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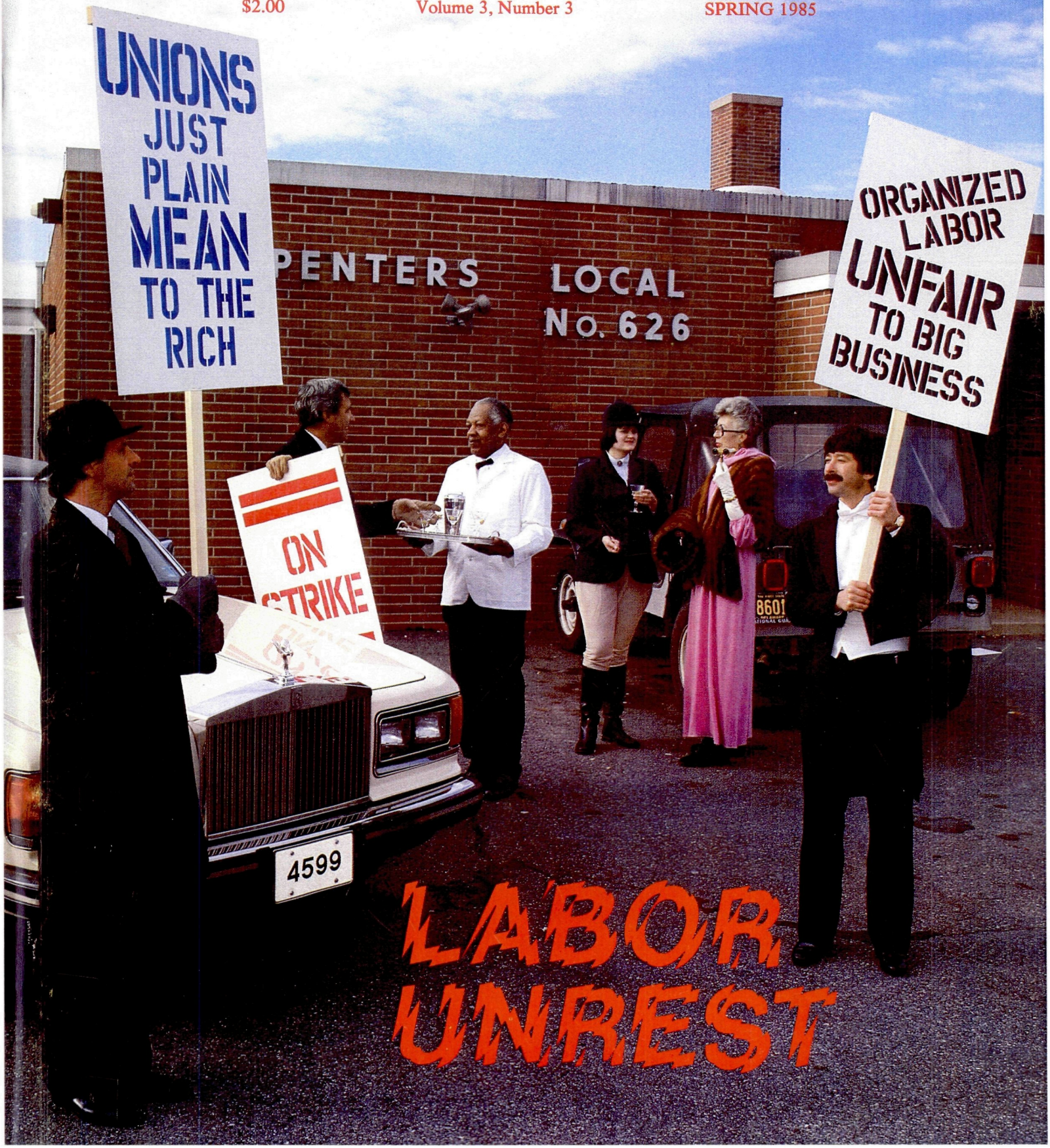

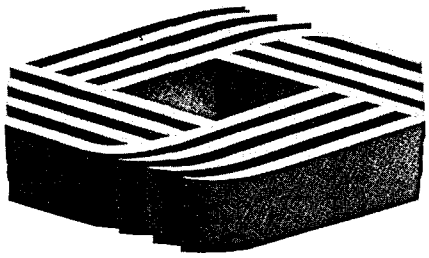

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DELAWARE LAWYER
A PUBLICATION OF THE DELAWARE BAR FOUNDATION

VOL. 3 NO. 3
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Contents

This number of DELAWARE LAWYER is largely given over to labor issues. How better to dramatize the ferment of change in this branch of the law than to display the topsy-turvy confrontation that graces our cover? The overprivileged proletarians on the picket line suggest that the worm has turned. Our worms (from left to right): Mr. David A. Anderson, Mr. Franklin S. Eyster, II, Mr. Clarence Driver, Miss Carolyn Mack (the designation "Ms." is unknown to good society), Mrs. Josephine Winternitz, and Mr. Lawrence I. Zutz. Credits: photography - Mr. Eric Crossan; casting - Mr. Richard Kiger; motor car - Mr. Harry David Zutz; booze paraphernalia - Mrs. William E. Wiggin; and setting - Carpenters Union Local 626. Special thanks to that good-natured and generous labor organization and to its business representative, Mr. Robert A. McCullough, for making possible this satirical tableau. Special thanks also to our good friend, Jake Kreshtool, for procuring the introduction.

DELAWARE LAWYER is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises and other literary works on legal subjects of general interest to Delaware judges, lawyers and the community at large. As it is one of the objectives of DELAWARE LAWYER to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or DELAWARE LAWYER. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

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This is the last issue you will see of DELAWARE LAWYER as a three times a year publication. Commencing with Volume 4, No. 1 in June we become a quarterly. Gauge Corporation, which handles the manufacture of the product you hold in your hands, has beefed up staff to the point where we can visit with you more frequently, and we hope to deliver an even more alluring product. Quarterly publication opens the doors to national advertising, listing with the Standard Rate and Data Service, and the prospect of more varied contents.

Our principal guru, Bar Foundation Chairman Victor Battaglia has observed that the magazine in recent issues may have strayed a little from the opening promise of appeal beyond the legal community. Managing Editor, Richard Levine has leveled the same charge. In this issue we restore a balance of editorial catholicity. See contributions by Walsh, Russell, and Prickett. While we have no plans for lubricious centerfolds, gossip columns or steamy classified advertisements ("Fun loving title searcher seeks broad-minded paralegal with collection of whips") we really intend regularly to remind ourselves that lawyers are only one part of a larger community and that we shall be richer in spirit and wiser in practice if we continually exchange ideas with those we serve.

Disappointments

In this our Labor issue, quite brilliantly designed and assembled by Sheldon Sandler of Young, Conaway, Stargatt & Taylor, we practice creative outrage. The cover is but an example. Our object of course is to make people think and if necessary to make them angry enough to speak out. To date this magazine has generated very few letters to the Editor, a grim sign of editorial anemia. Please write when you disagree with us. We will print your comments fair and square, and not expurgated without your permission. And since we have the unfair advantage of the last word, we will let you see in advance any fire we return.

Department of Failed Manners

Our most recent issue (Fall, 1984) was generated in unseemly haste. Lawyers and Government in Politics simply *had* to be out before election. Editors Randy Holland and Bill Chandler did a monumental job of cajoling busy politicos into writing articles, editing their output, and getting us to the printer on time. One suspects in an issue that arrived on our desk shortly before Halloween the presence of lively ghosts. Some of the writers suddenly displayed an eloquence thriftily withheld from their earlier public statements. Our thanks to Randy and Bill, whose essential contribution we neglected to salute in these pages. Ascribe our bad manners to haste and not to inherent viciousness.

WEW

This Issue

In Delaware and throughout the country, vast changes in the nature and practice of labor law have occurred in recent years. What a competent labor lawyer needs to know and have at his fingertips has greatly expanded. The explosive growth of discrimination law in the last decade seems to be subsiding a bit, only to be replaced by elemental changes in the private sector employment at will relationship that have spawned a whole new growth area for labor litigators.

Meanwhile, in the unionized segment of the work force, the unions are on the defensive (as illustrated by our cover, for which, incidentally, I totally disclaim responsibility) and struggling to gain a foothold in areas of the country traditionally antipathetic to the union movement, and in new, mostly white collar industries.

Locally, until recent years, there was no Delaware labor bar. In truth, it is still small in numbers, but with the establishment of the Delaware State Bar Association Labor and Employment Law Section, those few of us in the private bar who have developed a labor practice have joined together with in-house counsel and government attorneys to form a very active section.

This issue of DELAWARE LAWYER presents some of the topics in which Delaware labor lawyers are currently interested, and speaks volumes concerning the high level of competence achieved by local practitioners.

Sheldon N. Sandler

LETTER TO THE EDITORS

Professor Kenneth Haas's article on capital punishment in the summer '84 issue has prompted this thoughtful comment:

Gentlemen:

I commend Mr. Haas's scholarship in his argument against capital punishment. Would opponents of the death penalty change their position if it could be conclusively established that executing murderers will deter others from committing murder? Would proponents of the death penalty change their position if it could be conclusively established that executing murderers will have no deterrent effect? I suspect that the majority of those with the capacity for honest introspection would answer in the negative. If that suspicion is correct, then the citation of statistical studies does not address the fundamental issue. The relevant question is simply whether one believes that a person who takes a life should forfeit his own. Mr. Haas may be one who can honestly answer that question for himself by looking to statistics. If so, he is in the minority. For most of us the answer will be found only by looking inward.

Very truly yours,
John J. Schreppler, II

Robert K. Payson

Delaware Bar Foundation is committed to fostering communication not only among members of the legal profession, but also between the legal profession and the community at large. DELAWARE LAWYER, which is sponsored by the Foundation, helps to fulfill that commitment. Many of the articles that have appeared in DELAWARE LAWYER, are informative and interesting to the lawyer and layman alike.

At a recent meeting of the Foundation, Justice Moore reported, with some dismay, a series of questions which he had been asked by non-lawyers. For example:

> How large are juries in the Supreme Court? Why does the Supreme Court sit in Dover, and witnesses have to travel all the way down there to testify? Why do judges on the Supreme Court sentence criminals to such short terms in jail? What does the Court of Chancery do? Isn't the Court of Chancery open only to big business corporations? Is the Chancellor really a judge? Isn't the President Judge of the Superior Court (or the Chancellor) in charge of all Delaware courts? Why hasn't the Chief Justice of the Delaware Supreme Court fired one or more federal judges, or at least overruled their decisions?

To lawyers such questions make no sense and, at first blush, are even humorous. However, it should concern all of us that many intelligent and educated people in our community do not have the vaguest idea about the basic jurisdiction of our courts. The judicial system is an integral part of our democratic form of government and the public should be aware of the fundamentals of that system.

I do not suggest that even if the general public were to master the fundamentals of the jurisdiction of Delaware courts, we would have accomplished our goal. Nonetheless, Delaware Bar Foundation, together with the Delaware Bar Association, should perhaps prepare a brochure or pamphlet that would outline in general and simple terms (please, *no* "legalese") the jurisdiction of our courts and their composition. I suspect that high school teachers of government and civics would welcome such an aid. In fact, a pilot program conducted by the Foundation for criminal law education at the Caesar Rodney High School in Dover has been a resounding success. Copies of the jurisdictional brochure or pamphlet could also be distributed to other educational institutions and to community and civic organizations.

I also believe that most Delaware newspapers would find a simple explanation of our courts and their composition to be both newsworthy and a matter of public interest. In this regard, I note with appreciation a number of recent articles in the *The Morning News* and the *Evening Journal* about our Court of Chancery. Those articles reported objectively on the importance, both nationally and locally, of the Court of Chancery, and on the problems facing the Court. I have little doubt that those articles played an important role in convincing the legislature to help solve those problems. Perhaps the creation of a liaison between the news media and the Foundation would be useful in establishing a line of communication that would help educate the public about our judicial system. A monthly article featuring current information about the system might go a long way in alleviating the lack of understanding shown by the questions posed to Justice Moore. For example, an article about our IOLTA plan and the funds it has provided for legal services to the poor through the Community Legal Aid Society and Delaware Volunteer Legal Services, Inc., the *pro bono* branch of the Delaware Bar Association, would be enlightening (if not surprising) to the public at large. An article on *pro bono* legal work performed by many members of the bar under the auspices of Delaware Voluntary Legal Services, Inc., with comments from the clients served, would also be of interest to the public.

The public should also be told why lawyers are justifiably proud of their profession. In addition to the fact that the vast majority of clients are well served by their lawyers, my perception is that lawyers do more governmental, civic, and charitable service than any other profession, but we get very little credit for such service. What we do get are statements such as Ralph Moyed's recent comment that lawyers' appearances on behalf of clients in Justices of the Peace Courts are an "infestation." We should set the record straight. Every person is entitled to the option of representation in all courts, Moyed's views notwithstanding. When lawyers are publicly criticized for defending an unpopular cause or client, there should be some mechanism to explain to the public our professional responsibility and the absolute right of every individual to a competent defense. Why do lawyers wink at snide comments directed to lawyers in general? If we are as justifiably proud of our profession as we should be, we must defend ourselves by explaining to the public what we do and why. I do not suggest that the legal system and the legal profession are perfect. But there is a big difference between constructive criticism and unwarranted cynicism. The Bar Foundation will continue to communicate with the public in an effort to educate everyone about the importance of the legal system and the lawyers' role in that system. □

Employee Status In Delaware

THEN, NOW, AND TOMORROW

Sheldon N. Sandler

We live in the midst of profound change in the relationship between the employer and the employed. Twenty years ago, "labor" lawyers (the redundant appendage "and employment" has only recently been added) devoted themselves almost exclusively to problems arising between employers and unions. Employers without unions had little need for such counsel. Today, labor and employment lawyers spend seventy to eighty percent of their time dealing with matters affecting the *non-union* employee and his employer.

Let us first consider the history of employment status in the United States and Delaware, then examine the changes that have taken place in both the public and private sectors, and finally, make a prophetic stab at what is likely to happen to the employer-employee relationship. I am convinced that there is a coming synthesis of employment status, in which both public and private sector employers will concede the entitlement of those who work for them to the protection of increased, legally recognized job security.

