILOGY:
CHANGING THE LANDSCAPE OF THE ADA**

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ABSTRACT

The agencies that enforce the Americans with Disabilities Act (ADA) have determined that a person's disability is to be assessed without regard to devices, medication, or other adjustments that may have reduced or eliminated the manifestation of the impairment. An epileptic, for example, whose tendency to seizure is controlled by medication, could still be considered disabled and could have the protection and the benefits of ADA coverage. Until recently, the circuit courts have followed the agencies' lead. In the summer of 1999, however, the U.S. Supreme Court made three decisions that invalidated this approach to determining whether a person is disabled. This article examines, assesses, and criticizes those decisions and suggests an alternative approach.

BACKGROUND ON THE ADA

On July 26, 1990, President George Bush signed the Americans with Disabilities Act (ADA) into law. Its principal purpose was to eliminate discrimination against individuals with physical or mental disabilities. Congress noted when the act was passed that some 43,000,000 Americans¹ had one or more physical or mental

¹The 1994 Census Bureau estimate is 54 million disabled.

disabilities and that they had long been a “discrete and insular minority,” faced with restrictions and limitations and subjected to a “history of purposeful unequal treatment [1-3]. The elements of the ADA that figure into this article are:

1. Title I of the ADA prohibits discrimination against disabled individuals in employment. This title sets out to assure that handicapped individuals have the same opportunity as other workers to take their place beside them and perform the same tasks in the same work environment. The ADA does not set quotas for employing handicapped individuals, but it prohibits employers from failing to hire *qualified* applicants *because* they are handicapped [4, 5].
2. The ADA defines the term “disability” broadly, as did its predecessor, the Rehabilitation Act of 1973 [6]. The ADA states that a person is disabled if s/he: 1) has a physical or mental impairment that substantially limits a major life activity; 2) has a record of such impairment; or 3) is perceived as having such an impairment [1, §12102(2)]. To acquire ADA protection, the impairment must substantially limit the individual’s ability to perform that activity.
3. Working is considered to be a major life activity [7]. To determine whether a disorder is to be protected by the act, the key questions focus on the severity of the disorder, its prognosis, its impact on the person’s ability to work at a particular job, and the effectiveness of the controlling medication. There are no *per se* interpretive rules. Cases are decided on an individual basis, but claimants must show they are “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes . . . [8, at 625].
4. A person is considered qualified for a position if s/he can perform its essential functions, with or without reasonable accommodation. An essential job function is one that: 1) employees in the position are actually required to perform and where 2) removing that function would fundamentally alter the position [9]. The employer’s interpretation of the essential functions of a particular job will bear on the determination [1, §12111(8)(1992); 10].
5. The concept of “reasonable accommodation.” This refers to any change in the work, its environment, or the way things are customarily done to enable a disabled individual to qualify for a position. The ADA requires employers to provide reasonable accommodation to disabled employees, as long as the accommodation does not involve undue hardship or cause a violation of a collective bargaining agreement [11]. Accommodations could include job restructuring, new equipment, readers, or interpreters.
6. A mitigated state is the state or condition of an individual who is receiving treatment for an impairment—the diabetic receiving insulin, the amputee who gets around with a prosthetic device, or the sufferer of a mental disorder

that is controlled by medication. Sometimes the mitigation turns what was once a severe limitation to a major life activity into something far less restrictive. The question addressed in this article is whether such an individual can still be considered disabled under the ADA [12].

SUTTON V. UNITED AIRLINES

The central issue in the three ADA cases the Supreme Court decided in the summer of 1999 was whether conditions corrected by devices, medication, or the body's own accommodations can be considered disabling under the ADA. In the lead case, the Sutton petitioners were twin sisters whose uncorrected visual acuity was 20/200 or worse [13]. With corrective measures (eyeglasses), however, their vision fell into the normal range. In 1992, they applied to United Air Lines for employment as commercial airline pilots. Even though they met the airline's requirements with regard to age, education, experience, and FAA certification, they were rejected because they did not meet the carrier's requirement of *uncorrected* visual acuity of 20/100 or better.

