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Quirky Questions
REAL-LIFE EMPLOYMENT LAW

A NEW QUESTION EVERY WEEK

Nearly every day, executives and managers, and the in-house counsel and Human Resources professionals who work with them, are confronted with unanticipated questions regarding the workforce. Just when they think they have "seen it all," along comes a new and often stranger scenario involving an odd twist to an area they thought they fully understood. These individuals often find themselves back at square one when trying to construct an appropriate response and devise a creative solution to the problem presented. Sometimes these "Quirky Questions" can be resolved easily; other times, they implicate practical and legal issues that are not immediately apparent.

Roy Ginsburg's Quirky Employment Questions Blog addresses these types of questions. We hope you find it informative, educational and entertaining. Roy will post a new question each Monday morning. During the week, he will post thoughtful, creative and humorous responses from the readers. The following Monday, Roy will present his analysis and display a new question.

We encourage you to submit your thoughts and reactions to the questions presented. We also encourage you to submit questions that you would like to see addressed, subject to the following qualifications:

- Your submission of any comments or questions does not establish an attorney-client relationship between you and Dorsey & Whitney LLP, or between you and Roy;
- You should not send confidential information or include confidential information in your questions or submissions. Any information submitted will not necessarily be kept confidential.
- The information presented in this Blog is intended to constitute general information, not specific legal advice. You should consult your own lawyer if you are confronting legal issues similar to those presented in this Blog.

If you would like to review additional information regarding these qualifications, please click on the following URL to read the full disclaimer,

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or scroll down to the very bottom of this page to the "Terms of Use" and click on "Legal Notice and Disclaimer." Your feedback and questions should be submitted to Roy at ginsburg.roy@dorsey.com.

Reasonable Accommodation for Absent Employee? Quirky Question # 154

August 4, 2010 | *Posted by* Ginsburg, Roy | Topics: Disability Discrimination, California Questions, Reasonable Accommodations of Disabilities

[Readers: It's the first Wednesday of the month so it's time for one of our West Coast Quirky Questions. Tune in next Wednesday for the analysis from one of our colleagues in our Southern California office. Regards, Roy]

One of our manufacturing employees, call him Jim, was fairly seriously injured in an accident on the production floor. Jim applied for workers' compensation and was examined by a doctor. The doctor let us know that in his opinion, Jim would no longer be able to perform his job, since it required a significant amount of lifting and bending that he was simply no longer physically capable of doing. Rather than taking immediate action based on the doctor's opinion, we waited. We thought maybe his condition would improve – Jim was a good employee, and we just didn't want to do anything too hasty.

Meanwhile, we knew Jim was aware of the doctor's report that he could not return to his job, but he didn't get in touch with us to contradict it or to tell us he did want to try to return to work if we could find a way to have him do it. Admittedly, we did not try to contact him either. The months passed, and he never did get in touch with us or communicate that he wanted to return. Finally, 8 months later, we decided it was time to terminate him, since he had shown no signs of wanting to come back to work, even if he could. We sent him a letter enclosing the doctor's report and explaining that we were forced to terminate employment since he could not perform his job, and there was no other job available.

Now Jim is suing us. He claims we did not reasonably accommodate his disability, since we did not engage in an interactive process with him! Do we have any possible defense?

Comments/Questions |

Chambers USA Client's Guide: 2010 Results Are In!

August 3, 2010 | *Posted by* Ginsburg, Roy |

In 2004, *Chambers USA* (America's Leading Lawyers for Business) began publishing its "Client's Guide," which includes a state-by-state analysis of law firms, divided into multiple practice areas. In the category of "Employment Law" in Minnesota, Dorsey was listed as one of three "Band 1" firms (Chambers' highest ranking category), with four of our ten Minnesota partners (Christensen, Ginsburg, Hobbins and Reinhart) receiving individual recognition. As *Chambers* pointed out, one interviewee observed that "there are no weaknesses in the Department."

The 2005 edition of *Chambers*' text echoed many of the 2004 comments. In 2005, however, Dorsey was listed as the *only* Band 1 Minnesota firm in the area of employment law. Moreover, in 2005, six of our ten L&E partners (Christensen, Eng, Ginsburg, Hobbins, Raphan and Reinhart) received individual recognition, more than from any other Minnesota law firm.

In 2006, Dorsey maintained its exclusive ranking as *Chambers*' only Band 1 employment practice in Minnesota. Again, six of our partners received individual recognition (Christensen, Eng, Ginsburg, Hobbins, Raphan and Reinhart), still more than any other Minnesota firm. As Chambers noted, "This Midwestern giant's labor and employment team '*has very few equals*' in Minnesota or even nationwide." (Emphasis in original.)

The 2007 Chambers' book mirrored the earlier results. Dorsey continued to be ranked as a Band 1 employment firm in Minnesota (though one of our competitors also achieved that lofty status). Again, six of our ten partners received individual recognition (Christensen, Eng, Ginsburg, Hobbins, Raphan and Reinhart), more than any of our competitors. Chambers wrote, "The team has experience across the full range of issues in the labor and employment field, and clients are impressed by its '*depth of experience, national presence and strong lawyers across all levels of the firm*.'" (Emphasis in original.)

The *2008 Chambers*' guide continued the pattern of the previous four years. Dorsey was one of just two Band 1 employment practices in Minnesota. The same six Dorsey employment partners who had received individual recognition since 2005 continued to be specifically acknowledged by *Chambers*. As Chambers pointed out, "With the acquisition of a new partner each for the California and [Seattle] offices, the labor and employment group . .

. continues to 'thrive as it expands its already great national reach.' This adds to the practice's 26-strong Minnesota team and signifies the '*depth of resources that the firm has to cover all aspects of labor and employment law*.'"

The *2009 Chambers USA Client's Guide* replicated the prior results. Dorsey and just one other Minnesota firm were rated as Band 1 firms by Chambers. Again, six of our partners (Christensen, Eng, Ginsburg, Hobbins, Raphan and Reinhart) received individual recognition. In 2009, Chambers described Dorsey as the *"600-pound gorilla of the local labor and employment market."* Chambers acknowledged particularly our group's expertise in wage and hour collective actions, as well as employment discrimination litigation, restrictive covenant disputes, and traditional labor work.

The *2010 Chambers USA Client's Guide* is now out. For the seventh consecutive year, our L&E practice has been rated as Band 1 by Chambers – the only Minnesota employment practice to receive that ranking every year since Chambers started its evaluations. Once again, the same six partners have received individual recognition from Chambers. As one source quoted by Chambers observed, *"This top-notch labor and employment group helps us develop watertight legal and business strategies."*

We hope to have the opportunity to work with you and your company. We'd like to demonstrate to you that these accolades and recognition are deserved.