The Doctrine of Employment at Will

While some people apparently believe that the doctrine of employment at will goes back to Thomas Hobbes's state of nature and is the "natural law" of employment relations, it has in fact been widely accepted for little more than 100 years. Just as surprising, it is a peculiarly American notion, its development a departure from the English common law. In Great Britain, one hundred years ago the status of a worker who had no other expressed understanding with his employer was called a "general hire". The law viewed his engagement as one for a full year, so that in a primarily agrarian society both parties might have the benefit of four seasons.

The radical redefinition of the relationship in the United States is attributable almost entirely to one Horace Wood, a professor who announced in 1877:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and, if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. *Wood, Master and Servant* §134 (1877).

For this thesis, Professor Wood relied on cases from four jurisdictions, none of which supported his contention. Wood's analytical skills may be open to question, but his sense of history was impeccable. The times were right for a body of imaginary common law that allowed employers the broadest possible discretion to expand and contract and otherwise regulate their work forces. Wood's rule, as it came to be known, became in short order the law of the land. By the time a Delaware court addressed the issue in 1899, employment at will had attained the status of black letter law. *Greer v. Arlington Mills Manufacturing Company,* Del. Super., 43 A. 609 (1899). Delaware courts hardly ever had occasion in the next 80 years to revisit the issue. In the few instances when they did it was only to pay obeisance to the doctrine, never to question it. But in other forums, legal and legislative, the doctrine began to suffer a gradual erosion.

Statutory Changes

The undiluted doctrine of employment at will prevailed in the public and private sectors for decades, but beginning in the 1930s limitations started to appear. The first restriction on the power to "fire at will" was laid down by federal statutes dealing with the right to engage in union activity. The Railway Labor Act, the short-lived National Recovery Act, and the profoundly important National Labor Relations Act forbade private sector employers from discharging those who engaged in union activity.

The 1960s brought wider proscriptions. In 1964, Title VII of the Civil Rights Act of 1964 made it a statutory violation to discharge an employee because of race, color, sex, religion or national origin. In 1967, the Age Discrimination in Employment Act extended that protection to those between 40 and 70.*

Similar statutes were passed in Delaware, and for the first time employers faced well-defined categories of discrimination restricting their ability to fire employees. Nevertheless, so long as they avoided discharge for those defined reasons, "employment at will" remained the law.

The Public Sector and the Unionized Sector

The current changes in the status of private, non-union employees repeat a cycle that has occurred twice before. After the passage of the National Labor Relations Act in 1935, a segment of the work force was organized and collective bargaining agreements were negotiated. A central component of the typical agreement was a provision stating that "no employee shall be discharged except for just cause". Coupled with this language was a grievance procedure ending in arbitration by an outside expert, binding on all parties. Thus, in the unionized sector, employment at will has not existed for years.

Although it is less widely recognized and understood, the same thing has occurred in public employment, primarily as the result of decisions by the United States Supreme Court and the lower federal courts, coupled with the passage of merit system laws that have provided a "cause" standard for discharge of covered employees. The advent of widespread public sector unionization has also brought public employees some of the collective bargaining benefits earlier negotiated by union-represented employees in the private sector.

From the late 1960s through the mid 1970s the United States Supreme Court handed down a series of constitutional law decisions, establishing a cluster of related rights for public sector employees that, in effect, did away with the doctrine of employment at will in government employment. All public employees were found to possess a constitutional right to free speech and could not be discharged for exercising that right. *See, e.g., Aumiller v. University of Delaware,* 434 F. Supp. 1273 (D.Del. 1977). Other independent constitutional rights followed, including a right of privacy. *See, e.g., Lewis v. Delaware State College,* 435 F. Supp. 239 (D.Del. 1978). In the 1972 case of *Board of Regents v. Roth,* 408 U.S. 564, the Supreme Court created a more sweeping protection, derived from the Fourteenth Amendment guarantee against deprivation by the State of life, liberty or property without due process of law. The Court took its cue from the writings of another professor, Charles Reich, who had espoused an expanded view of "the new property" that added to traditional notions of property intangible entitlements such as one's job. *The New Property,* 73 Yale L.J. 733 (1964). The Court held that an employee with a legitimate expectation of continued employments, the contours of which were defined by the actions and representations of the governmental employer, had a "property interest" in his job. That interest could not be removed without constitutional protections, including fair procedures and a substantive guarantee of non-arbitrariness. The Court also held that sometimes the deprivation of a public employee's job posed a threat to "liberty" under the Fourteenth Amendment as well. While loss of a job was not the same as actual confinement, under certain circumstances the loss could impose a stigma that would damage the employee's reputation and hamper him in getting another job. It would, the court held, thereby burden a "liberty interest". Although in recent cases the court has retreated from some of these holdings, with few exceptions public sector employment is no longer terminable at the will of the employer. Delaware federal courts were quick to recognize these rights and have protected public employees in thoughtful decisions widely cited elsewhere as models of clarity and balance.

Common Law Changes

Until very recently, the private sector, non-union employee who had not been the victim of discrimination as defined by statute, remained an employee at will. A few state law cases had established narrow exceptions to the doctrine. However, in the last few years, perhaps in instinctive recognition that the need for Professor Wood's rule no longer exists in our industrialized society, the courts have issued a torrent of limiting decisions. They cluster around four exceptions to "employment at will". →

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* *I am truncating some developments. Title VII did not apply to public sector employees until 1972, and the ADEA originally afforded protection only until age 65. It was later extended to 70. Federal employees are subject to no upper age limit.*

In 1959, a Teamsters Local 396 employee named Petermann was subpoenaed to give a deposition. His superior at the union told him to lie. He refused, and was fired. Although Petermann was employed at will, and the employer argued that it could terminate his services any time and for any reason, the California Court of Appeals, in *Petermann v. Teamsters Local 396,* 344 P.2d 25 (1959), refused to lend official sanction to an action of an employer repugnant to the mores of society. Discharging an employee because he refused to commit perjury became a common law exception to employment at will. While the case remained a solitary exception for many years, other courts have recently established additional public policy exceptions. Though not always easily labeled, these tend to fall into three sub-categories, (1) that of the employee discharged for performing a public obligation such as serving on a jury, responding to a subpoena or blowing the whistle on illegal activity, (2) that of the employee terminated for exercising a legal right or privilege, such as filing a worker's compensation claim, reporting an OSHA violation or refusing to take a polygraph test in reliance on a state protective statute, and (3) that of the employee fired after refusing to commit a crime or violate an industry practice or a professional code of ethics.

The second common law exception that has arisen stems from a case decided by the New Hampshire Supreme Court in 1974, *Monge v. Beebe Rubber Company,* 316 A.2d 549. There, an employee who had repeatedly refused to date her supervisor was discharged. Instead of resorting to "public policy", the Court developed a startling theory; in every contractual relationship, including employment, there is an implied covenant of good faith and fair dealing. By discharging her for failure to accede to the supervisor's sexual advances, Mrs. Monge's employer had breached that covenant. Although the New Hampshire court later abandoned this theory in favor of a narrower public policy approach, its neighbor, Massachusetts, and several western states, notably California, have embraced it. Obviously, in those states employment at will is a dead letter, since each action of an employer must be minimally well-intentioned and fair. A judge or jury will decide if the employer measured up, a prospect not welcomed by even the most enlightened company. The principle is very much like the substantive due process ban on arbitrary action affecting a public sector employee's rights.

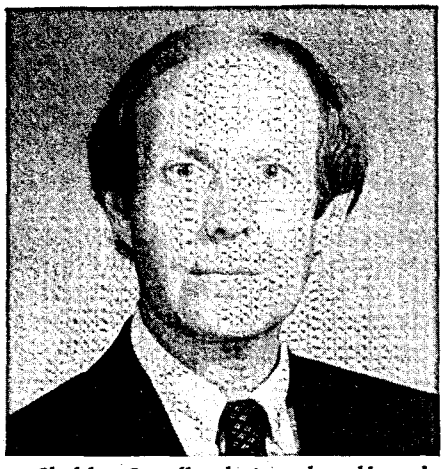
The third exception to employment at will that has evolved in the private sector also bears a striking resemblance to a part of the public sector employee's bundle of rights, those known as a "property interest". An increasing number of courts now hold that statements and actions of private employers can constitute express or implied-in-fact contracts with their employees. In searching for a basis to establish a contract of this kind, plaintiff's attorneys review the entire employment history of an employee, engaging in much of the same kind of search as the public sector plaintiff's attorney does in trying to establish the objective expectancy of continued employment necessary for a "property interest". Useful evidence could arise from statements the employee at a job interview, an orientation meeting, or any time thereafter. A contract could be based upon a personnel manual, a benefit book, a series of good evaluations, regular raises or indeed,

from long service alone. To date, courts applying Delaware law have refused to recognize that a personnel manual can be a binding contract, viewing it rather as a unilateral statement of employer policies, subject to change at any time. *Heideck v. Kent General Hospital,* Del. Supr., 446 A.2d 1095 (1982); *Avallone v. Wilmington Medical Center,* 553 F. Supp. 931 (D. Del. 1982). Delaware courts have, however, recognized that the employment at will relationship can be altered by contract. In *Haney v. Laub,* Del. Super., 312 A.2d 330 (1973), the Court held that, although the employee in question was employed at will, the fact that he had been given a stock option agreement that permitted him to exercise the option unless he was terminated for cause had altered the employment relationship. This extra consideration demonstrated the parties' modified understanding that the employee could be terminated only for cause.

Perhaps the most startling Delaware development to date is the unreported decision in *L. H. Doanes Associates v. Seymour,* C. A. No. 83A-M A1 (June 19, 1984), a case involving not termination but an employee's claim of entitlement, when he *quit* his job, to a cash payment for accumulated compensatory and vacation time. A written employer policy in existence at the time the employee was hired stated that the employer would not pay overtime to exempt employees, i.e., those not covered by the federal wage and hour law. The record was silent as to how accumulated vacation time would be treated. Inexplicably, the employer's bookkeeper had kept track of exempt employees' overtime and vacation. In some instances where an exempt employee left under good terms, he received a severance payment that arguably included accumulated overtime and unused vacation pay. The Superior Court held that the employer "whether unwittingly or knowingly" had changed its policy. "The employment contract was modified by an implied agreement consisting of the conduct of the parties involving the very issue of overtime, vacation time, and separation pay." That case is currently pending decision before the Delaware Supreme Court. Whatever its fate, it evinces the strong current appeal of exceptions to employment at will, given an attractive fact situation.

The fourth and final exception to employment at will is not so much a true exception as a species of tort law extended to cases of employee discharge. Torts such as international infliction of job-connected emotional distress are now recognized in some states where the facts surrounding a discharge were egregious. Typical is the case of the unfortunate Howard Johnson's restaurant manager who, to combat a series of thefts, announced that until one of his waitresses came forward and confessed, he would follow a policy of firing a waitress a day, in alphabetical order. Waitress Agis successfully sued for intentional infliction of emotional distress. *Agis v. Howard Johnson Co.,* 355 N.E. 2d 315 (Mass. 1976). However, a Delaware court has held that this cause of action is preempted by the worker's compensation law. *Battista v. Chrysler Corporation,* Del. Super., 454 A.2d 286 (1982). Perhaps the most interesting new employment-related cause of action is the tort of "wrongful evaluation". Several Michigan cases have held that where, as the result of an intentionally trumped up or negligent evaluation, an employee is discharged or otherwise penalized, he can sue for damages. Since Delaware is now, like Michigan, a comparative negligence state, it might be possible for a discharged employee to recover partial damages, as did a Michigan plaintiff, even where the employer is able to show some justification for the discharge, if discharge arose in part from a negligent evaluation.

To date, Delaware courts have not joined in the move to impose wholesale limitations on employment at will, although two federal courts in other jurisdictions, applying Delaware law, have opined that, given the right facts, Delaware courts would recognize sweeping limitations. *See Maloney v. E.I. du Pont de Nemours & Company, Inc.,* 352 F. 2d 936 (D.C. Cir. 1965); *Hansrote v. Amer Industrial Technologies,* ____ F. Supp. ____ (W.D. Pa. 1984). My crystal ball tells me that the future is not bright for employment at will in Delaware. As a relatively new judge-made doctrine, the need for which has long since passed, it is ripe for change. The United States is the only industrialized country that has kept it in any form. Japan espouses "shusin koyo" or permanent employment. Western European countries and Canada require just cause for termination. Moreover, the United States Supreme Court, in two recent cases, has taken a benign view of the evolving →



Sheldon Sandler designed and largely assembled the contributions to this issue, for which our hearty thanks. He is a member of Young, Conaway, Stargatt & Taylor, a firm that has contributed mightily to this magazine. Shelly, one of our ablest trial attorneys, does not confine his talents to labor controversies. He successfully represented the plaintiff in Aumiller v. University of Delaware, 434 F. Supp. 1273 (D. Del. 1977), a noted precedent in civil liberties law. In so doing he earned the special commendation of the presiding judge, The Honorable Murray Schwartz. We of DELAWARE LAWYER are flattered to have his work in our pages.

common law. In *Belknap Inc. v. Hale*, 103 S. Ct. 3171 (1983), a company that had reneged on a promise of permanent employment to strike replacements was held subject to suit in state court for breach of contract and misrepresentation. The Court didn't even mention the doctrine of employment at will as a possible impediment. And in *Hishon v. King & Spaulding*, 81 L. Ed. 2d 59 (1984)*, a representation by a law firm to student applicants for jobs as associates that they would receive fair consideration for partnership years later was held to have created an enforceable contract. This reasoning is similar to the express or implied-in-fact contract exception to employment at will.