The federal district court rejected Suttons' claim. The court held that, despite being virtually blind without their glasses, the sisters were not *actually* disabled because: 1) they could correct their visual impairments, thereby negating their claim under the first prong of the definition of a disability; and 2) they were not *regarded* by the airline as being disabled, causing their case to fail under the third prong. The district court essentially concluded that the petitioners were unable to demonstrate that they were limited in the major life activity of working because their condition had been successfully mitigated. Until the *Sutton* decision, the circuit courts of appeal had largely accepted the *EEOC Guidelines* that required potential disabilities to be considered in their unmitigated (uncorrected) state [14]. The Tenth Circuit Court of Appeals upset this tradition by accepting the district court's logic and affirming its ruling [15].

An Impermissible Interpretation

The Supreme Court agreed. The majority opinion of the U.S. Supreme Court, written by Justice O'Connor, reviewed the legislative charges that had been given the agencies enforcing the ADA. The Court stated that none of the agencies had been given the authority to interpret the term "disability," but the enforcing agency's (EEOC) regulations had the effect of interpreting that term because the regulations had defined such terms as physical and mental impairments, substantially limits, and major life activities [13].

The Court then turned to EEOC instructions which provided that the determination as to whether an individual is substantially limited in a major life activity must be made without regard to "mitigating measures such as medicines, or assistive or prosthetic devices" [13, at 2146]. The Court concluded that "the

approach adopted by the agency guidelines . . . is an impermissible interpretation of the ADA” [13, at 2146]. The effects of measures that correct for or mitigate a physical or mental impairment must be taken into account when judging whether that person is “substantially limited” in a major life activity and, therefore, “disabled” under the act. The Court based this conclusion on a combined reading of three separate ADA provisions.

1. The act defines a disability as a physical or mental impairment that substantially limits one or more major life activities. The phrase, “substantially limits,” is in the present indicative verb form. The language, therefore, should be read as requiring that a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity [13].
2. The *EEOC Guidelines*, furthermore, have contemplated an individualized, case-by-case determination of disability [16]. The EEOC directive that persons be judged in their uncorrected or unmitigated state would require courts to make disability determinations either on general information about a disorder or upon speculation about the effects of an uncorrected impairment [13].
3. Finally, the Court argued that the figure of 43,000,000 Americans with disabilities that was incorporated into the act, is inconsistent with the definition of disability presented by the petitioners. After reviewing census data and other statistical information, the Court concluded that the 43,000,000 figure reflected an understanding that those whose impairments were largely corrected by medication or other devices are not “disabled” within the meaning of the ADA. Had Congress intended to include all persons with corrected physical limitations among those covered by the act, the figure would have been much higher [13].

The Court then addressed the issue of United Air Lines vision requirement. It stated that the ADA allows employers to prefer some physical attributes over others and to establish physical criteria, but

[a]n employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one’s height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not substantially limiting impairments make individuals less than ideally suited for a job [13, at 2150].

The majority opinion closed by stating that when the major life activity is that of working, the statutory phrase “substantially limits” requires the plaintiffs to show they are significantly restricted in the ability to perform either a class of jobs or a

broad range of jobs in various classes. The inability to perform a particular job does not constitute a substantial limitation in the major life activity of working [17]. Thus, in addition to their other problems with the case, the Sutton sisters failed to demonstrate that their poor eyesight limited them from anything more than the single position of global airplane pilot.

The Majority Opinions in the Companion Cases

The basic principles announced in *Sutton* were applied in its two companion cases. In *Murphy v. United Parcel Service*, the plaintiff was an automotive mechanic with high blood pressure whose job required him to drive commercial vehicles [18]. Department of Transportation (DOT) health certification requirements prohibit the operation of a commercial vehicle by individuals whose current clinical diagnosis of high blood pressure is likely to interfere with their ability to operate a commercial vehicle safely [19]. Murphy was discharged when his condition was discovered because it violated this regulation [18].

The third case, *Albertsons, Inc. v. Kirkingburg*, involved a truck driver who was a victim of an uncorrectable condition called amblyopia (lazy eye syndrome) that left his vision almost monocular [20]. Because monocular vision limits the individual's depth perception, the DOT requires that commercial truck drivers possess corrected distant visual acuity of at least 20/40 *in each eye*. The physician employed by the company erroneously certified that Kirkingburg met the DOT standards, but in a later physical examination his monocular vision was discovered. The doctor suggested he seek a DOT waiver to continue with his job. He began that process, but the company fired him before it was completed because he could not meet the basic DOT vision requirement. Some months after his discharge, he received the waiver but the company refused to reinstate him [20].