If we can assist your company with any of its L&E needs, please contact me. Regards, Roy

Comments/Questions |

Forcing Employees to Litigate in One State, Quirky Question # 153

August 2, 2010 | *Posted by* Ginsburg, Roy | Topics: Choice of Law, Civil Procedure

Our company has independent-contractor consultants in many states. Our headquarters is in Minnesota. We know that we could be sued in any of the states where we have independent contractors, and that many of those states apply their own legal tests to determine whether an individual is an independent contractor or employee. To get a little predictability, and hopefully, minimize our liability, we'd like to include a choice of law provision in our independent contractor agreements designating Minnesota as the controlling law. Will that provision be enforceable if we get sued in a state other than Minnesota?

Comments/Questions |

Roy's Analysis of Quirky Question # 152, Same Conduct and Multiple Claims

August 2, 2010 | *Posted by* Ginsburg, Roy | Topics: Sexual Harassment, Recent Decisions, Sex Discrimination, Negligent Hiring, Negligent Retention, Negligent Supervision

Quirky Question # 152:

One of our employees complained of sexual harassment. We investigated, though admittedly not as promptly as we should have. We discovered that the harasser had engaged in some seriously problematic conduct. Our investigation also revealed that the harasser had engaged in similar conduct at a prior employer and previously, at our company, with a different employee who had elected not to report.

The victim of the harassment is now threatening to sue us and demanding settlement compensation. Her lawyer suggests that if we do not settle, he will sue us for multiple claims, including both sexual harassment and negligent hiring. (Apparently, his investigation also revealed the past problems.) Is this legit? Can we be sued for multiple claims based on the same conduct?

Analysis:

As you likely know if your company has had to defend many employment claims, it is a rare plaintiff (and rarer plaintiff's counsel) who asserts only one claim. Typically, plaintiff's attorneys evaluate the nature of the wrongful conduct and consider how many different claims that conduct might support. In a case of egregious sexual harassment, for example, the same conduct might support a claim for sex discrimination under Title VII, a claim for sex discrimination under a parallel state statute, and common law claims for assault, battery, negligent or intentional infliction of emotional distress, negligent hiring, negligent retention, and negligent supervision. In addition to these nine causes of action, the presence or absence of certain facts may lead to the pleading of several other claims as well.

"Kitchen-sink" pleading can sometimes be legitimate. For example, the federal anti-discrimination statutes cap emotional distress damages, whereas many state statutes or common law claims do not. Similarly, the federal anti-discrimination statutes, and many state statutes as well, limit the recovery of punitive damages, which typically are not constrained under common law theories. At other times, however, pleading every conceivable claim is simply a waste of both judicial and the parties' resources, and judges often are justifiably impatient with this approach.

It also is fair to question whether it makes sense to plead multiple claims, rather than focusing strategically on the claims that are most compelling. Perhaps the most frequently asserted plaintiffs' explanation for this approach is that it reduces the likelihood that all claims will be dismissed on summary judgment.

The pleading of multiple claims also raises the question implicated by your question – do the statutory claims preempt or supplant the common law claims grounded upon the same facts? As you may know, the doctrine of preemption is based on the idea that when the legislature passed a statute in a particular area, it intended for the statute to supplant pre-existing common law claims and limit plaintiffs to the new statutory cause of action and the relief provided by the statutory scheme. At times, Congress and state legislatures are quite explicit regarding the preemptive effect of a specific statute. For example, states' workers' compensation statutes make absolutely clear that the statutes are the exclusive remedy for injuries sustained by employees at work. At other times, however, Congress or state legislatures do not clearly articulate their intent on this issue, leaving litigants and courts to sort through the language of the statutes and/or the legislative history to discern whether preemption was intended. In some circumstances, preemption is found; in other instances, the opposite determination is reached.

You inquire about whether the same conduct could justify a statutory claim for sexual harassment and a common law claim for negligent hiring. Although I have not conducted a 50-state survey on this issue and although it is beyond the scope of this article to do so, my impression is that in most, but not all, jurisdictions, these claims are not mutually exclusive. But, as I have emphasized in other Blog postings, employment law reflects a combination of federal and state law. It is critical, therefore, to analyze how this issue is addressed in the jurisdiction where your company is doing business.

For example, just two months ago, the Supreme Court of Texas examined this issue in the case of *Waffle House, Inc. v. Williams*, No. 07-0205 (June 11, 2010). The Texas high court explored whether the Texas Commission on Human Rights Act (TCHRA) preempted a common law claim of negligent supervision and retention. Deciding this issue of first impression, the Texas Supreme Court stated, "Our view is that the TCHRA, the Legislature's specific and tailored anti-harassment remedy, is preemptive when the complained-of negligence is entwined with the complaint of harassment." In reaching this conclusion, the court found that the facts supporting the negligence claim were "inseparable" from those underlying the alleged harassment. This led the Texas court to assert, "We do not believe the Legislature's comprehensive remedial scheme allows aggrieved employees to proceed on dual tracks – one statutory and one common-law, with inconsistent procedures, standards, elements, defenses, and remedies."

Despite this general conclusion, the Texas high court pointed out the limitations of its own holding. The court emphasized that its ruling did not "foreclose" an assault-based negligence claim arising from independent facts unrelated to sexual harassment. Similarly, the court noted that its holding does not bar a tort claim against the individual harasser or assailant. The court also reserved judgment on how the case might have been resolved on the theory that the employer was vicariously liable for the individual's assault of the plaintiff under common law ratification theory.

The facts leading to the *Waffle House* decision were relatively straightforward. Williams worked as a waitress at Waffle House for approximately 9 months. Beginning in her first week of employment and continuing throughout the rest of the time she worked for Waffle House, she was subjected to a variety of offensive behaviors by one of the restaurant's cooks. The conduct included unwanted physical contact, crude remarks and gestures, and other offensive behaviors. Williams reported the conduct on multiple occasions but Waffle House failed to respond appropriately and the harassment continued. Williams ultimately resigned her employment, claiming that she was constructively discharged. She sued under both TCHRA's prohibition of sexual harassment and the common law claim of negligent retention and supervision. The jury found for Williams on both claims, awarding her $400,000 in past compensatory damages, $25,000 in future compensatory damages, and $3.46 Million in punitive damages. Williams opted for the higher damages awarded pursuant to the common law claims, rather than the statutory claims. The trial court capped the punitive damages at $425,000 pursuant to Texas law mandating equivalency of compensatory and exemplary damages. The intermediate appellate court affirmed the trial court's ruling and the case went up to the Texas Supreme Court.