A Delaware court recently recognized consideration for an employee's covenant not to compete in an employer's agreement to continue his "at will" employment, *Research and Trading Corporation v. Powell*, Del. Ch., 468 A.2d 1301 (1983). The same logic would find contractual consideration in an employee's willingness to remain with an employer in return for the protections afforded by a personnel manual, providing at least a modicum of job security. In the related area of pension rights, the Delaware Supreme Court has repeatedly recognized that an offer of a pension is now regarded as part of an employee's contract of employment, presented to an employee to induce him to join and to remain with his employer. *In Re State Employees' Pension Plan*, Del. Supr., 364 A.2d 1228, 1234 (1976). It is likely that, presented with the right cases, Delaware courts will recognize the current exceptions to employment at will. In the long run both public and private sector employees in Delaware and around the country will have some measure of job security.

Employers can adjust to these coming changes in several ways. Currently, many are opting for a "band aid" approach, attempting to maintain the "at will" status of their employees for as long as possible by stripping from their personnel policies any references to job security and preparing disclaimers informing the employees that they are terminable at will. Assuming these changes can be accomplished without calling down on employers what they would, no doubt, view as the twin plagues of permanently impaired employee morale and unionization, such an approach probably makes good legal sense. However, a longer term solution must be considered as well. In order to avoid the expense of litigation and potential open ended tort damages, some employers (for example, Hercules, Inc. locally) are experimenting with unilaterally created internal grievance procedures for non-union workers. These procedures range from a simple opportunity to vent frustration to a supervisor, to a more formal and lengthy process ending in binding arbitration before an outsider. In the long run, a process ending in a binding decision by a person viewed by all parties as impartial, who acts promptly, and who has the power to award reinstatement and back pay, would be relatively painless for the employer and would provide employees with a degree of job security well-suited to industrial society today — and tomorrow. □

* *For a further discussion of this striking decision see p. 44*

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This month's Energy News You Can Use newsletter explains how Delmarva Power's new energy bill lays out all your monthly gas and electric costs in plain English.

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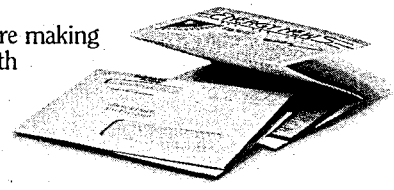
It helps you budget for seasonal costs. Shows you how this month's bill compares to last month's, and even last year's. So you can spot changes in your energy usage, which will help us all make energy choices more wisely. All in an easy-to-read format. And for that you deserve the glory—with the power.

Read all about your new monthly bill format in this month's Energy News You Can Use newsletter. Look for it with your bill or at your nearest Delmarva Power office.

It's one more way we're making life easier for people—with your help—at Delmarva Power.



Delmarva Power

HOME LAW

When a man makes his business away from home,
his dog (at least) usurps the throne.
Like Prospero, who fell inside his book,
or Lear, who gave his kingdom up
in a fit of trust, the man who moves
too far away confuses
obsession with that homely element
that's hard for worldly minds to name
(though any family dog could wag it out).
When Agamemnon rose and went
with thousands on his business trip, he blamed
the rival company. No doubt,
but Clytemnestra had her policy
and executed faithfully.
Keep your business simple — on the place,
for home's the highest court we face.

Hilary Russell

Hillary Russell, a practicing poet, teaches English at Tower Hill School in Wilmington. His verses have appeared in many publications, including The Beloit Poetry Journal, Ploughshares, The Country Journal, The Graham House Review, and Yarrow.

AFFIRMATIVE ACTION:

Equal Opportunity or Equal Result?

Frederick H. Schranck

The phrase "Affirmative Action" frequently provokes an intense emotional response—not only among its beneficiaries or victims, but also among the nation's opinion leaders of every stripe on the political spectrum. This strong reaction reflects a failure to achieve a national consensus. Are affirmative action programs intended to enhance equal opportunity, or should they produce equal results?

The more recent forms of affirmative action stress equal results. Those who advocate these policies assume that equal opportunity only exists through statistically measured proportional racial representation. For them, racial discrimination is so embedded in all facts of American life that something called "institutional racism" exists. As Nathan Glazer has described their views, "[All] cases of differential representation in an institution demonstrate [to them the existence of] 'institutional racism'." Accordingly, in their view affirmative action through "preferential treatment," "goals," and "timetables" is needed to attain proportional representation in all fields of endeavor. The object of these advocates is sometimes referred to as "numerical equality" or "equality of results."

Affirmative action originally reflected a view of equal opportunity that some call "moral equality." Moral equality assumes that everyone has the right to be considered on his own merits as an individual without regard to race. The legislative history of the Civil Rights Act of 1964, of which Title VII (Equal Employment Opportunity) is a part, demonstrates that the sponsors of this historic legislation had moral equality in mind during the debates on Title VII.

But the passage of Title VII did not simply call for passive non-discrimination. The new law also encouraged affirmative action, initially consisting of active recruitment programs, enhanced training and educational opportunities, and proclamations of one's status as an "Equal Opportunity Employer." Nevertheless, former Senator Hubert Humphrey, a prime sponsor of the 1964 Act, stressed that proportional representation by race was not required:

> "[T]here is nothing in [Title VII] that will give any power to the [EEOC] or to any court to require . . . [employers] to meet a racial 'quota' or to achieve a certain racial balance."

Affirmative action as originally understood fostered policies designed to produce equal opportunity, without critical emphasis on the racial results.

A *practical* problem with the "equal opportunity" version of affirmative action soon developed, however. Without the activities called for under the "equal results" approach, enforcement agencies and others found it difficult to monitor employers' good faith attempts to meet the requirements of Title VII and related regulations and executive orders. With no "goal" or "timetable" against which to measure "improvement" or "compliance," how could one tell if employers were doing the right things? Thus, in large part to meet this enforcement concern, the original ideal of equal opportunity eventually gave way to the notion of equal results through "enhanced" affirmative action.

The history of discrimination law with respect to affirmative action is too detailed and complex for this article to treat in more than a summary way. After all, entire books have been written on the matter. More than in other areas of the law, however, the Supreme Court played a highly visible role in developing the law of affirmative action. In closely decided cases, often with multiple opinions, the Court has tended to encourage equal results policies. The irony is that the intense national interest in how the Supreme Court handled affirmative action was usually directed at cases of limited applicability. The debate generated much heat on the fundamentally unusual, and little light on the practical meaning of the term.

For example, the highly publicized *Bakke* case and the more recent *Stotts* case concerning the Memphis Fire Department involved aspects of affirmative action that are not typical. More critical affirmative action cases, such as *Weber* and, especially, *Connecticut v. Teal*, have been given comparatively short shrift. The issues decided in the latter two cases have a greater impact on affirmative action as it is usually practiced. Those who are affected by the attempts to achieve true equal employment opportunity through affirmative action should be aware of *Weber* and *Teal*, and why they deserve more attention than *Stotts* and *Bakke*.

The *Bakke* case involved the medical school of the University of California. Allen Bakke sued the university, claiming that its special admissions program, which explicitly set aside 16 slots for minority applicants, twice prevented him from being admitted because of his race.

The final decision produced mixed results. Five justices held the program unlawful and affirmed the lower court order admitting Bakke to the medical school. On the other hand, with Justice Powell as the swing vote, five justices also agreed that "race may be taken into account as *a* factor in an admission program . . ." (Emphasis supplied)

Essentially, this is as far as the *Bakke* decision would go in the direction of racial preference. After all the initial excitement of the decision and its immediate aftermath, some hard issues crept back into view. First, how is race to be *a* factor without eventually becoming *the* factor? Didn't this fence-straddling decision merely delay the achievement of consensus between the choices of moral equality and numerical equality. Second, such explicit racial preferences as the University of California used in its program were already rare. For many affirmative action administrators, the unacknowledged, less explicit practice of using race as essentially *the* factor in decision-making could continue in the absence of a potential plaintiff's ability to prove it existed. Thus the *Bakke* decision only eliminated a crude attempt at affirmative action.

One year later, in the *Weber* case, the Supreme Court returned to the affirmative action issue. This time, however, the national interest failed to rise to the level reached in *Bakke*, even though *Weber* had a larger practical effect on affirmative action programs.

In 1974, Kaiser Aluminum and Chemical Corporation wanted to appease the Office of Federal Contract Compliance (OFCC), the federal agency responsible for insuring compliance by government

→

contractors subject to affirmative action requirements under Executive Order 11246. Therefore, Kaiser and the United Steel Workers agreed upon a "voluntary" affirmative action plan. This plan reserved for black employees 50 percent of the openings for in-plant craft-training programs until the percentage of black craft workers in a plant equalled the percentage of blacks in the local labor force. Brian Weber, a white Kaiser employee, sued when he was denied admission to the program because of his race, even though he had greater seniority than more junior blacks who were admitted.

Weber argued strenuously that the plan could not prevent his admission, referring to explicit language of Title VII which made it unlawful to discriminate by race in training and apprenticeship programs, and which specifically provided that nothing in title VII "shall be interpreted to *require* any employer... to grant preferential treatment... to any group because of the race... of such... group on account of an imbalance" in that group's availability in a given work force compared to the community. (Emphasis supplied). However, Justice Brennan chided Weber for his misguided reliance on "a literal interpretation" of Title VII and ruled that nothing in Title VII prohibited "voluntary race-conscious affirmative action," such as the Kaiser-USWA plan.

Although the court majority was willing to ignore legislative history to reach this result, it was not willing to grant *carte blanche* to all affirmative action programs involving explicit racial preferences. Nor would it state what exactly was "the line of demarcation between permissible and impermissible affirmative action plans." By way of guidance, it noted that the Kaiser-USWA plan (a) did not require firing whites and hiring black replacements; (b) allowed half the training groups to be white (thus indicating that Title VII protects *groups*, not individuals such as Brian Weber); and finally (c) would ostensibly end "as soon as the percentage of black skilled craft workers in the . . . plant approximates the percentage of blacks in the local labor force." Presumably, therefore, any affirmative action plan that kept within these bounds would be upheld.

Practically speaking, therefore, the *Weber* case is far more important than *Bakke*. *Bakke* said race can be *a* factor in affirmative action plans. *Weber* says race can be *the* factor, as long as there

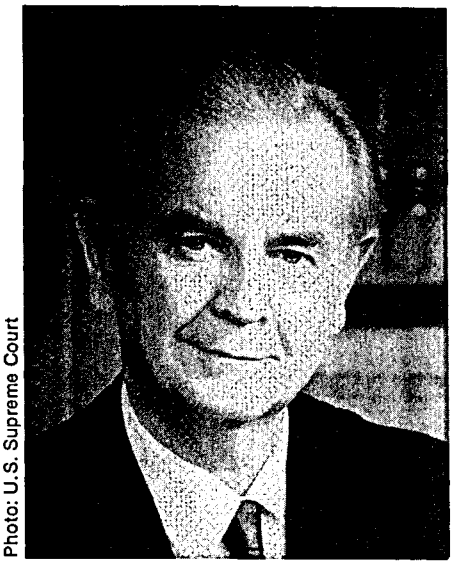


Photo: U.S. Supreme Court

Justice, William J. Brennan, Jr.
"Slippery Pieties?"

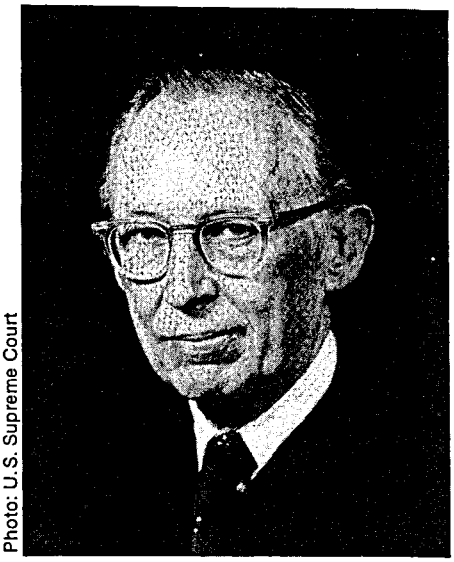


Photo: U.S. Supreme Court

Justice, Lewis F. Powell, Jr.
"Prescient questions"

are some minimal protections for other racial *groups*. Those "protections" are fairly limited. The first, no explicit firing and replacement by race, is not a major protection, since few employers in their right minds would do anything that stupid. The second, guaranteeing some access to all groups, stops short of protecting individuals, whom the court had previously held Title VII protected. The third "protection," tied to labor force statistics, gives the least assurance. How temporary is a goal with such a slippery definition, given the mobility of the work force? Furthermore, once having achieved parity, does anyone truly believe the plan could then be dropped? The pressure to maintain racial balance would be enormous.

Perhaps the relatively muted reaction to the *Weber* decision should not be too surprising, since the Kaiser-USWA plan is not much different from many other plans in force throughout he country. Through such "voluntary" action employers can protect themselves from costly suits and assure their status as "Equal Opportunity Employers."

More recently, the *Stotts* case brought the issues of affirmative action back to national prominence. Again, however, the furor is surprising, given the actual limitations of the case.

Carl Stotts, a black officer in the Memphis Fire Department, filed a class action suit alleging racial discrimination. In 1980 the parties entered into consent decree without a trial and without any admission by Memphis that it had discriminated against blacks. The decree provided for specified hiring and promotion "goals", the former similar to an earlier 1974 consent decree between Memphis and the United States. However, neither decree awarded seniority or provided for the possibility of layoffs.

In 1981 Memphis suffered a fiscal crunch, necessitating layoffs in the fire department. One effect of the layoffs would have been partial reduction in recent gains made in the department's black hiring. Stotts obtained an injunction forcing more senior whites to be laid off, while blacks with less seniority were retained.

Not too surprisingly, the Supreme Court reversed. First, the seniority system was not used to discriminate, and therefore had to be upheld, as the Court had held years earlier in the *Teamsters* case. Second, Memphis hadn't *agreed* to any change in its seniority system when it entered into the consent decrees. Nor had it agreed that there were any "victims" of its prior hiring and promotion systems such as to award them competitive seniority.

Naturally, both ends of the political spectrum had much to say. The U.S. Civil Rights Commission's reaction was typical. The majority called the ruling "a reaffirmance of the principle that race and gender are not proper bases to reward or penalize any person." The dissenting commissioners said the majority panel "insists on putting blinders on society concerning the present and past effects of discrimination. Civil rights laws were not passed to give civil rights protection to all Americans,* as a majority of this commission seems to believe."