Murphy and Kirkingburg appealed their cases to the federal courts, ultimately reaching the Supreme Court. Following the logic expressed in *Sutton*, the Court concluded that neither petitioner was limited substantially in any major life activity because their conditions had been successfully mitigated by medication or the body's adjustments [18, 20].

The 1999 Supreme Court Decisions: The Dissenting View

Justice Breyer joined Justice Stevens in his dissent from the *Sutton* and *Murphy* decisions, and the two justices concurred only partially in *Kirkingburg*. Their dissenting views centered on the concept of mitigation. They expressed the belief that a person's disability is to be determined without considering any mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication.

After reviewing the three-pronged definition of disability, Justice Stevens concluded that the sweep of the statute's definition makes it "pellucidly clear" that

Congress intended the act to cover people who had successfully mitigated the effects of an otherwise disabling condition. If a disability exists only where a person's *present or actual condition* is substantially impaired, as was argued by the majority, there would be no reason to protect people who were once disabled but are now recovered.

Legislative History

The majority stated that there was no need to delve into the legislative history of the ADA because the statute was clear. However, much of Stevens' dissent is based on that history. The ADA originated in the Senate, and its report stated that the goal of the act was to "ensure that persons with medical conditions that are under control and therefore do not currently limit major life activities are not discriminated against on the basis of their medical conditions" [21, p. 23]. Thus, "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids" [21, p. 24].

The House report repeated the Senate's basic understanding. When determining whether an individual's impairment substantially limits a major life activity, the "impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation" [22, p. 28]. The dissent also found further support in the Report of the House Committee on Labor and Education [23].

The 43,000,000 Argument

The dissent argued further it was "wrong" for the Court to confine the coverage of the act because a broadened interpretation of the term "disability" would expand the number of people in the protected class. It offered two reasons for taking this position. First, the narrow approach would deny coverage to a sizable portion of the original core group of 43 million. The majority opinion would exclude controllable conditions such as diabetes and severe hypertension from the act's protection, and those conditions were expressly understood as limiting impairments in the legislative history.

The second reason was tied into the desirability of interpreting the statute generously—to emphasize inclusion rather than exclusion. The ADA set out to provide a comprehensive national mandate to prevent discrimination against individuals with disabilities. The Court has often dealt with other classes of individuals that have fallen outside the core prohibitions of other antidiscrimination statutes. In those cases, the court has consistently construed the legislation to include comparable evils, even those beyond Congress's immediate concern when it passed the legislation.

Individualized Treatment

The majority argued that an approach that failed to consider individuals in their mitigated state would create a system in which people would be treated as members of a group or class rather than individuals. The dissent argued that the majority's approach similarly reduced the need for individualized treatment because it allowed employers to "dismiss out of hand every person who has uncorrected eyesight worse than 20/100 without regard to the specific qualifications of those individuals or the extent of their abilities to overcome the impairment [13, at 2158]. The dissent also pointed out that the *Sutton* case was not about whether the two sisters were qualified or whether they could perform the job of an airline pilot without putting the public in peril. The case was about an airline's duty to come forward with some legitimate explanation for refusing to hire otherwise qualified applicants because of their uncorrected eyesight or "whether the ADA leaves the airline free to decline to hire petitioners on this basis even if it is acting purely on the basis of irrational fear and stereotype [13, at 2157].

DISCUSSION

The *Sutton* cases have a momentous effect on employees, employers, and on the process of litigation under the ADA. When the Court decided infirmities should be evaluated in their mitigated state, millions of individuals were removed from the ambit of the ADA. *Sutton's* broad language could affect the ability of every individual with a mitigated impairment to qualify for positions, for reasonable accommodations, for entrance into job-training programs, and for entitlement to a number of other disability-based terms, conditions, or privileges of employment.

In addition, when the Court so broadly protected the right of employers to set employment standards, employers were given far greater freedom in screening applicants and employees than had been granted under any other civil rights statute. The *Sutton* decisions, in turn, could have a large impact on insurance costs and coverage if further interpretations allow employers to set employment standards that would remove qualified applicants who were substandard insurance risks from the hiring pool.