As noted above, the Texas Supreme Court held that Williams' exclusive remedy against Waffle House was her statutory harassment claim, even though the legislative creation of a statutory remedy is "not presumed to displace common-law remedies," and the "abrogation of common-law claims is disfavored." However, the court stressed that the enactment of a statutory cause of action may abrogate a common-law claim if there is a "clear repugnance" between the two causes of action. As framed by the court, "Today's question is whether employer liability for unwanted sexual touching by a coworker (simple assault under Texas law given its 'offensive or provocative nature) is limited to a tailored TCHRA scheme that specifically covers employer liability for sexual harassment. We think the answer should be yes."

The Texas court observed that allowing Williams to recover on her tort claim would "collide with the elaborately crafted statutory scheme," a scheme that "incorporates a legislative attempt to balance various interests and concerns of employees and employers." In support of this conclusion, the court pointed to five substantive distinctions between the statutory structure and the common law cause of action: a) administrative review; b) statute of limitations; c) substantive elements of the claims; d) affirmative defenses; and e) remedies. With respect to each of these areas, the court identified significant differences between the statute and the common law. For example, with respect to "administrative review," the court noted that the statute required exhaustion of administrative remedies and encouraged alternative dispute resolution, features absent in the common law claim. Similarly, the statute of limitations of the two legal theories was different. With respect to the elements of the claim, the Texas court found significant differences, essentially concluding that it would be easier to make out a claim under the common law theory. Likewise, with regard to the affirmative defenses and remedies, the court found important distinctions between the parallel schemes.

The *Waffle House* decision is not above criticism. First and foremost, the court largely disregarded the fact that Texas legislature, when creating what the court characterized as an "elaborately crafted statutory scheme," did not simply state that the statute was the exclusive remedy for any claims relating to sexual harassment. Often times, this type of omission is fatal to a preemption argument. Second, the court's deference to the supposed thoughtfulness of the legislative process – often a reflection of horse-trading and compromise – is itself suspect. Third, the court's ruling fails to consider circumstances where the facts supporting a common law claim would not support a statutory claim. Are plaintiffs in those situations precluded from litigating based on the pre-

existing common law claim simply because the conduct complained of falls with the statutory scope? Fourth, arguably the torts of negligent hiring, retention and supervision are designed to address different workplace problems than prohibitions against sexual harassment and impose different types of obligations upon employers (e.g., due diligence with respect to reviewing the employee's prior employment history). Fifth, the *Waffle House* decision may simply lead plaintiffs' counsel to plead their clients' cases differently, pursuing the ideas set forth in the decision about the limitations of the court's ruling.

Regardless of whether you consider the decision brilliant or flawed, however, it does illustrate one more arrow in the defense quiver. When confronted with claims that arguably overlap, defendants should consider carefully whether they can assert a preemption argument as to some of the common law claims. (As noted in the *Waffle House* decision, the Texas Supreme Court recently has decided a couple of other cases in which it found that other causes of action – certain types of whistle blowing claims and the tort of intentional infliction of emotional distress – also were preempted by the TCHRA.) The applicability of the preemption defense will turn largely on the specific language of the state statute that defendant contends has preemptive effect.

As for your specific situation, I hope the analysis above highlights the issues you should consider. Without knowing the state in which your situation has arisen, it's difficult to know whether there is a likelihood of your successful pursuit of a preemption argument. A careful examination of the specific language of your state's anti-discrimination statute, as well your state courts' decisions on preemption should provide you insight into whether you likely will succeed with this defense. Finally, note that even if your employee is entitled to pursue both of the overlapping statutory and common law claims, your employee will not be able to recover twice for the same wrongful conduct.

Comments/Questions |

Leadership Series, Article # 4

July 30, 2010 | *Posted by* Ginsburg, Roy | Topics: Guest Articles, Leadership

[Readers: Presented below is the fourth article in our Leadership series. This article was submitted by Christine Esckilsen. Ms. Esckilsen is a Managing Director in the General Counsel Department at Piper Jaffray's Minneapolis headquarters. She manages all of the firm's litigation. In addition, Ms. Esckilsen advises the firm on employment law issues and consults on matters including hiring, performance management, executive compensation, policies and procedures. Prior to joining Piper in 2002, Ms. Esckilsen was in private practice for seven years at Littler Mendelson in California where she was an employment and labor law litigator for national corporations.

Ms. Esckilsen has had the benefit of observing leadership skills as both in-house and outside counsel. Moreover, she herself is a leader within the Piper organization. As such, she brings a unique perspective to this important topic. I hope you find Christine's article instructive and interesting. Regards, Roy]

Reflections on Leadership

By: Christine Esckilsen

Every company has its own culture. I work for an investment bank. Perhaps you are now thinking bailout money (we didn't take any), proxy statements, red-eye flights, sharp elbows and Brooks Brothers ties. Fair associations all. Yet working here has taught me that effective leadership is best accomplished by being present, open, and connected, concepts addressed below. Why is this important? Because the key to effective leadership is developing engaged employees. We cannot truly engage others unless we are present, open, and connected with them.

To accomplish this, we need to draw on our mind, physical body and emotions. As Americans, we prize and stress the intellect. So, the true work comes in understanding and managing the physical body and the

emotions. Once we accomplish this, we can mobilize our teams and feel good doing it! For the skeptics, I submit to you that if this model of successful leadership can work at an investment bank, it can work anywhere.

Why does engagement matter? Highly engaged employees have a strong personal and psychological attachment to their organization. They feel closely aligned with the values of and vision for the company. Not only are they more likely to stay in their jobs longer, thus increasing the company's return on investment and reducing the high costs associated with turnover, they work harder because they are committed to the strategy of the organization. They tend to share their positive enthusiasm for the organization with other employees and potential recruits. They seek and create teams that openly share information, cooperate and celebrate successes. In this way, their attitude acts as a positive contagion. The bottom line: companies with higher levels of engagement show increased revenue growth.

How do we engage an employee? First, we must be present. To know whether we are truly present requires a degree of self-awareness few of us have been taught in the workplace. Yet, "[we] will make no progress without self-awareness." Coach Wooden's Leadership Game Plan for Success, John Wooden and Steve Jamison (2009). Becoming self-aware takes practice. We regularly have to "check in" with our emotions (am I stressed out? am I still angry about a negative encounter from this morning? am I distracted by an upcoming meeting?), as well as our physical body (is my body facing the employee or half-turned away? are my eyes darting back and forth to my computer as I monitor my e-mails? are my shoulders tensed? is my jaw clenched? am I talking very quickly or raising my voice?).