Disregard the obvious historical error of the dissenters and consider instead their frighteningly Orwellian tone. Once again, however, the initial response by both sides remained overblown with respect to the practical effect of the decision. The *Stotts* case says little of anything concerning "voluntary race-conscious affirmative action" systems. All *Stotts* really implies is that if the plans are to pass muster they must have the appearance of free choice. Otherwise, these forms of affirmative action can only be imposed after victim status is decreed by agreement or decision after trial.

A far more important affirmative action case, *Connecticut v. Teal*, received far less media coverage than *Stotts*, *Weber*, or *Bakke*. Perhaps this is because it appeared to deal with only a relatively mundane issue concerning employment tests. In fact, *Teal* probably has a greater practical impact on affirmative action than *Bakke* or *Stotts*, since it made a greater change in how an affirmative action plan must be applied so as to avoid liability. →

* *(!) The Editors.*

Winnie Teal, Rose Walker, Edith Latney, and Gracie Clack were successful provisional supervisors in Connecticut's Department of Income Maintenance. Eventually they sought permanent promotions to their positions. Unfortunately for them, the Connecticut civil service system required successful performance on a test, not necessarily on the job.

The state administered an initial written test, with only those passing the test permitted to go forward in the process. The passing rate of all black candidates turned out to be only 68.1 percent of the passing rate of all white candidates.

Ms. Teal and the other three women failed to make it past the cut-off score on the examination. Thus, they were unable to take advantage of the other features of the state's civil service promotion scheme, which included among other things an affirmative action program designed "*to ensure* a significant number of minority supervisors." (Emphasis supplied).

For 11 of the 26 successful black candidates, Connecticut's affirmative action program worked satisfactorily: they received promotions. The state was satisfied, since the promotion rate of the original black candidate pool was nearly twice that of the original pool of whites. It not only met the state's concern over its affirmative action "bottom line"; it allowed its work force statistics to "catch up" to proportional representation more quickly, as in Kaiser's 50-percent plan. That, however, did not satisfy Ms. Teal and the others. They sued the state under Title VII, alleging that the written test had an adverse impact against them as blacks.

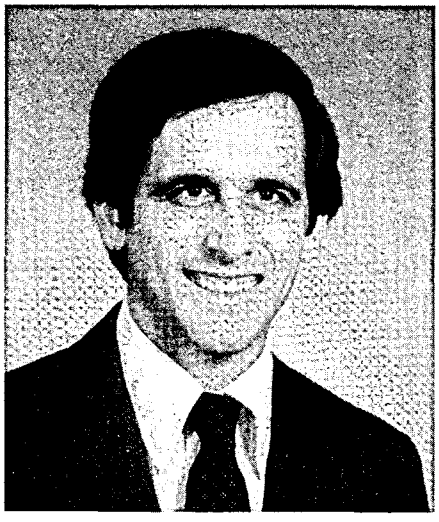
In a five-four decision, with Justice Brennan again leading the majority, the Supreme Court held that an adverse impact on the initial group of blacks taking the pass/fail test stated a *prima facie* case of employment discrimination. The "bottom line" results of the complete process were no defense.

To support the decision, Justice Brennan initially stressed (surprisingly, in light of *Weber*) that the "principal focus of [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole." The question for the Court then became: how should the individuals be protected? Furthermore, at which point in the process? The Court majority accepted the plaintiffs' view that it was proper to look at the *group* racial results at each step of the process at which *individuals* were prevented from going forward, rather than the more generally accepted, simpler analysis comparing the beginning group totals with the groups at the end. Thus, without apparently recognizing what it was doing, the Court nodded deferentially toward individual worth, and then re-engaged itself in a new form of group analysis.

Justice Powell's dissent was not so slippery. He noted that the Court's prior decisions "made clear that discriminatory-impact claims cannot be based on how an individual is treated in isolation from the treatment of other members of the group. Such claims necessarily are based on whether the group fares less well than other groups under a policy, practice, or test."

The primary difference between Justices Powell and Brennan was that Brennan would look for racial impact at any step in the process, while Powell would withhold judgment until the process was complete.

Justice Powell's further comments on the likely result of *Teal* were startlingly prescient. He predicted that since it is difficult and expensive to defend tests against challenges to their validity, employers would either run the risk of using tests, hoping the results would not have a racial impact, or eliminate tests entirely and resort to "simple quota hiring". Furthermore, employers could resort to some other form of preferential treatment, but this would eliminate the "catch-up" version of affirmative action that Connecticut had used. Justice Powell warned, "the Court hardly could have intended to encourage this." →



Frederick H. Schranck is an assistant City Solicitor in the City of Wilmington Law Department. For the last five years he has represented the city in all EEO/AA matters. His work is centered on personnel law of all kinds, from contract negotiations to Workers' Compensation claims. He has made presentations at Continuing Legal Education programs of the Delaware State Bar Association, the most recent concerning the Age Discrimination and Employment Act at the Labor Section seminar on Wrongful Discharge held last November. Fritz, good lawyer that he is, defines with precision the voice in which he speaks to our readers. "The views that I express in this article are my own and do not necessarily reflect the position of the City of Wilmington."*

* *For the uninitiated: Equal Employment Opportunity/Affirmative Action*

The *Teal* majority's more likely intention was to force other employers with less "success" than Connecticut either to spend large sums to validate their tests or to give up on tests and resort to "goals" *after* affirmative recruitment policies swelled the applicant pool. *Teal*, therefore, leads toward an absolute emphasis on equal rights. Along with *Bakke* and *Weber, Teal* makes it harder for those who wish to provide equal opportunity through affirmative action, without undue emphasis upon results and without serious risk of an expensive lawsuit.

These Supreme Court cases illustrate a deep division within the Court, which mirrors the national failure to decide on the meaning of equal opportunity. At present, a majority of the Court have indicated a preference for equal results policies. Nonetheless, the use of these policies over the last decade or more has created intense, widespread, and often justified resentment, and may have done more harm than good toward meeting the agreed goal of equal opportunity. Perhaps this resentment can be defused, however, by an agreement to return to a more rigorous application of the affirmative action policies of the original understanding, in place of "goals" and "timetables." It is possible to engage in affirmative efforts with only one eye focused on the bottom line; however, it is not easy.

In all fairness, the enforcement agencies, personnel administrators, and employers who must contend with affirmative action should not be excessively faulted for favoring the use of equal results policies to assure one version of equal opportunity. In nearly every other free enterprise endeavor, success is usually measured by results, not by efforts. In addition, racial politics and the nation's prevalent attitude in favor of the "quick fix" should not be overlooked as other reasons for the drift away from the original conception of equal opportunity and affirmative action.

But there is no such thing as a successful quick fix, especially in a field as emotionally charged as equal opportunity. If we are to ensure that applicants will be assessed on their skills and not their origins, long term success will only be achieved through hard work. Otherwise, the continued use of a simple equal results policies will eventually endanger the nation's acceptance of the moral base supporting the law of equal opportunity. □

This article considers four U.S. Supreme Court decisions. Instead of clogging the narrative with repeated citations and driving the proofreaders nuts, we set them here for the benefit of our inquisitive minority.

Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525 (1982)

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. ____, 104 S. Ct. 2576 (1984)

Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978)

United Steel Workers of America v. Weber, 443 U.S. 193, 99 S. Ct. 2721 (1979)

The Revenge of the Literate

In an issue devoted to employment law we think it fitting to discuss *MacPherson v. Department of Water Resources,* 734 F2d 1103 (5th Circuit 1984). Gwendolyn MacPherson is a remarkable woman, oozing a negative charisma powerful enough to reduce bureaucrats to helpless wrath and appellate courts to nervous, ultrafastidious attention to their prose styles. Gwendolyn lost her case both at the trial level and on appeal, but in doing so she had the last laugh and emerged as a folk heroine to those who pride themselves on writing and speaking carefully.

The text of Circuit Judge Gee's opinion discloses that plaintiff Gwendolyn MacPherson was a public employee of exceptionally high intelligence and fierce dedication to her job. One day her immediate superior circulated a memorandum entitled, "Outside Requests of *(sic)* Staff Testimony at Administrative and Judicial Hearings". It was badly written - so badly written that Gwendolyn was prompted to send it back marked up with cheeky editorial suggestions. She returned this billet doux *(see illustration)* to her superior in an envelope marked "personal", and without disclosing her identity. The superior took offense and instituted inquiries to flush out his anonymous persecutor. Gwendolyn readily admitted her lese majesty, and her superior canned her. She sued for reinstatement on the grounds that her dismissal was a wrongful act of sex discrimination. The trial court found, and the Circuit Court agreed, that the decision to fire her was irrevocably made before her identity (and therefore her gender) was known. Accordingly she lost. (She does not seem to have explored the possibility of a free speech theory.)

Several things emerge from Gwendolyn's literary assault and the reciprocal vendetta mounted by her superior. The memorandum she criticized, which was actually prepared by somebody other than the boss, is indeed an arrestingly putrid piece of English composition. It is obvious that the Fifth Circuit panel that affirmed Gwendolyn's loss entertained a sneaking admiration for her and that they were a little bit afraid of her: the Court observes in a footnote, "In anticipation of a critical review of our remarks, we have been at some pains with their• style and grammar." But, amusingly, not quite enough pains. At one point Judge Gee observes, "She established an enviable work record marred by only a single *verbal*•• reprimand . . . ". Judge Gee plainly means "oral" unless he is trying to save us from falling into the error of thinking that Gwendolyn was reproved by means of indian smoke signals or pictorial representations. Further on in his opinion Gee tells us that "Mr. Davis determined to fire the reviser, *whomever*•• he or she might be." The objective form of the pronoun shows that Judge Gee, fearful of Gwendolyn's contempt, was betrayed by an excess of refinement into a grammatical howler. Needless to say we live in terror lest a copy of this issue fall into Gwendolyn's hands and we receive a doubtless well deserved keelhauling for our stylistic sins.

• A purist might favor "our" over "their", but we are dealing in this imperfect world with jurists, not purists.

•• Italics ours.

Overall comments

You frequently leave out articles (a, an, the) in front of nouns.
You tend to obfuscate by using long, unwieldy phraseology. Simplify!
Simplify! This will help correct your tendency to misplace modifiers.
The content of this memo is confusing. It is obvious to me that when one
is subpoenaed one must appear, regardless of the opinion of the Department.
Furthermore, one must tell the truth when under oath.

Please rewrite and resubmit.

Reprinted with the kind permission of West Publishing Co. The entire memorandom and Gwendolyn's strictures appear on pages 1105-7 of 734 F2d.

Karen E. Peterson

It Is Now 3:15!

There are villages in which men fish and women weave and ones in which women fish and men weave. But in either village, the work done by men is valued higher than the work done by women.

Margaret Mead,
Anthropologist

The wage gap between men and women is the most persistent symptom of sexual inequality in the United States. Women who work outside the home full-time year-round earn 60.7¢ for every dollar earned by their male counterparts. [1] In state and local governments, women earn 71¢ for every dollar earned by men. [2] In the federal government, the ratio is 63¢ to one dollar. In the private sector it's 56¢. Although many people believe that the status of employed women has improved over the years, the ratio between women's wages and men's wages has remained essentially the same since the year 1930.

Some people believe that the wage gap exists because: (1) women choose to work in low-paying jobs; (2) women interrupt their careers to have babies and raise families; (3) women are less educated than men; and (4) women are not committed to the labor force as men are.

However, the landmark 1981 study by the National Academy of Sciences entitled *Women, Work, and Wages: Equal Pay for Jobs of Equal Value* concluded that only a small part of the earnings differences between men and women can be accounted for by differences in education, labor force experience, or other human capital factors believed to contribute to productivity differences among workers. The study found that 50 to 75% of the wage gap cannot be explained. The lack of evidence for alternative explanations strongly suggests widespread wage discrimination.

There are two major causes of the wage gap:
(1) women's work is undervalued and underpaid, and
(2) women have been segregated in the work force.

Women's Work—Undervalued, Underpaid

"It's 'Catch 22': Women's work historically has been paid poorly because women were doing it and women work for less because they cannot get more." [3].

The National Academy of Sciences found that the more an occupation is dominated by women, the less it pays. The question is: would the low-paying jobs be low-paying regardless of who held them, or are they low-paying because of the sex of their incumbents? Obviously, some jobs will inevitably pay less than others. The fact that these jobs are disproportionately filled by women and minorities may reflect differences in qualifications, interests or traditional roles. But the Academy found that in many instances jobs held mainly by women and minorities pay less simply because they are held by women and minorities.

. . . in many instances jobs held mainly by women and minorities pay less simply because they are held by women and minorities.

It's a bad old story. An 1883 wage survey conducted in Philadelphia showed that a majority of women workers at the textile mills received less for their 78-hour work week than male workers were getting for one 10-hour day. Not much has changed in the last 150 years.

In Montgomery County, Maryland, a liquor store clerk with a high school diploma and two years of experience earned $12,479 a year in 1979. A school teacher with a college degree and two years of experience received only $12,323 a year. More than 70% of school teachers in the county are female. All the liquor clerks are male.

In Denver, Colorado, an entry-level tree trimmer or sign painter earns $1,164 to $1,191 a month while the entry-level registered nurse gets $1,064. Tree trimmers and sign painters in Denver are predominantly male, but nurses are overwhelmingly female.

In testimony before the Equal Employment Opportunity Commission, a Wisconsin woman who had been a secretary for 18 years and was currently working for the chancellor of a university, stated that her salary was lower than that of entry-level parking lot attendants at the university, who were 18 year old males. [4]

In 1979 the University of Washington in Seattle paid its skilled food service workers, most of them female, a starting salary of $646 to $827. Traffic guides, most of them male, who sat in booths and issued automobile passes, started at $806 to $1,032.

Continued on page 24

Michael S. Purzycki

Sacred Cows and Unacceptable Costs

Imagine how pleasant it is to take a political stance against 52% of the American population, as well as roughly 51%, including minorities, of the American work force! My opposition to comparable worth ("CW") has been viewed as hostility to fair and adequate pay for women and minorities. Nothing could be farther from the truth. Beneath the alluring and seemingly harmless monikers of "pay equity" and "comparable worth" lurks a complex doctrine, which requires not a brief discussion, but an in-depth analysis. I am frustrated to find that most people will not take the time to understand this doctrine and its complexities, and are easy prey to arguments in its favor, which appeal more to our hearts than to our heads.