The effect on the legal process is also immense. The plaintiff win rate in ADA cases is low [24]. A recent American Bar Association study of almost all ADA trial and appellate court rulings concluded that employers prevailed in 92 percent of the cases [25]. A later study of 267 federal appellate court cases found plaintiffs prevailed only 4 percent of the time [25, T. 5]. Because the post-*Sutton* plaintiff has a more difficult job establishing the existence of a disability, more claims will be intercepted earlier in the legal process, and the number of plaintiff "wins" will probably drop even further. *Sutton* may also encourage forum shopping, particularly where state laws more generously interpret the term "disability" [26].

Problems with the Majority's Decision

Ignoring the Second Prong

The *Sutton* Court ignored the second prong of the definition of disability. The Court overlooked the fact that individuals can be considered statutorily disabled if they have “a *record* of such an impairment.” The Sutton sisters and Kirkingburg had *records* indicating their vision was seriously impaired, and seeing is defined by the act as a major life activity. Murphy had a *record* of hypertension and Kirkingburg of amblyopia. If the term “disability” is defined in three ways linked by the connective “or,” the Court cannot logically ignore any part of the definition.

Evaluation in the Unmitigated State

The Court also argued that evaluating disabilities on an unmitigated basis violates the rule that disabilities are to be evaluated on a case-by-case basis. Justice Stevens' comments about it being no less universalistic to require a person to be judged in a mitigated rather than an unmitigated state and his comments about it being as easy to test the Suttons with their glasses on as with their glasses off seem to make good sense.

The Court further explained that inferences drawn about how a person would perform in an unmitigated state would be speculative if the mitigating measures have controlled the disorder. But how much speculation is required when all the disorders confronted in the *Sutton* Trilogy were so well-documented? The Suttons, without glasses, might have difficulty finding the plane, let alone flying it. Murphy's hypertension, left alone, could make him a menace at the wheel as could the limited depth perception caused by Kirkingburg's monocular vision.

Forty-Three Million Americans

The Court also asserted that the ADA's reference to 43 million Americans with disabilities meant those whose impairments are largely controlled by medication or other devices are not disabled within the meaning of the ADA. Justice Stevens described this as a “thin reed” upon which to make a significant change in the interpretation of a major statute [13, at 2160; 28], and I agree. *Sutton* represents an important shift in public policy. The Court's arguments about the number of people who would be covered are based on a figure contained in the ADA's exhortative preamble, tangential to the substance of the act, and not subject to serious scrutiny or debate. This is a weak basis for a change in policy that affects a significant part of the disabled population.

Ignoring the Legislative History

The majority's unwillingness to examine the legislative history is mind-boggling. The fact that two justices drew contrary conclusions about the

interpretation of the statute should have sent both sides to the legislative history to clarify the intent of Congress. As noted earlier, both houses of Congress did consider whether disabilities should be evaluated in their mitigated or unmitigated state and concluded that protection should be extended to individuals whose disabilities are, in fact, checked by mechanical devices, medication, or their own special efforts.

PROBLEMS IN THE DECISIONS' IMPLICATIONS

The Reach of the Decisions

What are the boundaries of the *Sutton* Trilogy? When the Court determined that infirmities were to be evaluated in their mitigated state, it placed no bounds on the infirmities. The decisions covered only individuals with near-sightedness, hypertension, and amblyopia, but the language extended the potential application of the concept to some large but undefined area. For example, how far do the *Sutton* decisions reach in the area of mental impairments? Individuals with widespread infirmities such as attention deficit/hyperactivity disorder (ADHD), bipolar disorder, or depression have traditionally been considered to be protected under the ADA. Are they now?

Using ADHD as an example, a strict construction of *Sutton* suggests a person who suffers from the disorder will not be covered by the act if it is controlled by medication. Yet part of the problem with disorders such as ADHD is one of denial. The individuals come to think of themselves as being cured and stop taking the medicine. If they stop taking the medication, do they then become covered by the ADA? Has *Sutton* created the anomalous situation whereby the person who has adapted to an infirmity by a device or a medicine might benefit by abandoning the adaptation?