Leaders' moods and actions have an enormous impact on those they lead. Once we become aware of our emotions and physical body, we can employ tools to manage them most effectively. For example, in the moment, we can take a few cleansing breaths. It is amazing how effective this simple technique is for calming the mind and body. We might verbally acknowledge the fact that we are stressed out or angry. In the long-term, we can develop a daily centering practice that will help us show up for work and truly be present every day. "To be an exemplary leader it's necessary to take on new practices that will move us out of our heads and into our bodies." Leadership Dojo: Build Your Foundation as an Exemplary Leader, Richard Strozzi-Hecker (2007). After all, our body controls the brain as much as the mind controls the body. (While this remains a novel concept in the Western World, Easterners – practitioners of yoga, martial arts and meditation – have embraced this truth for centuries.) Getting into our bodies allows us to unify our speech, actions and words. This unity resonates with our employees; it translates as authenticity and creates trust.

Second, we must be open. Once we have become truly present with another person, we have created a pathway to becoming open. An employee who sees, hears and senses that we are committed to the interaction with him/her is primed to be more receptive to what we have to say, and more willing to be forthcoming with us. Strong, open leaders share information about the direction of their team, business line or company; speak with conviction about their guiding vision; and deliver candid performance feedback on a regular and ongoing basis. Moreover, strong, open leaders welcome feedback. They recognize that "CEO disease" – where no one is willing to give bad news or offer constructive criticism with a senior leader – is an anathema to the company's and the leader's growth. They exhibit a healthy sense of humor about themselves. They know when to ask for help.

Third, once we are present and open, we are able to connect with those around us. Successful leaders listen to their employees and grant weight to their perspectives. They offer them opportunities to build their skills and continue learning so that they can find greater meaning in their work. They empathize with their employees, i.e., sense their emotions and react appropriately by assuaging anger, calming anxiety and sharing joy. In short, they take a genuine interest in them. This matters because we rely on our connections with others for our emotional stability. Simply put, "[w]hen people feel good, they work at their best." Primal Leadership: Learning to Lead with Emotional Intelligence, Daniel Goleman, Richard Boyatzis and Annie McKee (2002). Thus, the distinguishing trait of a successful leader is someone who fosters good feelings in those they lead.

There is no question that leading with a unified mind, body and spirit takes practice. It requires a disciplined approach to becoming more self-aware and a willingness to make a conscious choice to train ourselves to behave and act in a particular way until it becomes a part of who we are. Such practice has always been a benchmark of athletes and performance artists. If we can employ it in corporate America, we can learn to fully engage our employees and accomplish organizational success. And, better yet, we can improve ourselves in the process.

Comments/Questions |

Trivia Game

July 29, 2010 | *Posted by* Ginsburg, Roy |

Readers: Still no winners on the Trivia Game question posted to the left. Since I did receive my usual request for clues, I'll simply state that this question is relatively easy. Think season premier, think AT&T, think voice-over. I confess I'll be a mad hombre if you don't figure out this one. Best, Roy

P.S. Check out the Blog tomorrow for the next article in our Leadership series.

Comments/Questions |

Sexual Harassment and Negligent Hiring, Can Same Conduct Justify Two Claims: Quirky Question # 152

July 26, 2010 | *Posted by* Ginsburg, Roy | Topics: Sexual Harassment, Negligent Hiring

One of our employees complained of sexual harassment. We investigated, though admittedly not as promptly as we should have. We discovered that the harasser had engaged in some seriously problematic conduct. Our investigation also revealed that the harasser had engaged in similar conduct at a prior employer and previously, at our company, with a different employee who had elected not to report.

The victim of the harassment is now threatening to sue us and demanding settlement compensation. Her lawyer suggests that if we do not settle, he will sue us for multiple claims, including both sexual harassment and negligent hiring. (Apparently, his investigation also revealed the past problems.) Is this legit? Can we be sued for multiple claims based on the same conduct?

Comments/Questions |

Bawdy Behavior Outside of Work, Quirky Question # 151

July 22, 2010 | *Posted by* Ginsburg, Roy | Topics: Termination, Termination For Cause

We have several employees who periodically engage in somewhat bawdy behavior outside of work. (Surprise, surprise, sometimes alcohol is involved.) We don't believe this behavior is consistent with the image our company would like to project. Can we discipline these employees for their conduct (which invariably is reported back to us)? Can we fire them?

Roy's View and Reader Responses | Comments/Questions |

Lawyer Whistleblower Ethics - A Difficult Duty

July 13, 2010 | *Posted by* Ginsburg, Roy | Topics: Recent Decisions, Retaliation, Whistleblower Claims, Guest Articles

[Readers: Yesterday, I posted an article on the recent *Kidwell v. Sybaritic, Inc.* decision from the Minnesota Supreme Court. As I referenced in the final practical pointer in the analysis, the decision does implicate a

number of interesting ethical issues. My colleague, Bill Wernz, who was the former Executive Director of the Office of Lawyers' Professional Responsibility, has just written an article for *Minnesota Lawyer* (July 12, 2010, Vol. 14, No. 28) that focuses on just these ethical issues. With approval from *Minnesota Lawyer*, Bill's article is reprinted below. If you have any questions regarding Bill's analysis, don't hesitate to contact him at wernz.william@dorsey.com or at 612.340.5679. Regards, Roy]

LAWYER WHISTLEBLOWER ETHICS ISSUES – A DIFFICULT DUTY
By: Bill Wernz

How should an in-house lawyer's employment rights and duties be balanced with the ethics and fiduciary obligations of confidentiality? In *Kidwell v. Sybaritic* (Minn. June 24, 2010) the plurality opinion provides the civil law answer to this question, leaving the ethics debate to the concurrence and dissent. This question is also addressed in *Nordling v. Northern States Power, Co.*, 478 N.W.2d 498 (Minn. 1991) and in the 2005 amendments to Rules 1.6, 1.13, and 3.3, Minn. R. Prof. Conduct.

FACTS. On April 24, 2005, Kidwell, the general counsel of Sybaritic, Inc. sent an e-mail, titled "A Difficult Duty," to Sybaritic's managers. The e-mail stated, "It is my firm conviction that Sybaritic intends to continue to engage in tax evasion, the unauthorized practice of medicine and obstruction of justice. Accordingly, it is my intention to advise the appropriate authorities of these facts." Kidwell sent a copy of the e-mail to his father, a non-lawyer confidante. In May 2005, Sybaritic fired Kidwell. Kidwell brought a whistleblower claim of wrongful termination against Sybaritic. A jury found that Kidwell was fired in retaliation for blowing the whistle, but the appellate courts reversed. A Minnesota Supreme Court plurality found the evidence compelling that Kidwell's purpose was reporting "a potential problem to his client," as part of his assigned duties, rather than blowing a whistle.