The case for CW is usually made by an effective, shocking presentation of examples of how men earn more than women. Laborers make more than secretaries. Truck drivers earn more than nurses. And warehousemen outdistance clerical supervisors. These facts are not disputed. Statistics show that women continue to earn 59 to 64 cents for every dollar a man earns, after women — by all outward appearances — had made such great economic strides! Reducing or eliminating sex based disparities in wages is a reasonable and laudable objective. CW, however, represents more than an objective; it stands for a methodology. For the most part, I can agree on the objective. It is the methodology I find troublesome.

CW calls for equal pay for work of comparable value. This is not equal pay for equal work, which is already required by the Equal Pay Act. Instead, CW defines discrimination as paying females or those in minority classifications less than their relative worth when compared to male dominated classifications. The comparisons of nurses, secretaries, and receptionists to plumbers, truck drivers, and electricians are made by consultants who evaluate jobs by sets of generally accepted criteria. When studies are complete, if the jobs of truck drivers and of receptionists receive the same number of points, and the truck drivers earn more, the employer is liable for discrimination (presumably under Title VII of the Civil Rights Act, although no case stands expressly for that proposition). As employer compensation policy, the procedure may be fair and desirable notwithstanding abundant frailties in the science of job evaluation. As a matter of law, however, such a scheme presents far more problems than it solves.

Does wage discrimination under a CW theory violate the law? And more important to me as a policy maker, *should* it violate the law? Because I think discussion of the latter question will be helpful in reviewing the available case law, I shall discuss it first.

To approach CW, one must begin by looking at the problem that prompted it. Even proponents of CW will agree that in most cases, employers have no specific intent to discriminate against women. They just want to pay the lowest possible price for required services. Admittedly, employers' biases that a woman's work is worth less surely fit into the equation, and are quickly ratified by a market that seems almost contemptuous of the value of clerical and secretarial skills. Contributing to the market bias is a condition that has been characterized as the "herding of women into pink collar ghettos." In fact, 80% of the women in the work force can be found in 20 of the over 420 job classifications recognized by the Department of Labor. Moreover, in spite of lower wages, there remains a copious supply of women willing to enter those 20

Continued on page 25

Peterson - Purzycki Debate

DELAWARE LAWYER debates are blind. Neither antagonist sees the other's article until publication day. (Otherwise there'd never be a publication day, with all the last minute editorials maneuverings to score points.) We think this approach pays, as evidenced here: An enlightening joinder of issue on the topic we had not previously begun to grasp.

The Editors

The formidably accomplished Karen Peterson is Administrator of the Labor Law Enforcement Section of the Delaware Department of Labor. In addition, she is beginning her second four-year term as President of New Castle County Council. She sponsored the legislation authorizing the County's pay equity study now in progress and the subject of this debate.

New Castle County, Delaware, pays its Animal Keeper Supervisors (100% male) $15,122 a year (entry-level) but only pays its Senior Center Directors (100% females) $13,830 per year.

Nurses—96% female— make an average salary of $17,300 a year, while pharmacists—84% male—make an average salary of $25,000 a year. Most child care workers make less than dog pound attendants. Teachers make less than painters.[5]

The average woman with four years of college makes the same as a man with an eighth grade education.

Before the enactment of the Equal Pay Act and the Civil Rights Act, it was lawful to pay women and minorities lower wages than those paid to other employees even where jobs were identical. That practice was built into wage structures and continues to influence these structures today.

Occupational Segregation

The single most important cause of the wage gap between men and women is the concentration of women in a narrow range of low-paying, sex-segregated occupations. The degree of job segregation has remained essentially the same since the beginning of the century despite the entry of women into male-dominated occupations.[6] In 1982, 80% of all women worked in less than 6% of all occupations listed by the United States Department of Labor. Secretaries are 99.1% female; registered nurses are 84.5% female; elementary school teachers are 84.5% female; librarians are 82% female; household service workers are 98.3% female; and clerks are 86% female.[7]

Occupational segregation is practiced by nearly all employers and is considered evidence of discrimination. In *AFSCME v. State of Washington, 578 F. Supp. 476,* the Court relied heavily on the evidence showing that the State had deliberately segregated its work force, placing classified ads in the "male" or "female" column, job descriptions that limited a job to one sex, and "protective" laws that prohibited women from doing certain work. Most employers, including New Castle County, have done the same.

The Supreme Court told us three decades ago that segregation and equality cannot coexist. In *Brown v. Board of Education,* the Court held that racially separate educational facilities result in inferior education because "separating the races is usually interpreted as denoting the inferiority of the Negro group." The Supreme Court's holding that segregation is "inherently unequal" applies with equal force to the work place: a racially or sexually segregated job structure results in inferior wages because it denotes the inferiority of that race or gender. When the employer segregates the work force, wage discrimination invariably follows.

The Issue Is Discrimination

"Comparable worth" is not the issue, but it has become the red herring to obscure the real issue of discrimination. The strategy is simple: call everything "comparable worth" and claim that the Supreme Court did not approve a "comparable worth" theory in their 1981 *Gunther* decision.

"Comparable worth" and "pay equity" are popular terms. The real issue — the legal issue — is sex-based wage discrimination. Sex discrimination in compensation is prohibited by Title VII of the Civil Rights Act of 1964, which states:

> It shall be an unlawful employment practice for any employer — (1) . . .

Continued on page 26

positions. Obviously, a significant portion of the wage gap can only be attributed to deep societal and cultural currents impelling men to certain roles and women to others.

Now if this is the problem, is the reorganization of society according to CW dogma a solution? Superimposing a grid of required economic relationships among job classifications surely will have a predictable and profound impact on a free enterprise economy. The ability of employer and employee to negotiate freely and in good faith will never quite be the same. For example, the American Federation of State, County and Municipal Employees ("AFSCME") is now suing employers for deficient wages paid women under contracts negotiated by the plaintiff. To a large extent, therefore, parties will no longer be able to rely on negotiated contracts. Certainly not through different locals or unions employed by the same employer. The tentacles of CW reaching from one local to another would make reliance on such negotiations unpractical. Because CW is new and untried, labor, vying for female membership, has wedded itself to this initiative, ignoring fully the inevitable implications. And, of course, Federal agencies and courts, promulgating guidelines to standardize the complex and manipulable job evaluation methodologies, will merely hasten the demise of a free labor economy.

If this sounds apocalyptic, be reminded that for the first time in our history, white males are in the minority. Protected classes (an aggregation of "minorities") constitute a majority of the work force. While no one pretends that our market is pure, other intervention by the government into the marketplace (e.g., antitrust, crop subsidies, minimum wage, and governmental loans) rarely target any more than narrow interests of the economy or operate on the perimeter, as in the case of the minimum wage. None of these programs has the potential to intrude into the marketplace so pervasively as CW.

If one is able to swallow this large philosophical pill of establishing job "worth," let us consider the practicalities. By any standard, the method is grossly inefficient. In evaluating jobs, classifications are broken down into three separate categories: Male dominated jobs (70% incumbency), female dominated jobs (or those of other protected classes), and all other classifications. Pure CW calls for raising salaries in female dominated jobs to the proportionate levels of salaries in male dominated classifications. In the real world, however, if "x" points equals "y" dollars, *everyone* is going to want to be raised to the prescribed salary level according to his or her "worth". If you are not convinced that this would occur, note that in New Castle County government it is already in place. Our "CW" study is now an "internal job" study with the objective of leveling up all "underpaid" classifications, not just female dominated ones. Once one abandons the market and collective bargaining as reasonable bases for the payment of salaries, one is necessarily compelled to pay according to internal relationships, and political courage being what it is, no one is going to suggest a redistribution of available resources. Ergo, everyone gets a raise. NCC employees are already the highest paid municipal employees in the state. (Assuming a 20% differential, our Secretary III would earn up to $26,000 in July, 1985). And, if this prospect of runaway public extravagance is not enough to give pause, consider too that those male salaries against which women's are to be compared reflect any number of jobs that pay in response to shortages of qualified personnel. In other words, because of the sympathetic vibration of CW, the taxpayers will not only have to pay more for male dominated classes in short supply, but they will have to pay more for female dominated classes with the same point total. This is an argument that CW proponents disdain, ignoring the reality of the marketplace, which irrefutably provides the underpinnings for a free enterprise economy.

How about job segregation? As we are frequently reminded, CW proponents decry uniformly the "herding and crowding of women into pink collar ghettos." At the same time, however, they herald a system that pays premiums for staying in these jobs, unavoidably promoting the institutionalization of the pink collar condition. Up to this point, such segregation in the job market is an abstruse social phenomenon. After CW, this segregation will be crystallized by economic compulsion.

Of course, CW has an unacceptable cost. Whenever I say this, someone self-rightously rejoins that no one would have asked the cost of relieving society of the horrors of slavery! Quite true, but tiresomely irrelevant. The wage gap does not belong in the same discussion

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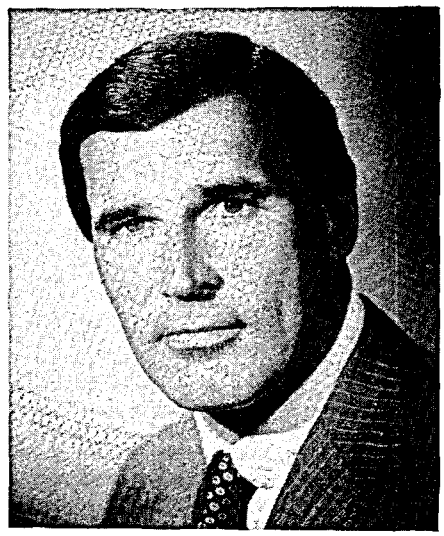


In little more than five years of practice, Mike Purzycki, a former University of Delaware football luminary, has made himself equally prominent in the world of law. After service as counsel to the Delaware Senate, he was elected to the New Castle County Council, where he is now Chairman of the Finance Committee. His concern for governmental solvency adds bite to his side of this debate.

to discriminate against any individual with respect to his compensation because of such individual's... sex...; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's... sex...

Before the Supreme Court's 1981 ruling in *County of Washington v. Gunther*, the application of Title VII was restricted solely to equal work situations where the work performed by both sexes was "substantially" equal. But because of occupational segregation, men and women do not generally perform the same kinds of work. As the Supreme Court held in *Gunther*, limiting Title VII to equal pay cases alone: "means that a woman who is discriminatorily underpaid could obtain no relief — no matter how egregious the discrimination might be — unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay." The Court declared that sex-based wage discrimination is illegal even if the jobs being compared are entirely different and that sex-based wage discrimination is no less illegal than wage discrimination based on race, national origin or religion.

Although the Supreme Court in *Gunther* ruled that wage bias is illegal, it was not clear what evidence would have to be presented to prove discrimination. The ruling *AFSCME v. State of Washington* finally put meat on the *Gunther* skeleton.

The evidence in *AFSCME* resulted in a finding that proof of discrimination in compensation was "overwhelming", typical of the practices of virtually every employer and public. Findings:

- Deliberate occupational segregation by sex. The employer placed classified ads in the "male only" and "female only" columns until the newspaper stopped accepting them.
- A significant inverse correlation between sex and salary. For every 1% increase in the female population of a classification, the monthly salary decreased by $4.51 for equivalent jobs. A 100% female job was paid, on the average, $5,400 a year less than a 100% male job of equivalent value. The possibility of such a relationship occurring by chance was less than 1 in 10,000.
- Disparities in salaries between primarily male and female entry-level jobs. Male entry-level jobs requiring no high school paid 10% more than corresponding female entry-level jobs. Male jobs requiring a high school diploma paid 22% more; men received 19% more than women for one year of business school and 13% more for two years of college.

The Court concluded that the State of Washington had violated Title VII by fostering both disparate treatment (intentional discrimination) and disparate impact.

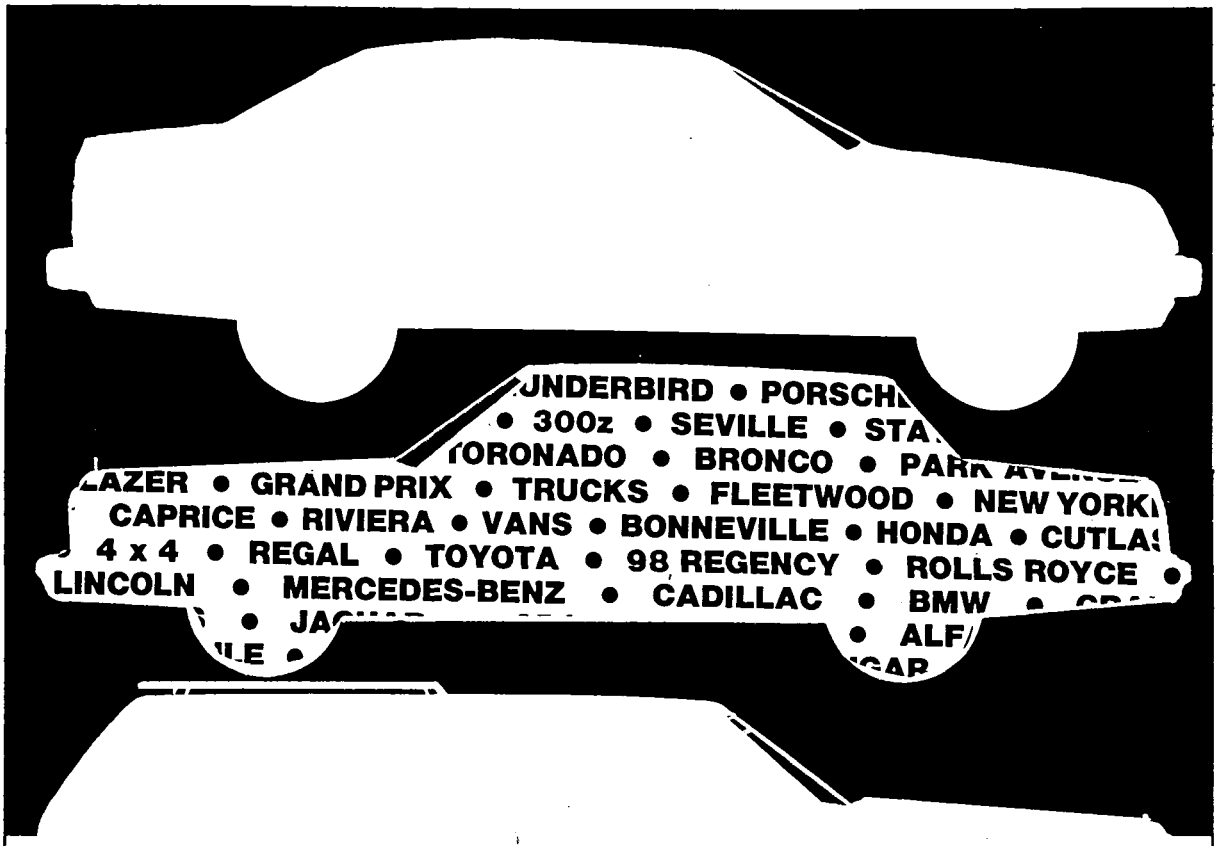
Other decisions have been consistent with *AFSCME. In Liberles, AFSCME v. County of Cook*,[8] the Court found that the county had discriminated racially by paying black Case Aide Trainees and Case Aides less than white Caseworkers. This case is no different from other so-called "comparable worth" cases in that it was brought under Title VII. The Equal pay Act does not cover race discrimination but Title VII prohibits wage discrimination founded on race and sex.