Employment Standards

Perhaps the most serious problem ties into *Sutton's* treatment of employment standards. While the ADA gives employers some discretion in setting employment standards, the *Sutton* decision appears to give them almost unlimited freedom. In determining essential functions, for example, the act states that "consideration shall be given to the employer's judgment as to what standards are essential . . ." [1, §102(8)]. However, the *Sutton* Court, went further, saying that an "employer is free to decide that physical characteristics or medical conditions that do not rise to the level of impairment . . . are preferable to others, just as it is free to decide that some limiting, but not substantially limiting impairments make individuals less than ideally suited for a job [13, at 2150].

Phrases such as “limiting, but not substantially limiting impairments” create an almost impossible interpretive tightrope for employers and employees. But such statements also ignore Section 102 of the ADA, which prohibits employers from utilizing standards or criteria: “(A) that have the effect of discrimination on the basis of disability” [1, §102(3)(A)]. Such statements also ignore the well-known disparate impact test applied under other civil rights statutes. This test essentially means that an employer may establish job requirements, but if the requirement leads to substantially fewer members of a protected class being qualified for employment, the standard itself must be shown to be necessary for job performance. The *Sutton* language appears to deny the disparate impact test to plaintiffs claiming discrimination under the ADA.

Why a Broad Policy Statement?

Finally, the Court could have decided the cases on a more limited basis. Rather than creating a general rule on testing in the mitigated or unmitigated state, the Court could have focused on the public safety aspects. It is possible that testing impaired employees in a mitigated state makes more sense when those employees are charged with the public safety, as are airline pilots and truck drivers. The Court could also have chosen to focus on whether the claimed disability in its unmitigated state denied the petitioners entry into a broad class of jobs or several jobs in different classes. It surely could have found that the infirmity claimed by the Sutton sisters did not qualify under this standard. The majority considered this option but chose to decide the case on a broader basis.

SUMMARY AND CONCLUSIONS

This article examined three recent decisions made by the U.S. Supreme Court that have changed the interpretation of the Americans with Disabilities Act. The three cases, the *Sutton* Trilogy, involved individuals with infirmities whose conditions were controlled by devices, medication, or by the body’s own adjustments. The core issue was whether disability determinations under the ADA should be made by considering the infirmity in a mitigated or unmitigated state.

The legislative history of the ADA records that both houses of Congress considered the issue and determined that a person’s disability should be evaluated in the unmitigated state. The EEOC, other agencies that had interpreted the act, and the earlier decisions of every circuit court followed the course indicated by Congress. However, in the *Sutton* cases, the Supreme Court concluded that the interpretation made by the federal agencies was “impermissible.” Disabilities should be evaluated in their mitigated state, thereby leaving individuals

unprotected by the ADA if their infirmities are held in check by prosthetic devices, medicines, or other means.

The *Sutton* cases address a difficult problem and the Court's solution was not unreasonable. It is difficult to regard people as disabled when they can correct their impairment with a mitigation as simple as eyeglasses. But in deciding the cases on a broad basis, the Supreme Court took on a policy-making role that ignored the original intentions of Congress, reshaped the interpretation of the ADA, altered its coverage in a monumental way, and, in my mind, ignored the letter and violated the spirit of the law.

Justice Stevens' dissent implies that the majority decided the *Sutton* cases on the basis of docket considerations—that the Court's decision was influenced by the specter of an overwhelming flood of lawsuits that would follow a decision in favor of the previously accepted test for disability [28]. It is also possible that some members of the majority thought that if they yielded to the earlier interpretations of the law, they would open the floodgates to millions of *undeserving* individuals—to people who were perfectly capable of handling a wide variety of jobs, whose disabilities were easily and inexpensively correctable.

But the Court's decisions, regardless of motivation, come at a very high cost. The language on employment standards appears to enable an organization to deny employment opportunities whenever the employer is uncomfortable with their corrected disability. The language suggests that the qualified applicant with a prosthetic device might be denied employment lawfully, even if the only reason is an employer's preference for an "able-bodied person." The fully qualified epileptic, whose disorder is controlled by medication, might be rejected lawfully because the employer was haunted by a "What happens if the medicine doesn't work one day?" specter. An applicant with a controlled condition of bipolar disorder might be rejected lawfully because the employer is uncomfortable with employees whose behavior is chemically influenced. The *Sutton* decisions punish otherwise disabled employees for engaging in self-help and for taking advantage of medical advances.