CONFDIENTIALITY. Rule 1.6 generally requires that a lawyer keep client information confidential, where disclosure would be embarrassing, detrimental or unauthorized. For Kidwell's threatened disclosure to be proper, some exception to the general rule would have to apply. The main rules governing an in-house counsel who is thinking of blowing the whistle on an employer's conduct are 1.6(b) (Confidentiality), 1.13(b) (Organization as Client) and 3.3 (Candor to the Tribunal).
NECESSITY. The ten sections of Rule 1.6(b) allow disclosures as "necessary" for specified purposes, such as rectifying a fraud in which a lawyer's services were used. None of the ten sections would have allowed Kidwell to disclose Sybaritic's confidential information to "appropriate authorities." Rule 1.6(b)(8) allowed Kidwell later to make disclosures necessary for his whistleblower claim, but this section does not authorize disclosures to authorities before employment termination. Even when disclosure is authorized, however, only information necessary for the permitted purpose may be disclosed. For example, a whistleblower suit might be served but not filed, to determine whether settlement is feasible. The complaint could meet notice pleading standards but not aver sensitive matters in detail. Permission to seal files might be sought. In short, even lawyers who have been wrongly fired, for whistleblowing, may disclose only as necessary.

KNOWLEDGE / SUSPICION. Rules 1.13(b) and 3.3 *require* that a lawyer disclose information in certain carefully defined circumstances. Both rules are triggered when a lawyer "knows" of certain improprieties. "Knows" is defined as "actual knowledge." In contrast, the whistleblower statutes protects an employee who "in good faith, reports a violation or *suspected* violation. . .." The court repeatedly refers to what Kidwell "suspected," not what he "knew." If Kidwell merely *suspected,* but did not *know*, there was client misconduct, he had no warrant under Rules 1.13 and 3.3 to make or threaten any disclosure outside the company. Even if Kidwell had known of misconduct, Rules 1.13 and 3.3 have other limits on disclosure.

ORGANIZATION. Minnesota's 2005 amendment to Rule 1.13(b) requires a lawyer for an organization who knows of insider misconduct to try to "proceed as is reasonably necessary in the best interest of the organization." Normal remediation involves reporting "up the ladder," *within the organization.* Minnesota did

not adopt ABA Model Rule 1.13(c), which allows a company lawyer to disclose insider misconduct to outside authorities, where the misconduct is apt to injure the company substantially.[1] Minnesota's Rule 1.13 does not provide any authority for disclosure of confidential client information to "appropriate authorities" or other outsiders, even where the lawyer has actual knowledge of misconduct.

TRIBUNAL. Rule 3.3 *requires* that a lawyer who *knows* of fraud on a tribunal "shall take reasonable remedial measures." If remonstrating with the client is ineffective, the lawyer ordinarily must disclose to the tribunal, even where disclosure is of privileged information. Rule 3.3 did not apply here, however, for two reasons. First, Kidwell's suspicion that Sybaritic was "obstructing justice," by withholding discovery responses, fell short of knowledge. Second, the Sybartic litigation was in Estonia, so Estonian rules, not Minnesota Rule 3.3, applied, pursuant to Rule 8.5(b), governing choice of law.

THREAT. Kidwell *threatened* to report what he believed to be Sybaritic's misconduct, to "appropriate authorities." The threatened disclosure was not authorized by Rule 1.6, 1.13, 3.3, or any rule. Whether Kidwell's threat fell was an unlawful "threat to expose a secret," under Minn. Stat. § 609.27, Subd. 1(4), is beyond the scope of this article. The court did not consider the threat, because Sybaritic did not cite the threat as a reason for Kidwell's termination, but the threat presents the most serious issue for ethics analysis.

RULE 1.6. AMENDMENT. The version of Rule 1.6(b)(5) that was in effect from 1985 to 2005 allowed disclosure of confidential information when "necessary to establish or collect a fee," but did *not* allow disclosure to pursue a "claim." In 1991, *Nordling* allowed an in-house counsel to make a wrongful discharge claim, but did not allow confidential information to be disclosed to support the claim. In 2005, Rule 1.6(b)(8) was adopted, allowing disclosures necessary "to establish a claim," including a whistleblower claim, but this amendment did *not* expand a lawyer's permission to disclose client information *before* an employer fired or disciplined a lawyer.

WHEN? The court regarded Kidwell's disclosures in his suit against Sybaritic as authorized by Rule 1.6(b)(8). This rule became effective October 1, 2005. Kidwell was fired in May 2005. The date his suit was filed is not mentioned in the court's opinion. If the suit was filed before October 1, 2005, disclosure of confidential information would *not* have been authorized, because Rule 1.6(b)(8) would not yet have become effective.

KIDWELL ON ETHICS. The plurality opinion did not address ethics, because it resolved Kidwell's claim by application of statute to facts. The concurrence and dissent debated ethics issues energetically, even though they apparently would not disagree on several fundamental points: (1) Rule 1.6(b)(8) generally permits whistleblower claims. (2) Kidwell's disclosure to his father was not permissible.[2] (3) Kidwell's claim would have been impermissible if Rule 1.6(b)(8) had not yet been adopted. (4) Kidwell would have had no claim if the jury found that Kidwell's disclosure to his father was the basis on which Sybaritic fired him.

The concurrence would have held that Kidwell's disclosure to his father negated Kidwell's claim against Sybaritic, even where, as the jury found, Sybaritic fired Kidwell for whistle-blowing. Put differently, even where termination of a lawyer's employment for ethical or fiduciary violations is pretextual, the concurrence regards the transgression as precluding compensation for a whistleblower claim. The dissent, in contrast, would allow the jury to determine the extent, if any, to which ethics violation or fiduciary breach should result in diminution or elimination of otherwise recoverable whistleblower damages.

COURT / LEGISLATURE. The concurrence and dissent argue a foundational ethics issue, namely who declares the scope of lawyers' professional obligations. The dissent cites authority that "it is the duty of this court to apply the law as written by the legislature." However, the dissent balances its statement of duty to the legislature by stating that Rule 1.6(b)(8) permits whistleblower claims. The dissent impliedly invokes the court's traditional right, asserted in *Nordling,* to determine that its confidentiality rules limit the application of legislation to lawyers. The real dispute between dissent and concurrence is how broadly the court's prerogative should be construed.