In *Taylor v. Charley Brothers*,[9] the Court found that the employer had segregated its employees by sex, paying women less for jobs requiring similar work.

In *Melani v. Board of Education*, [10] the Court, relying solely on a statistical analysis of the salaries of male and female staff, found intentional discrimination. The employer was unable to explain the discriminatory pattern.

In *I.U.E. v. Westinghouse*,[11] the Court found that in 1939, Westinghouse had depressed the wages of its female employees 18 to 20% merely because certain jobs were performed by women. Even though the practice was not prohibited in 1939, the Court found the current wage structure was built on that discriminatory foundation.

Opponents of pay equity claim that Congress will have to decide whether or not "comparable worth" was meant to be included in the Civil Rights Act of 1964. They cite conflicting case law to support their contention that the intent of Congress is unclear. One technique is to cite cases decided before *Gunther*. Citing pre-*Gunther* cases is like citing *Plessy v. Ferguson* after *Brown v. Board of Education*. Congress has already taken its position in enacting the 1972 →



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amendments to Title VII: "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."

The Four Basic Excuses

Winn Newman, AFSCME's counsel in the *Washington* case, calls the arguments most often offered against pay equity, "four basic excuses". They are: (a) the "apples and oranges" argument; (b) "blame the victim"; (c) cost; and (d) the "free market" or "everybody does it" argument.

The "apples and oranges" argument goes like this: "How can you compare a secretary to the guy who crawls in the sewers?" This argument assumes that it is impossible to compare dissimilar jobs. But virtually every large employer already uses some method to evaluate the internal relationships of different jobs, by objectively evaluating the composite of skills, effort, responsibility, and working conditions required.

For example, New Castle County government has already compared the sewer workers' jobs with other dissimilar jobs such as deputy sheriff, planner, tax assessor, etc. Why, all of a sudden, may we not compare a secretary's job?

Evaluating dissimilar jobs was the reason for developing job evaluation plans, which have been used in this country for over fifty years. In fact, almost two-thirds of the adult population are pay-graded by job evaluation schemes.

One would expect that with job evaluation systems in place already, no discrimination would exist. However, the findings in the *Washington* case point to the problem: there were two separate salary lines—one for men and another for female employees. As a result, women were paid, on the average, 20% less than the men for doing equivalent work. One of the purposes of a pay equity study is to eliminate the two-track system (which uses a different yardstick to measure the worth of "women's" work) and establish a uni-rail wage system for all.

The "blame the victim" argument suggests that the "cure" for sex-based wage discrimination is for women to change jobs. Telling women whose jobs are illegally underpaid that they can work elsewhere is like telling a mugging victim to move to another neighborhood.

The "blame the victim" argument suggests that the "cure" for sex-based wage discrimination is for women to change jobs. Telling women whose jobs are illegally underpaid that they can work elsewhere is like telling a mugging victim to move to another neighborhood.

Although affirmative action is certainly desirable, if in fact a secretary would prefer to be a plumber, this argument ignores the real issue of wage discrimination. Women and minorities have a right to be paid a non-discriminatory wage for the work they now perform. Even if New Castle County were to train every secretary to be a plumber, that would still fail to address the issue of sex discrimination for those who took their places as secretaries. Furthermore, the wages of plumbers would eventually be reduced because "the more an occupation is dominated by women, the less it pays."[12]

"Cost" has been used as an argument against pay equity. The same argument has, of course, been used against minimum wage laws, child labor laws, the Civil Rights Act, Equal Pay Act, the Pregnancy Disability Act, Davis-Bacon, and every other "socialist" labor law ever enacted in this country.

The "cost" argument asserts that wage discrimination will have to be tolerated because the cost of correcting it will destroy the economy. But Congress did not place a price limitation on the cost of ending discrimination. In *Los Angeles Department of Water and Power v. Manhart,* women employed by the Department filed suit because their employer required them to contribute more than men to the pension plan since, according to actuarial tables, women live longer and receive more benefits. The Department argued that it was simply recovering its "anticipated costs".

The Supreme Court ruled that the cost of correcting discrimination practices is no justification for violating Title VII. The Court said that the employer's argument "might prevail if Title VII contained a cost justification defense comparable to the affirmative defense in a price discrimination suit. But neither Congress nor the courts have recognized such a defense under Title VII."[13] In *AFSCME v. State of Washington,* the Court said, "the defendant's preoccupation with its budget constraints pales when compared with the invidiousness of the ongoing discrimination." [14]

The last argument is the "free market" or "everybody does it" argument. Employers say, "We don't discriminate; we just pay the going rate." Unfortunately, some (if not most) of these pay practices antedate the passage of Equal Pay Act and the Civil Rights Act of 1964. They were not illegal then. In many cases they continue to govern pay dif-

ferences between jobs. These pre-1964 discriminatory pay plans are the ones we transfer from employer to employer when we rely on the "going rate" for "female" jobs.

The Supreme Court and lower courts have rejected the "market" defense. In *Corning Glass Works v. Brennan,* the Supreme Court addressed the issue in an Equal Pay case: "The differential . . . reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."

"The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex constitutes an unfair method of competition."[15]

In *Norris v. Arizona Governing Committee,* the Court states: "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the market place." [16]

The Civil Rights Act was designed to eliminate discrimination. "Following the market" is designed to perpetuate discrimination.

"Comparable worth" is not the issue; the issue is sex-based wage discrimination, which is unlawful under Title VII or the Civil Rights Act of 1964. In the words of Judge Tanner in *AFSCME v. Washington,* "It is time, NOW—RIGHT-NOW—for a remedy."

It's 3:15!

It took one hundred and eighty-eight years for this nation to outlaw discrimination against female employees. It has been twenty years since the law was passed and yet the discrimination continues. Why? Because to employers, women are a terrific bargain. For the price of three men, an employer can get five women. That would be a good deal if it were not unlawful.

The majority of the people I represent are women. They are underpaid. Many live in poverty because of it. They are not willing to take it any longer. As Monica Faith Stewart said, in addressing opponents of the Equal Rights Amendments, "I stand only to present a truth.

You can vote this amendment up or down; quite frankly, it doesn't make any difference to me. You are acting as people of your class and tradition have always acted and you know what? It won't matter because we've survived much worse than this. Back when I was in school we had a saying, if things didn't go the way you'd like them in the classroom, we'd meet you outside at 3:15. And so, white males of the world, it is now 3:15." □

FOOTNOTES

[1] *Women's Work: Undervalued, Underpaid* (A fact sheet on Pay Equity) (Washington, D.C., National Commission on Working Women, 1983).

[2] *The Wage Gap: Myths and Facts* (National Committee on Pay Equity, 1983)

[3] C. Wilson, *Breaching the Next Barricade: Pay Equity for Women* (Washington, D.C., The Union for Democratic Action, 1981), p. 3.

[4] Wilson, *op. cit.*, p. 6.

[5] *It Pays to be a Man: An Overview of Comparable Worth* (Washington, D. C., Woman's Legal Defense Fund, 1984), p. 1.

[6] *Equal Pay for Work of Comparable Value* (Adapted from Testimony of the National Committee on Pay Equity presented by Nancy D. Perlman, Chair, before the U.S. House of Representatives, Subcommittee on Civil Service, Sept. 16, 1982) (Washington, D.C., Nat. Comm. on Pay Equity, March 1983), p. 2.

[7] M. Collett, *Comparable Worth: An Overview* (Washington, D.C., Public Personnel Management, Vol. 12, No. 4 1983), p. 325.

[8] 31 FEP Cases 1537, 1549 (7th Cir. 1983)

[9] 25 FEP Cases 602 (W.D. Pa. 1981)

[10] 31 FEP Cases 648 (S.D.N.Y. 1983)

[11] 631 F.2d 1094, 1100 (3d Cir. 1980), *cert. den.* 452 U.S. 967.

[12] W. Newman, *Statement on Behalf of AFSCME Before the Manpower and Housing Subcommittee of the Committee on Government Operations, House of Representatives, Feb. 29, 1984, p. 10.*

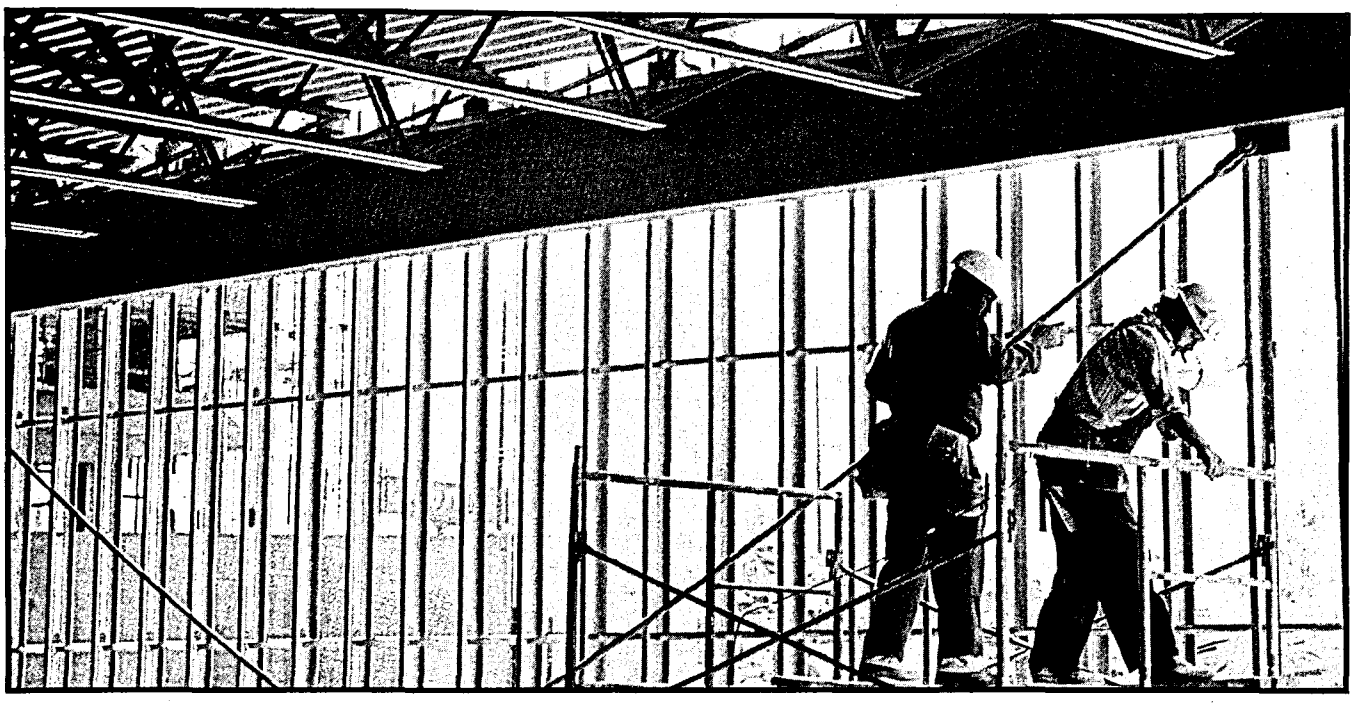
[13] *435 U.S. 702, 716-717 (1978).*

[14] *33 FEP Cases 824.*

[15] *417 U.S. 188 at 205, 207. (1974).*

[16] *671 F. 2d 330,335 (9th Cir. 1982), aff'd in part, rev'd in part 51 U.S. Law Week 5243 (1983).*

The foregoing article is drawn from a longer, scholarly study by Ms. Peterson. DELAWARE LAWYER will be happy to furnish a copy of the original article with bibliography to those wishing to explore the subject in greater depth.



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with slavery. Like other socially desirable goals, raising women's wages has a cost. Once it is removed from the ambit of intentional and invidious discrimination, it belongs with other cures for social ills that must yield to cost benefit analysis. In the private sector, the cost is estimated to be 350 billion dollars with not one scintilla of increase in productivity. Or, it is often quoted, the inflationary effect of the 1974 oil embargo. Closer to home in New Castle County government, we can expect an increase of about 2 million dollars or roughly an 8 percent increase in the property tax. I estimate that in State government CW would cost an amount equal to the income tax decrease instituted this past legislative session. In the federal government, where no one even pretends to be able to get the deficit under control, the costs could reasonably be predicted at about 5 billion dollars, or just about one-half of what we spend on Aid to Families with Dependent Children. If someone were able to muster the legislative will to spend this kind of money, it is also clear that other programs could ultimately suffer. In a day when social programs are under fire as scapegoats for the cause of the federal deficit, it is only common sense that massive expenditures to accomplish "pay equity" are sure to divert resources away from inner city projects, education subsidies, and other forms of public assistance that provide the economic foundation tion for a good deal of the minority community in America. In addition, such a "civil rights" efforts is going to wind up spending finite political capital to achieve left of center objectives in a country that increasingly embraces a moderate to conservative political philosophy. Minorities must be cautious about the way this capital is spent. Unfortunately, I see little evidence of this realization in Black America.