Furthermore, as Justice Stevens argued, limiting the coverage of the ADA also runs counter to the approach taken by Congress and the courts to every other civil rights statute. The rule has been to interpret these laws generously. Prohibitions on racial discrimination, originally intended to protect African Americans, for example, were soon extended to Hispanics, Asians, Native Americans, and other groups. The original prohibition on sexual discrimination was, over time, extended into sexual harassment and same-sex issues [29]. The ADA shares not only a tradition, but a common language with those statutes. The act says broadly that: "No covered entity shall discriminate against a qualified individual with a disability, because of the disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms and conditions of employment [1, §12112(2)]. *Sutton* flies in the face of these traditions and these words.

A Simpler, More Traditional Solution

A better approach to the problem would be one more closely tied to the traditional ways that agencies and courts have approached civil rights issues in employment. The recommended approach is one that shifts attention from the basis for determining disability to the basis for the employment standards.

The first question should be factual: was the individual denied an employment opportunity because of an infirmity, the record of one, or the belief that one existed? This question is a simple variation on the “but for” rule traditionally applied in civil rights cases. In relation to a classic civil rights case, would Mr. Griggs have been promoted “but for” the company’s requirement of a high school diploma? [30]. Would Messrs. Kirkingburg and Murphy have kept their jobs if it weren’t for their physical problems? Would the Sutton sisters have been hired if their vision was better?

If the answer to this question is yes, the next task is to determine the employment effects of the organization’s decision. The question would be this: Does this infirmity, the record of one, or the belief that one existed deny the individual opportunities in a single broad class of jobs or a number of jobs in separate classes? The Sutton sisters might have difficulty meeting this requirement, but Murphy and Kirkingburg would probably not because they were denied employment throughout the field of commercial truck operation.

If the answer to the second question is yes, the third step moves us further along with the traditional form of analysis. Can the individual meet the requirements of the position in question with reasonable accommodation? The question regarding the plaintiffs in the *Sutton* Trilogy would concern whether they could meet the requirements of the positions in question with reasonable accommodation. If the corrections enable the individual to perform the job, denying them opportunity at the job could violate the ADA.

Finally we move to employment criteria. United Airlines maintained that uncorrected vision of 20/100 was necessary to qualify for the job of global airline pilot. The criterion should be subjected to the same disparate impact test as was the requirement of a high school diploma or of a score in the intelligence test in *Griggs* [30]. If an employment criterion affects applicants or employees substantially more than it affects the rest of the population, the burden falls on the employer requiring the test to establish its necessity and efficacy. And if the employer is unable to establish the necessity or efficacy of the employment criterion, the criterion should not be a bar to the petitioner.

The same kind of disparate impact test should be applied to such federal regulations as those of the U.S. Department of Transportation that figured so prominently in *Sutton’s* two companion cases. It makes a great deal of sense to consider Justice Thomas’ suggestion in the Kirkingburg case. Justice Thomas Joined the majority opinion, “only on the understanding that it leaves open the argument that federal laws such as the DOT’s visual acuity standards might

be critical in determining whether a plaintiff is a “qualified individual with a disability” [20, at 2175].

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* * *

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ENDNOTES

1. Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*
2. C. C. Jones, Individuals Protected by the Employment Provisions of the Americans with Disabilities Act, *Journal of Individual Employment Rights*, pp. 209-220, 1994-95.
3. S. Feldman, Americans with Disabilities Act: Employer Obligations, *Journal of Individual Employment Rights*, pp. 91-113, 1993-94.
4. Legislative History of P.L. 1-1-336, The Americans with Disabilities Act. Committee on Labor and Education, U.S. House of Representatives, 101 Congress, 2d Session (Dec. 1990), Vol. 1. Serial 102-A, p. 124.
5. R. D. Lee and P. S. Greenlaw, Rights and Responsibilities of Employees and Employers Under the Americans with Disabilities Act of 1990, *Journal of Individual Employment Rights*, pp. 1-13, 1998-99.
6. Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* The coverage of the Rehabilitation Act, however, was limited to employees of the federal government and of federal contractors, while the ADA extends to private and public sector employers of 15 or more employees.
7. CFR § 1630.2(i).
8. *Weiler v. Household Finance Corp.*, 101 F.3d 619, 625 (7th Cir., 1996).
9. The EEOC’s regulations define a qualified individual with a disability as one who satisfies the prerequisite skill, experience, education, and other job-related requirements of the position the individual either holds or desires, 29 C.F.R. § 1613.702(f) 1991.
10. 29 CFR App. § 1630.2(n) 1991.
11. J. E. Grenig, *Disabled Workers*, in T. Bornstein, A. Gosline, and M. Greenbaum, *Labor and Employment Arbitration*, Matthew Bender, New York, 1998.