The court could not simply abdicate to the legislature. The whistleblower statute is oriented to exposure, while the ethics rules are oriented to confidentiality, with a few, carefully chosen exceptions. The statute protects an employee who in good faith reports a "suspected" violation of law to "any governmental body or law enforcement official." If only the statute governed, in-house counsel, instead of reporting insider misconduct "up the ladder," within the company, could claim a statutory employment protection for reporting, instead or in addition, to the F.B.I.[3]

If, as Kidwell threatened, a lawyer reported a client's misconduct to law enforcement, and none of the Rule 1.6 exceptions to confidentiality applied, the lawyer would be subject to severe discipline. The discipline would not depend on whether the lawyer was in-house or outside counsel. It would be anomalous to protect the in-house counsel's employment rights in such circumstances, but the whistleblower statute would do so, unless the court modified the statute as applied to lawyers.[4]

If the court were to treat in-house counsel just like other whistleblowers, employers could respond by entrusting their sensitive information only to outside counsel. Put differently, a jurisprudence that aimed at broad whistleblower protection of a small number of in-house counsel could result in a general loss of status and employment for in-house counsel.

The proper balance of lawyer confidentiality and social justice, in various manifestations, has been debated, in the wake of Enron and other corporate scandals, by bar associations, courts, the Securities & Exchange Commission, and the United States Congress. The balance has tipped farther toward disclosure rights and duties than ever before. *Kidwell* provides an occasion for reviewing these developments and for noticing that the circumstances in which the ethics rules permit in-house counsel to disclose confidential information outside the organization remain very limited.

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[1] Where a lawyer *suspects* or *believes* there is misconduct within an organizational client, but does not *know* of such misconduct, the lawyer will normally communicate information to a client contact, even though the disciplinary threshold is at the higher level of knowledge.

[2]The dissent finds the concurring opinion's reading of Rule 1.6(b)(8) "narrow," because "Rule 1.6 specifically contemplates whistleblower claims." Kidwell's disclosure to his father was not, however, a whistleblower report. The concurrence equates a violation of Rule1.6 with a breach of fiduciary duty, but the court has normally found violation of a rule to be at most some evidence of breach of fiduciary duty. Here the point is technical, because Kidwell's disclosure to his father would plainly violate both ethics and fiduciary standards.

[3] Because outside counsel is not protected by the whistleblower statute, any broad interpretation to protect in-house counsel who make disclosures outside the organization would presumably be followed by a shift in retention on sensitive matters, from in-house to outside counsel.

[4] Holding that statutory "good faith" requires obedience to the Rules of Professional Conduct would be a slight re-characterization of the concurring opinion.

Comments/Questions |

In-House Counsel as Whistleblower, Kidwell vs. Sybaritic, Inc.

July 12, 2010 | *Posted by* Ginsburg, Roy | Topics: Recent Decisions, Retaliation, Whistleblower Claims

The Minnesota Supreme Court finally has ruled on *Kidwell v. Sybaritic, Inc.*, Nos. A07-584 and 788 (June 24,

2010), the "in-house counsel as whistle-blower" case that was pending before it for more than 18 months. Unfortunately, the Court's ruling has not brought clarity to this area of the law.

I previously discussed this case in a Blog entry in August 2008 (to see the earlier analysis, use the "View by Topic" bar to the left, scroll down to "Retaliation" and go to Quirky Question # 50).

The Background Facts

As previously described, Kidwell was the General Counsel for Sybaritic, Inc. (Sybaritic), a company that manufactures and sells equipment and spa products to spa and medical-spa industries. Kidwell was hired in July 2004. Sybaritic fired him less than one year later, in May 2005.

Kidwell claimed that he had been fired because he had engaged in conduct protected by the Minnesota Whistleblower statute, Minn. Stat. § 181.932. Specifically, Kidwell pointed to the fact that just three weeks before his termination, he had sent the key executives of Sybaritic an email memorandum he had entitled, "A Difficult Duty." In his Difficult Duty memo, Kidwell stated, "I write to you with deep regret, but I cannot fail to write this email without also failing to do my duty to the company and to my profession as an attorney. That I cannot do." In the email, Kidwell pointed to the "pervasive culture of dishonesty" at the company, including the company's failure to investigate dishonest salespeople, the company's allowance of a staff member to engage in the unauthorized practice of medicine, and the company's failure to pay taxes in California. Despite the seriousness of those allegations, Kidwell characterized them as outside the scope of his responsibility and focused his Difficult Duty memo on his concern that "smoking gun" emails relating to a lawsuit in which Sybaritic was then involved and for which he was responsible, were being concealed or destroyed. Kidwell contended both that Sybaritic had included false allegations in its pleadings and that it had disregarded discovery orders. He concluded that the company was exposed to Rule 11 sanctions, charges of obstruction of a court order, and charges of obstruction of justice.

Kidwell stated that he intended to report his concerns – tax evasion, unauthorized practice of medicine, and obstruction of justice – to appropriate authorities. He ended his memorandum with the observation, "I regret that I see no other course of action available." Kidwell explained at trial that he hoped he "could pull this company back into compliance by enlisting some of the other members of management, and as the person responsible for the legal affairs of the company, that's what I had to do."

In what proved to be an error fatal to his case, Kidwell also sent a copy of the Difficult Duty memo to his father, because he previously had sought his father's advice on this "ethical dilemma" and wanted his father's guidance and support. Kidwell also researched Minnesota whistleblower law to ascertain his rights.

In response to the Difficult Duty memo, Sybaritic initially changed Kidwell's supervisor. The company also worked with Kidwell to develop a framework for resolving the issues he raised. Three weeks later, however, Sybaritic fired Kidwell. The company claimed it fired him because of performance deficiencies (uncompleted tasks and failure to pay certain invoices to outside counsel). Sybaritic further pointed out that when it investigated whether the invoices from outside counsel had been paid, which required a review of Kidwell's emails, it discovered that he had sent the Difficult Duty memo to his father. The company concluded that he no longer could be trusted and terminated his employment.

The Decisions of the Trial Court and Court of Appeals

Kidwell sued as a whistleblower. Sybaritic counterclaimed for breach of fiduciary duty and conversion. The case was tried to a jury, which awarded him damages of $197,000, plus attorneys' fees and costs. As to the counterclaims, the trial court found as a matter of law that Kidwell had breached his fiduciary duty to Sybaritic and instructed the jury on damages. The jury, however, found that Sybaritic had not been damaged as a result of this breach. On the conversion count, the jury awarded Sybaritic $2000.