How does a CW study affect minorities? Since they occupy most of the maintenance and service classifications, it is reasonable to assume that, under guidelines necessarily weighted to be sensitive to clerical and secretarial skills, service classifications will be allowed few points when the criteria of education, accountability, responsibility, and skills are applied to evaluating them. Not only will few points be awarded these positions; the relationship between them and other jobs is likely to be institutionalized, and no longer subject to relative increases through labor negotiations. CW proponents are quick to assert that minorities are included in the studies. This is a red herring. In addition to residency in the low point jobs, inclusion means nothing unless one has a 70% domination of a particular class. For CW purposes, New Castle County has only three minority-dominated classifications. In short, I believe CW will prove to be a diversion from minorities of important legislative and financial resources.

The history of the civil rights movement is instructive. Underpayment of females is generally accepted as the result of a cultural bias, the effect of which is to segregate women into jobs with salaries oppressed by the marketplace. Is it not fair to state that the condition of Black America is the result of a cultural bias stemming from a history rooted in slavery and fostered by centuries of relegation to second class status? In addition to economic deprivation, I would argue, by "impact" analysis, that blacks suffer economically, educationally, psychologically, and in many respects, culturally. Can anyone argue that the bias depressing women's wages is greater than that oppressing racial minorities? Hardly. Black America, as it exists today, is the product of conscious societal assumption of racial inferiority, repudiated in legislatures and in courthouses only during the last generation. Discrimination suffered by Black America has been legally dismantled by removing barriers and providing opportunities. No one has seriously suggested redressing past wrongs by reparation payments, although they could be persuasively if expensively justified. In fact, reparation is just what CW proponents are asking for.

Although I have stated only part of my case against CW, I should like to turn to my own recommendations for reaching the objective it so clumsily pursues. I believe a fair level of pay for women (why not an even higher one than for males?) can be achieved through two available methods. The first is a concentrated, effective affirmative action program promoting sex desegregation of the workplace, which will better allow women to move to higher paying jobs with hiring and promotion responsibility of their own. The second is collective bargaining, and the concentrated demands for increased wages. CW proponents scorn both of these promising methods. Consider New Castle County government.

Until recently, the County government's affirmative action program was a fraud on both women and minorities. It provided for a certification of protected groups only if three New Castle County employees did not apply for a job. Naturally, the predominantly white male employees applied for the desirable jobs. Without certification of women and members of minorities, the good jobs went to the white males. The poor jobs usually went to the women and minorities. My recently passed ordinance now provides for certification of protected classes in the event these groups are not represented by New Castle County applicants. Ironically, AFSCME (female members, no less), has reminded me that my affirmative action program is in violation of union contracts. But while AFSCME is protective of its membership, it cannot have it both ways. However, if we sincerely want to give women an opportunity to occupy any and all labor classifications, a partnership of employers, labor, and women must support these remedial efforts.

The second method is the collective bargaining process. The right of the American worker to bargain collectively is enshrined in so much federal law as to nearly raise it to the level of constitutional right. If women used half the energy in bargaining for higher wages that they expend in trouncing the American economy, they would find little difficulty in negotiating acceptable wages. If women are not satisfied with male representation then they would do well to organize separately. I am reminded that most secretaries hold jobs that do not lend themselves to organizing (e.g., employment in law offices). True, but how does CW help these women? Do we conduct studies to compare clerks with lawyers? Not likely. An advocate would rejoin, however, that these salaries would be raised in sympathy with the higher prices paid in the public sector and in large corporations where CW would apply. And this is precisely my point. The battle can be fairly fought where organizing is a readily available and effective remedy.

Speaking of negotiation, what went on in New Castle County should be enlightening. Throughout eighteen years of New Castle County labor negotiations, including those on behalf of the female dominated clerical unit, never has there been raised a question of disparate pay between men and women. When CW was being touted as the women's issue of the 80's, AFSCME negotiated for increases in three different locals while never once raising the question of disparate pay. As soon as negotiations were completed and a three year contract in place, AFSCME made it clear that it wanted women to be leveled up to the now higher male dominated wages. My colleagues apparently did not find this tactic disingenuous and offensive, but I did. They obligingly passed a resolution authorizing the Pay Equity Study. (More on why I opposed this study later.) AFSCME should know that if true pay equity is to succeed, it must be accomplished in the same forthright manner that any employee, male or not, negotiates wages. One has got to make a demand. If garbage, collectors in New York City can get wage increases by piling up garbage, why can't women get them by stopping the flow of paper, which is the lifeblood of the information age.

In selling CW to the taxpayers, one tactic is to convince them that achieving pay equity legislatively is in the long run cheaper than having a court find us liable for discrimination (Judges have become marvelous foils.) This characterization of the state of case law is simply inaccurate. Since the major CW cases have taken place in the Ninth Circuit, a quick review is instructive.

In *County of Washington v. Gunther*, 451 U.S. 161, 25 FEP Cases 1521 (1981), the court opened the door to a non-equal pay claim of sex based wage discrimination. Although the court clearly stated that the plaintiff's claim was "not based on the controversial concept of comparable worth," it found that the Title VII prohibition of sex based wage discrimination was not limited to claims of unequal pay for *equal* work. It further stated that plaintiffs "seek to prove by direct evidence that their wages were depressed because of *intentional* sex discrimination consisting of setting the wage scale of female guards, but not for male guards at a level lower than the county's own survey of outside markets and the worth of the jobs warranted." The court decided that the Bennett amendment of Title VII incorporates the four defenses that an employer may use against a charge of discrimination under the Equal Pay Act and that equal wage causes of action were not limited to those described under the Equal Pay Act.

While *Gunther* provides the foundation for such claims, the case that made comparable worth famous was *AFSCME v. State of Washington*, 578 F.Supp. 846, 33 FEP 808 (W.D. Wash. 1983). AFSCME filed a complaint against the State of Washington with the aid of the EEOC alleging discrimination in pay for women in the employ of the state. The action relied on theories of disparate treatment, disparate impact, and comparable worth. In finding for the plaintiff, the court relied on disparate impact and disparate treatment, and acknowledging that the comparable worth study was an integral part of the action, stated that the case "is more accurately characterized as a straightforward 'failure to pay case'." The judgment against the State of Washington is an imposing 350 million dollars.

Whether or not AFSCME is upheld on appeal, it is important to note that in this case, the State of Washington conducted a pay equity study to uncover alleged discrimination. After disparities were revealed, the legislature and Governor acknowledged the fact of pay discrimination and ratified the process by which such discrimination was defined. Subsequently, in defiance of its own stated objectives, Washington failed to right the wrongs. While the court's logic may not be upheld, it is not difficult to understand how government hubris provoked the court's zeal in finding liability.

A similar case decided after AFSCME →

and Gunther gives reason to believe that Ninth Circuit courts will not put the welcome mat out for AFSCME. In *Spaulding v. University of Washington*, 35 FEP CASES 217 (1984), in a similar CW claim, the court's decision is rife with hostile holdings and dicta such as "where plaintiff's sex discrimination claim is a wide ranging claim of wage disparity between only comparable jobs, the law does not go so far as to allow a prima facie case to be constructed by showing disparate impact." It quoted from *Power v. Barry County*, 539 F.Supp. 726, 29 FEP Cases 559 (W.D. Mich. 1982), that "Gunther's 'recognition of intentional discrimination may well signal the outer limit of legal theories cognizable under Title VII'." And from *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), "the discriminatory impact model of proof is not however the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." It went on to state that "Title VII did not require employers to ignore the market in setting wage rates for generally different work classifications." Finally, the court refused "to accept a construction of Title VII allowing the nursing faculty to establish a prima facie violation of that act whenever employees of different sexes received disparate compensation for work of differing skills that may subjectively be of equal value to the employer, but does not command an equal price in the labor market."

Even without briefing this matter, I can say with confidence that the courts are clearly uncomfortable in applying a disparate impact theory of liability that necessarily holds employers responsible for the non-job related consequences of societal discrimination. In virtually all instances where the courts have found liability under these same general sets of circumstances, and there are several notable cases, there has been a demonstrated "discriminatory animus" of the employer with or without the accompaniment of a job study. When I argued so vehemently on the floor of Council against conducting the pay equity study, I knew that what was being billed as an innocent study to uncover disparate pay was really a set-up. If New Castle County government does not pay in accordance with the results of the study, we, like the Washington defendants, may find ourselves defending a case brought by a female employee, lethally armed with our own pay equity study.

The wage gap is a serious societal problem. Well-meaning people believe they have found a solution. Unfortunately, it cannot serve the women it seeks to protect. Exempting women from the rigors of the marketplace and having them look to *male* (!) leadership for comparative wage increases will do little to achieve the equality and dignity in the workplace that this doctrine purportedly seeks. A recently conducted study by the Rand Corporation concluded that women will achieve pay parity with men not through legislative initiatives, but through increased education and qualification in the workplace. As our social fabric changes and more women head households, economic need will dictate that women make money the "old fashioned way"! But they will not only "earn it"; they will *demand* it. And, that is better than legislating it any day. □

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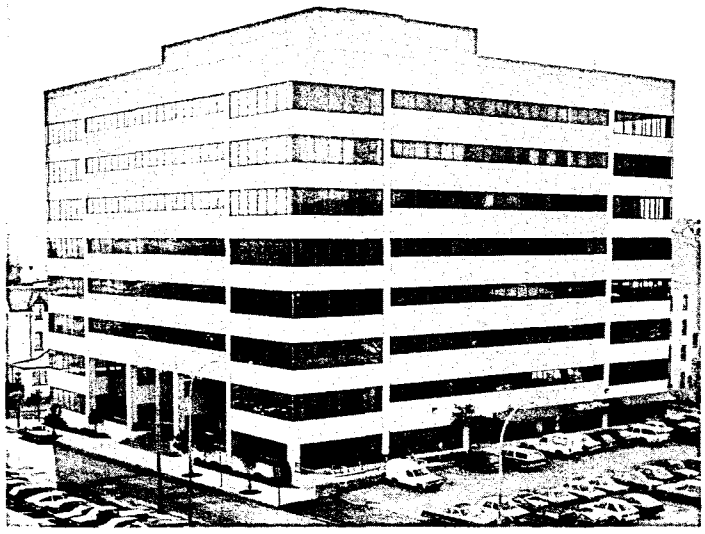

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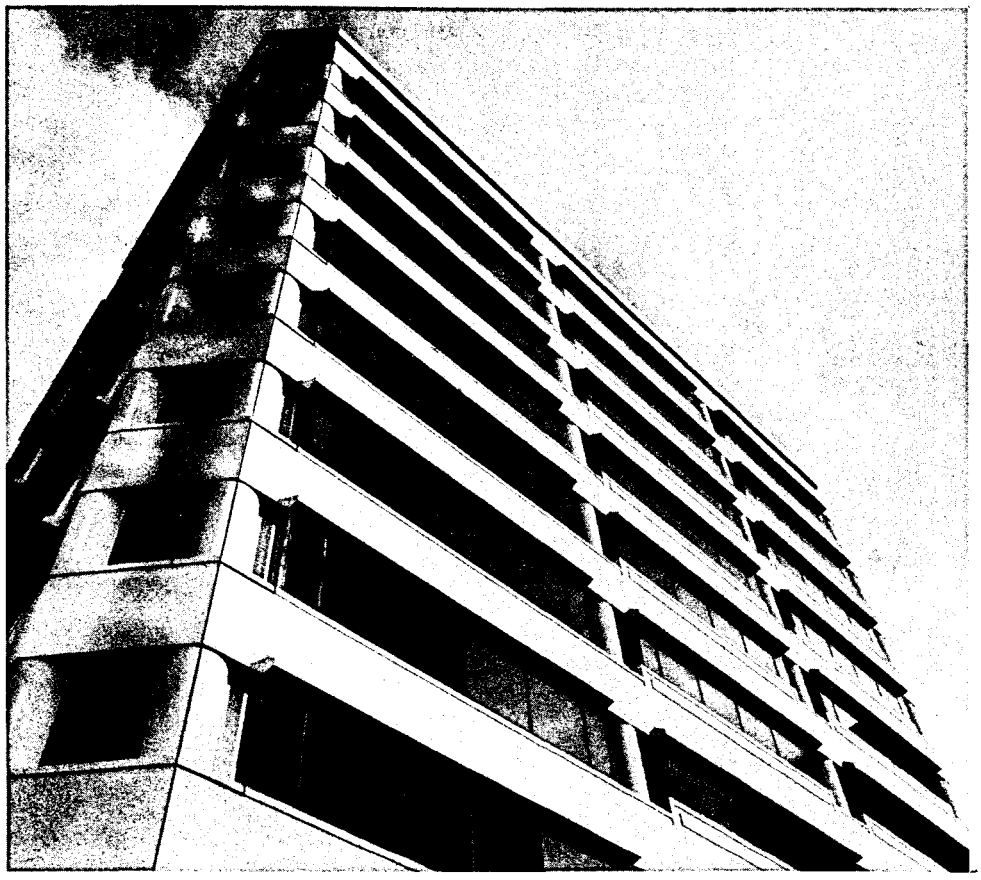

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Sexual Harassment in the Work Place TITLE VII to the Rescue

Heaven Will Protect The Working Girl . . .?

Barry M. Willoughby

Sexual harassment has long been a disruptive problem for employers and employees alike. Only recently has it been branded illegal discrimination based on sex. Sex discrimination against employees is prohibited by Title VII of the Civil Rights Act of 1964, 42 *U.S.C.* §§2000e, *et seq.* Ironically, this prohibition was included at the suggestion of several Southern Congressmen who thought such a provision would discredit the entire act and torpedo passage. It turned out, of course, that Title VII was passed along with the rest of the statute.