12. A. F. Silbergeld and R. B. Meeks, Federal Appellate Courts are Split on How to Treat Plaintiffs with Chronic Health Conditions that Can Be Mitigated, Under the Americans with Disabilities Act, *National Law Journal*, Monday, May 4, 1998, p. 2(5).
13. *Sutton v. United Airlines*, 119 S.Ct. 2139 (1999).
14. The Supreme Court referred to the following decisions which held that disabilities should be determined in their mitigated state: *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998), learning disability that affected the ability to read; *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-630 (7th Cir. 1998), diabetes; *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-938, (3d Cir. 1997), epilepsy; *Arnold v. United Parcel Services, Inc.*, 136 F.3d 854, 859-866, (1st Cir. 1998); and *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-471 (5th Cir. 1998), adult still disease. For a similar result, see *Elizabeth Criado v. IBM Corporation*, 145 F.3d 437 (1st Cir. 1998), attention deficit disorder. In the *Sutton* decision, Justice Stevens stated repeatedly in his dissent that eight of the nine circuits that have addressed the mitigation issue define the term “disability” without regard to ameliorative measures [14, at 2153].
15. 130 F.3d 933 (1997).
16. The determination of disability must be made *on a case by case basis* without regard to mitigating measures. . . .” 29 CFR pt. 1630. App. § 1630.2(j) (1998). (Emphasis added.) See also *Bragdon v. Abbott*, 524 U.S. 624 (1998), where the court declined to consider whether HIV was a *per se* disability under the ADA.
17. 29 CFR § 1630.2(j)(3)(1).
18. *Murphy v. United Parcel Service*, 119 S.Ct. 2133 (1999).
19. 49 CFR §391.41(b)(6).
20. *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).
21. S. Rep. No. 101-116, p. 23, 24 (1989). Reference made to controlled diabetes and epilepsy.
22. H. R. Rep. No. 101-485, pt. III. p. 28 (1990).
23. The report referred to hearing loss and epilepsy and said they were covered by Section (A), “even if the effects of the impairment are controlled by medication.” Com. on Ed. and Lab., H. Rep. 101 Cong., 2d Session (Dec. 1990) v. 1., p. 325.
24. B. A. Lee, The Implications of ADA Litigation for Employees: A Review of Federal Appellate Court Decisions, July 1999, scheduled for publication by *Human Resource Management* (University of Michigan).
25. J. Parry, Study finds employers win most ADA Title I Judicial and Administrative complaints, *Daily Labor Report*, (BNA), 119, E-a-3, June 22, 1998. Cited in [25, p. 9].
26. Notes from a seminar discussion of a paper submitted by Barbara A. Lee, Comparison of Employment Provisions of the ADA and NJLAD, presented at ICLE seminar on Americans with Disabilities Act/Employment Discrimination Conference. . . . Future of the ADA Litigation After the Supreme Court Holdings in *Olmstead*, *Kirkingburg*, *Murphy*, *Sutton* & *Cleveland*, New Jersey Institute for Continuing Legal Education, October 1, 1999, pp. 223-230.
27. “In the end, the Court is left only with its tenacious grip on Congress’ finding that ‘some 43,000,000 Americans have one or more physical or mental disabilities,’ . . . and that figure’s legislative history is extrapolated from a law review article authored by the drafter of the original ADA bill introduced in Congress in 1988 [14, at 2160].

28. For example: “It has also been suggested that if we treat as “disabilities” impairments that may be mitigated by measures as ordinary and expedient as wearing eyeglasses, a flood of litigation will ensue [14, at 2159].
29. *Oncala v. Sundowner Services, Inc.*, 118 S.Ct. 998 (1998).
30. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

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