The trial judge denied Sybaritic's motion for judgment as a matter of law and the case was appealed. The intermediate appellate court reversed, holding that Kidwell did not engage in conduct protected by the Minnesota Whistleblower statute "because he was fulfilling the responsibilities of his position of employment when he reported a suspected violation of law." The Court of Appeals did not find that Kidwell was *per se* barred from bringing a whistleblower claim simply because he is an attorney, as courts in some other jurisdictions have held. But, as noted, the intermediate appellate court concluded that Kidwell's Difficult Duty memo concerned matters within the scope of his job duties and, therefore, was not a protected report under the Whistleblower statute.

Kidwell appealed to the Minnesota Supreme Court. Sybaritic conditionally cross-appealed, seeking review of three inter-related issues. The Minnesota Supreme Court accepted review of all four issue but, as explained below, reached only one.

The Decision of the Minnesota Supreme Court

The issues presented by the *Kidwell* case divided the Court. Three judges voted to affirm the Court of Appeals decision, though on different grounds, one judge concurred in the plurality's decision, but based his concurrence on an entirely separate analysis, and three judges dissented, concluding that the jury's verdict should have been sustained. From a practical perspective, the four judges who decided to affirm the Court of Appeals' result ended Kidwell's litigation against his former employer and zeroed him out all damages. But, given the alignment of the judges and the different rationales offered by the majority for the affirmance, the decision may not have clarified whistleblower jurisprudence in Minnesota.

The three judges who concurred in their decision to affirm the Court of Appeals decision focused on the language of the Minnesota Whistleblower statute and the specific facts of the case. The first question considered by the Minnesota Supreme Court was the scope of the protected conduct under the Whistleblower statute. The Minnesota Court of Appeals had concluded that a report made in fulfillment of an employee's job duties does not constitute statutorily-protected conduct. Minnesota's high court, however, did not find support for this interpretation in the statute itself. "The whistleblower statute does not contain any limiting language that supports the blanket job duties exception the court of appeals crafted. We therefore reject as too broad the court of appeals' conclusion that, as a matter of law, 'an employee does not engage in protected conduct under the whistleblower act if the employee makes a report in fulfillment of the duties of his or her job.'"

Having rejected the intermediate appellate court's statutory interpretation, however, the Minnesota Supreme Court emphasized, "we do not go so far as to hold that an employee's job duties are irrelevant in determining whether an employee has engaged in protected conduct. We have explained that the whistleblower statute 'protects the conduct of a neutral party who "blows the whistle" for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower.'" Here, relying on its earlier whistleblowing cases, Minnesota's high court stressed that the statutory requirement of "good faith" meant that the report must be "made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim." The court noted that when examining the purpose for which the whistleblowing report was made, it is important to examine the employee's job duties.

Thus, "an employee cannot be said to have 'blown the whistle' when the employee's report is made because it is the employee's job to investigate and report wrongdoing. When an employee responsible for investigating and reporting illegal behavior makes a report of such behavior, that employee will need something more than the report itself to support the conclusion that the employee is making the report as a 'neutral party' who is intending to 'blow the whistle.'"

Relying on an arguably analogous federal court decision, interpreting the federal Whistleblower Protection Act, the court then provided two examples of how an employee might be able to demonstrate that the report was

made for legitimate whistleblowing purposes even when the employee's job responsibilities encompass the investigation and reporting of wrongdoing. First, the employee could demonstrate that it was necessary to go outside the chain of command because the normal chain of command was unresponsive. "[I]n such a situation under our whistleblower statute, because the report was made outside the employee's chain of command, a reasonable fact-finder could, depending on the evidence, infer that the employee's purpose was to expose an illegality." Second, if an employee – even one charged with investigating and reporting wrongdoing – made a report that was outside of his/her assigned job duties, the conduct could be protected. "[U]nder our whistleblower statute, a reasonable fact-finder could, depending on the evidence, infer that an employee who makes a report based on an employment-related obligation, but not as part of an assigned job duty, was doing so in order to expose an illegality."

With that analytical framework, the Minnesota Supreme Court then examined the specific facts of the *Kidwell* case. Even construing the evidence in the light most favorable to Kidwell, as it was obligated to do in light of the jury verdict, the court rejected the jury's findings and affirmed the Court of Appeals' reversal of the jury verdict. Simply put, the court concluded that Kidwell's emails and his trial testimony regarding those emails confirmed that his purpose in communicating about the alleged wrongdoing within Sybaritic was not to "expose an illegality" but was to provide legal advice to his client (the company). "Kidwell did not offer any other evidence from which the jury could conclude that his purpose in sending the email was anything other than the performance of his assigned responsibilities as in-house counsel."

In his role as General Counsel, Kidwell was responsible for all of the legal affairs of the company. He was responsible for investigating and reporting on illegal activities within Sybaritic. He wrote his Difficult Duty memo to, as he characterized it, "pull this company back into compliance . . .." The individuals to whom he provided his Difficult Duty memo were the executives of the company with whom he had interacted and to whom he reported on various legal issues confronted by Sybaritic. And, while he threatened to go outside the normal reporting channels and report the problems to those involved in law enforcement, he never did so. Indeed, the only person to whom Kidwell reported outside the company was his father, and he did so solely to obtain guidance regarding the "ethical dilemma" he confronted. Based on these facts, the plurality of the Minnesota Supreme Court found that there was no evidence to support the jury's conclusion that Kidwell had engaged in conduct protected by the Minnesota Whistleblower statute.

As referenced above, however, only three of the seven judges on the court agreed on the analysis described above. The deciding vote was cast by Chief Judge Magnuson, who recently resigned from the court. Chief Judge Magnuson grounded his concurrence in the result on an entirely different reason – the fact that Kidwell had breached his fiduciary duty to Sybaritic by providing a copy of the Difficult Duty email to his father. Chief Judge Magnuson concluded that Kidwell's breach of fiduciary duty barred his claim. While the Chief Judge acknowledged that the statute did not bar whistleblower claims by attorneys, he emphasized, "A lawyer may bring a whistleblower claim, but he or she is not thereby relieved of the fiduciary obligations imposed by the Rules of Professional Conduct, either before or after the claim is brought. Any disclosures of client confidences must be within the strict confines of the Rules of Professional Conduct. I would therefore hold that when a lawyer breaches his or her fiduciary duty to the client, the client has an absolute right to terminate the attorney-client relationship. And that right cannot be burdened by any claim from the lawyer for compensation or other damages." Because Kidwell had breached his fiduciary duties to Sybaritic, Chief Judge Magnuson concluded that he had "forfeited his right to recovery."

The three dissenting judges rejected both the plurality opinion and the concurring opinion.

Practical Guidance

So, where does the Kidwell decision leave Minnesota practitioners and their clients? What lessons can be drawn from the decision?

First, Minnesota has not joined the states that absolutely bar whistleblowing claims by in-house counsel.

Second, the Minnesota Supreme Court rejected the analysis of the Court of Appeals, which parallels other state court whistleblowing decisions, that there is a blanket 'job-duties' exception to Minnesota's Whistleblower statute. (The dissenting judges also rejected that part of the lower court's decision.) The court did not find support for that analysis in the statutory language.

Third, although the Court rejected an all-encompassing job-duties exception, there likely will be a high burden for an employee responsible for investigating and reporting wrongdoing to bring a whistleblower claim. At a minimum, this employee will likely have to establish that the whistleblowing report was somehow outside the scope of his/her normal job duties or that it would have been futile to make the report internally given the individuals involved in the wrongful conduct. (Other potential fact patterns that would diminish the relevance of the employees' job duties were addressed by the dissent.)

Fourth, the federal Whistleblower Protection Act may, or may not, provide useful precedent for interpreting the Minnesota statute. Three judges found it to be a relevant parallel statute and found the opinions interpreting that statute informative; three judges found that the differences in the statutory schemes should have led the court to conclude that the federal statute was irrelevant to interpreting Minnesota's Whistleblower statute.

Fifth, one judge found the breach of fiduciary duty to be an absolute bar to the plaintiff attorney's claims. Three judges rejected that analysis and three were silent on that issue. In any event, that factual component of the *Kidwell* decision should inform other potential plaintiffs and defendants. For example, if Kidwell had communicated his concerns to his own counsel, rather than his father, and had not done so via the company's email system, this issue presumably would not have arisen.

Sixth, as the Supreme Court decision in *Kidwell* illustrated, and as the plurality emphasized, these cases are going to turn largely on their individual facts.

Seventh, while the opinion provides some guidance on the Whistleblower statute, the opinion is not definitive. While it rejected the Court of Appeals' job-duties exception analysis, the judges were evenly divided on other critical parts of the statutory interpretation. Moreover, because Kidwell did not bring a claim under Minnesota's common law whistleblower theory, the decision does not address that alternative cause of action.

Finally, the Minnesota Supreme Court did not focus its analysis on the ethical issues emanating from the fact pattern of the case or the Minnesota Rules of Professional Responsibility. But, these issues are front and center in any case in which an attorney elects to initiate a whistleblower claim whether based on statute or common law.

Comments/Questions |

Defining "Family", Quirky Question # 150

July 8, 2010 | *Posted by* Ginsburg, Roy | Topics: Family and Medical Leave Act (FMLA), California Questions, Leave Issues

[Readers: The July 4 holiday and key decisions from the U.S. Supreme Court that have diverted our attention from the posted Quirky Questions have altered our schedule slightly. I soon will report on an important decision from the Minnesota Supreme Court addressing lawsuits by in-house counsel claiming to be "whistleblowers." After I address that decision, I will return to our more standard Quirky Question format.

In the interim, set forth below is one of our West Coast Quirky Questions, though its applicability is far broader than the West Coast. Tune in next week for the analysis. Best, Roy]

An employee has asked if they can take a leave of absence to care for a sick child who is not their own. Do

I have to provide leave to an employee for the care of a sick child, even if they are not the legal parent? What if the child has two parents already?

Roy's View and Reader Responses | Comments/Questions |

Granite Rock Co. vs. International Brotherhood of Teamsters, Arbitration Issues Arising from a Disputed Collective Bargaining Agreement

July 2, 2010 | *Posted by* Ginsburg, Roy | Topics: Recent Decisions, Union Organizing, Arbitration, Unions, United States Supreme Court

[Readers: Set forth below is an analysis of the latest Supreme Court decision on an employment case. It was written by my colleagues Doug Christensen and Courtney DaCosta. Please contact either Doug or Courtney if you have any questions about this decision. They can be reached at christensen.doug@dorsey.com christensen.doug@dorsey.com or dacosta.courtney@dorsey.com dacosta.courtney@dorsey.com, or by phone at 612.340.8875 and 612.492.6017, respectively. Additional information regarding Doug and Courtney is available at http://www.dorsey.com/christensen_doug/ and http://www.dorsey.com/dacosta_courtney/.

We hope you find this analysis helpful. Enjoy the July 4 Holiday. Best, Roy]

Roy's View and Reader Responses | Comments/Questions |

Rent-A-Center West, Inc. v. Jackson, A Divided Supreme Court Weighs In On Employment-Based Arbitration Agreements

June 28, 2010 | *Posted by* Ginsburg, Roy | Topics: Recent Decisions, Arbitration, United States Supreme Court

[Readers: As I mentioned last week, the U.S. Supreme Court has been busy, particularly with regard to the resolution of the employment cases on its docket. Once again, we're postponing slightly the discussion of the pending Quirky Question to share with you an analysis of another critical Supreme Court decision.

The analysis below was written by my partner, Mike Iwan. If you have any questions about the Supreme Court decision or Mike's analysis, do not hesitate to contact him at either iwan.mike@dorsey.com or 612.340.5613. Additional information regarding Mike is available at **http://www.dorsey.com/iwan_michael/**.

We hope you find this analysis helpful. Regards, Roy]

Roy's View and Reader Responses | Comments/Questions |

New Process Steel LP v. NLRB, Supreme Court Rules On NLRB Composition

June 23, 2010 | *Posted by* Ginsburg, Roy | Topics: National Labor Relations Act, United States Supreme Court

[Readers: The Supreme Court has been busy of late, particularly with regard to employment decisions. Set forth below is an analysis of another recent decision by my colleagues Doug Christensen and Chris Amundsen. If you would like additional information about this decision, please do not hesitate to contact Doug and Chris at christensen.doug@dorsey.com christensen.doug@dorsey.com and amundsen.chris@dorsey.com amundsen.chris@dorsey.com, respectively. Regards, Roy]

Roy's View and Reader Responses | Comments/Questions |

City of Ontario v. Quon, The Supreme Court Weighs In on Employee Privacy Expectations

June 22, 2010 | *Posted by* Ginsburg, Roy | Topics: Privacy Rights, United States Supreme Court

[Readers: Late last week, the Supreme Court rendered an interesting decision, addressing employees' privacy expectations when utilizing company-issued electronic communications devices. An analysis of the decision is set forth below, under the "Roy's View and Reader Responses" tab. Next Monday, I will address Quirky Question # 149. Regards, Roy]

Roy's View and Reader Responses | Comments/Questions |