Since the prohibition against sex discrimination was a late addition to Title VII, there is little legislative history to tell us if sexual harassment is forbidden, and the early cases sought to determine whether it was even actionable. Some held that sexual harassment was not gender-based discrimination because it involved harassment of *some* but not *all* members of one sex, usually women. Some courts held that a policy not applicable to all women did not cross gender lines, and did not give rise to valid sex discrimination claims.

The Supreme Court rejected that view in *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971).* Although *Phillips* is not a sexual harassment case, it does establish the theoretical ground work on which such claims are founded. *Phillips* deals with a school district, which had a policy against hiring women with young children — a policy not applicable to men. The employer argued that its policy did not cross gender lines because it distinguished between categories of women, and not between men and women. The Court of Appeals accepted this argument and held that the discrimination was between two classes of women, i.e., those with children and those without, and therefore not within the coverage of Title VII. The Supreme Court, however, rejected the argument that all members of a victimized class had to be affected before discrimination would be found.

Lower courts applied the *Phillips* rationale by holding that sexual harassment violates Title VII. *See Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). The Third Circuit addressed the issue in *Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977). In that case, a female employee charged that her supervisor propositioned her and told her that if she did not acquiesce, she would be fired. The district court had found no Title VII violation, but the Circuit Court reversed, holding that at direct employment consequences to an employee as a result of sexual advances by a superior violate Title VII.

It is still critical to remember, however, that since sexual harassment is a Title VII claim, gender-based discrimination must be shown even if an entire sex is not affected. One of the ironic twists of Title VII generally, and sexual harassment law specifically, is that harassment of both genders is not a violation of Title VII, *Barnes*, 561 F.2d at 990 n. 55, because the offensive conduct is not limited to one sex.

A homosexual supervisor, however, who only approaches members of his own sex does violate Title VII because his actions create a term or condition of employment applicable to one sex but not the other. *Id.* On the other hand, there is no general prohibition against employee's discrimination against homosexuals, transsexuals or other groups because of their sexual preference. *Ulane v. Eastern Airlines*, 742 F.d2 1081 (7th cir. 1984). This is because Title VII does not prohibit discrimination based on sexual preference, but only discrimination based on gender. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982). An employer's rule against hiring homosexuals of *either sex* creates no Title VII violation.

An Assortment Of Claims

There are now several distinct types of action under the umbrella heading of sexual harassment. The *Tomkins* case is an example of the classic job benefit/-detriment claim. In such cases, a supervisor, usually male, approaches a subordinate and demands sexual favors on penalty of discharge or some other adverse job-related consequence.

The second type of case is that of the hostile environment. It consists in an assertion by an employee that the work environment is poisoned by sexually suggestive remarks, innuendoes, dero-

* *Interestingly, the Supreme Court appeared to retreat temporarily from this doctrine in General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The Court held that General Electric's policy of not paying for pregnancy-related disability did not violate Title VII, because the policy was based not on sex, but pregnancy. It found that the distinction lay between those who are pregnant and those who are not. The former group is exclusively female, the latter both male and female. Since the latter group included men, the Court found no Title VII violation. Following *Gilbert*, Congress passed the Pregnancy Disability Amendment making discrimination based on pregnancy part of the definition of sex discrimination. 42 *U.S.C.* § 2000e-(k). In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 103 S. Ct. 2622 (1983), the Supreme Court held that congressional enactment of the Pregnancy Disability Amendment not only overruled *Gilbert*, but also constituted a legislative rejection of the entire underlying rationale.

gatory comments and the like, making the shop or the office an unpleasant place. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). These cases developed by analogy to earlier race discrimination cases in which minority employees successfully argued that it was illegal for an employer to allow them to be subjected to racial slurs at work, even in the absence of a tangible job detriment. See, for example, *U.S. v. City of Buffalo*, 457 F. Supp. 612 (W.D. N.Y. 1978).

A hostile environment case differs from the job benefit/detriment case in several ways. First, the employee need not show that he or she is deprived of any particular job benefit. The employee need not have been discharged or denied a promotion or some other benefit to state a cognizable claim. It is sufficient to show such a degree of subjection to sexually suggestive remarks, comments, and the like as to render the environment unacceptable.

Another major difference between the hostile environment and the job benefit/detriment cases is the standard of liability to which an employer is held for the actions of its employees. In a job benefit/detriment case, an employer is vicariously liable for the actions of supervisory employees. *Tomkins, supra. Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983). In a hostile environment case, some courts have said that vicarious liability is too strict: the employee must show that the employer had notice of the abusive environment. The United States District Court of Delaware recently embraced that view. *Ferguson v. E. I. DuPont Co.*, 560 F. Supp. 1172, 1198-99 (D. Del. 1983). The court noted the differences between hostile environmental and job benefit/detriment cases, and held that the employer must have notice of the hostile environment before it can be held liable. In so doing, the Court rejected the EEOC's guidelines, which called for strict liability even in hostile environment cases. *See also, Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982). *Ferguson* should put an employer on notice that he does not have to have actual knowledge of harassment to be held liable. Something less will do: his recklessness or negligence in failing to be aware of that hostile environment.

A final type of sexual harassment case is a variation on the job benefit/detriment claim. A cause of action for sexual harassment exists in the situation where an employee submits to a supervisor's advances in return for a job benefit denied to another employee. For example, when a male supervisor makes submission to his sexual demands a condition for a promotion, and a female subordinate consents, a Title VII violation occurs. The United States District Court of Delaware was the first court to recognize the cause of action in *Toscano v. Nimmo*, 570 F. Supp. 1197 (D. Del. 1983). The court noted that since the supervisor admitted to having a sexual affair with the successful applicant, and there was strong evidence that the promotion was a *quid pro quo* for the sexual favors granted by the applicant, the plaintiff had established that the granting of sexual favors by the female applicant was a term or condition of employment applicable to females, not males, and therefore violative of Title VII. The EEOC sexual harassment guidelines support *Toscano* in defining such conduct as a potential violation of Title VII. 29 C.F.R. § 1604.11 (g).

A more recent case, *King v. Palmer*, 35 F.E.P. Cases 1302 (D. D.C. 1984), accepted the *Toscano* theory of sexual harassment as a violation of Title VII. In that case, however, there was not direct →

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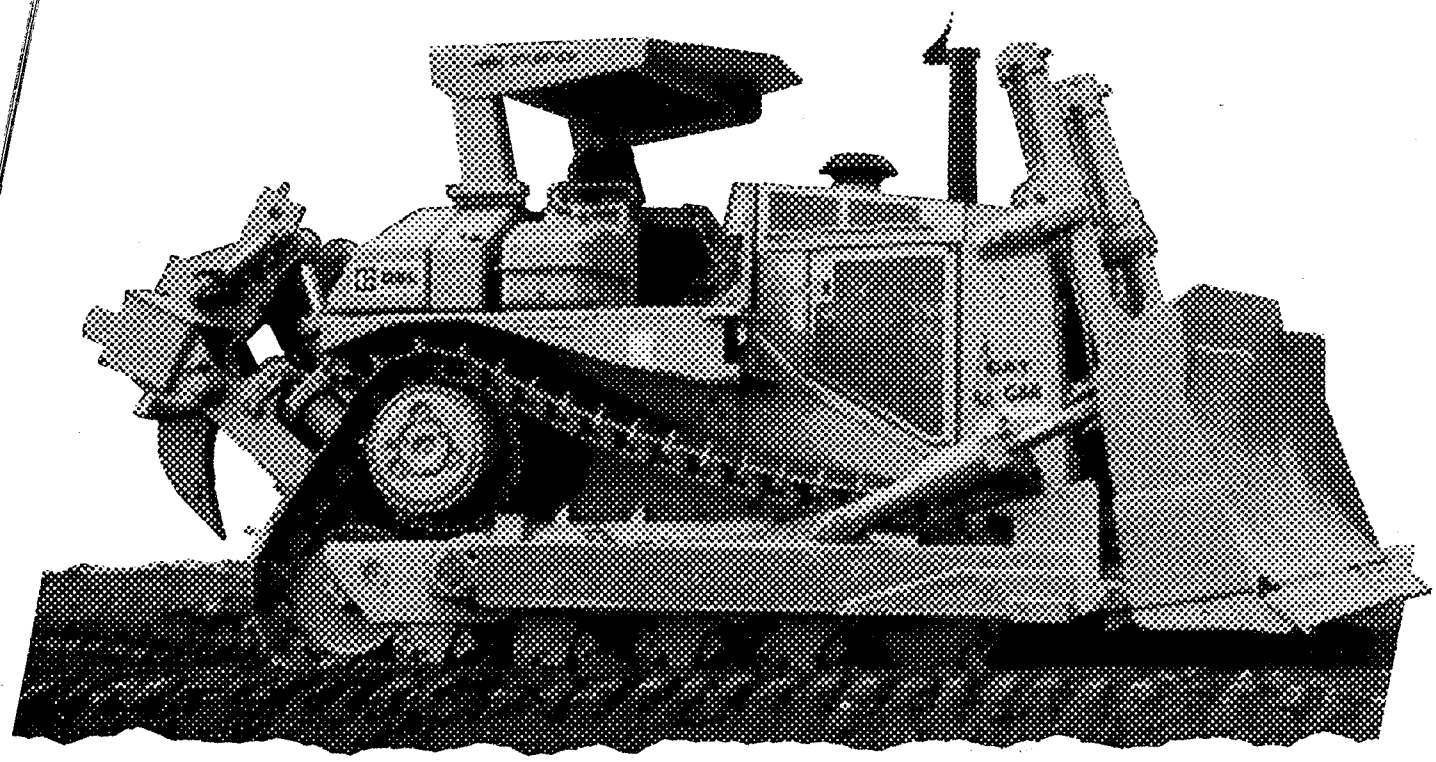

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proof of a sexual relationship between the selecting official and the successful applicant. The Court rejected the claim on the facts, insisting upon strong evidence of a sexual relationship between the selecting official and the applicant before the plaintiff will have met the burden of proof. The Court stated that cases of this sort cannot stand on "knowing winks, prurient overtones, and other evidence characteristic of divorce law."*

EEOC Guidelines

The Equal Employment Opportunity Commission (EEOC) has promulgated guidelines on sexual harassment at 29 C.F.R. § 1604.11 (1982). The EEOC guidelines do not have the force and effect of law, but they are entitled to judicial deference. The guidelines have not been uniformly followed by the courts, as in *Ferguson*, but should be the starting point for the analysis of a sexual harassment case.

Section 1601.11(a) defines sexual harassment as follows:
"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

The EEOC guidelines state that in determining whether sexual harassment has occurred, the agency will look to "the totality of the circumstances." The EEOC will look for a work connection to the harassing conduct: Did advances occur at work? Were they a condition for obtaining a job benefit? Did rejection of such overtures carry with it the imposition of a job sanction? Consent or encouragement by the victim and the frequency of harassment are important factors in determining whether the "totality of the circumstances" shows that sexual harassment occurred.

The guidelines also state the EEOC's position on employer responsibility. The employer will face liability for sexual harassment committed by its supervisory employees, irrespective of the employer's knowledge or ignorance of such conduct. Indeed, the guidelines would make the employer responsible for sexual harassment by a supervisor even if the employer's policy specifically forbids it. While this guidelines appears to have been followed by the courts in job benefit/detriment cases, the *Ferguson* court and other courts have rejected such a strict standard in hostile environment cases.

The guidelines provide that an employer is responsible for sexual harassment by non-supervisory co-workers if the employer knew or should been aware of it. Thus, the employer is not responsible under the guidelines for sexual harassment by non-supervisory employees unless it knew of the sexual harassment or was at least negligent in not knowing about it.

The EEOC guidelines also provide that an employer may be responsible for sexual harassment by *non-employees* if it knew or should have known. The most familiar victim of sexual harassment by non-employees for which the employer may be responsible is the waitress required to dress in a sexually provocative fashion and then subjected to a customer's lewd attentions. Under the EEOC guidelines, the employer may have to pay for lubricity provoked by the scanty costume it ordained.

. . . an employer may even be responsible for the misconduct of non-employees. If a waitress, required to dress in a sexually provocative fashion, is subjected to a customer's attentions, her employer may be liable for third party lubricity.

Piloting The Corporate Bark Through The Tunnel Of Love

In defending a sexual harassment case, it is important for the employer, to show, if possible, that it fully and fairly investigated the employee's claim once the allegation came to its attention. There is an indication in *Tomkins* and other cases that prompt remedial action by an employer may absolve it of liability. For example, in *Ferguson*, Judge Schwartz, in rejecting the plaintiff employee's claim, noted the prompt efforts →

** A bracing whiff of old fashioned common sense in a branch of the law that increasingly treats the boudoir as a civil rights battlefield. The Editors.*

Barry Willoughby, a native Wilmingtonian, is a graduate of the University of Delaware and of Dickinson School of Law, where he was a member of the Law Review. He is associated with the Labor & Employment Law Department of the Wilmington firm of Young, Conaway, Stargatt and Taylor. His practice includes public and private sector labor and discrimination law.

taken by the DuPont company to rectify a supervisor's conduct. On the other hand, in *Toscano*, Judge Stapleton noted the complete failure of the Veterans Administration to take remedial steps once it knew of the plaintiff's claim that she had been denied the promotion given a co-worker who had granted sexual factors to the selecting official. The Veterans Administration, unlike to DuPont company, did not attempt to fairly investigate the claim and rectify the problem internally. Instead, it retaliated against the plaintiff for bringing a Title VII claim and rewarded the selecting official with a promotion. The response by the DuPont company is clearly the right way to avoid liability. It is also usually in the best interest of the employee to resolve the matter internally because of the delay, expense, and difficulty of proof in a Title VII case.

There are several preventative measures by which employers may avoid liability. First, establish a policy against sexual harassment. Second, train supervisors to avoid sexual harassment (actual or apparent) and to recognize a hostile work environment.

Next, the employer should have an internal remedy that allows the victim to complain to someone other than the victimizer. Generally, in a big company, reports of sexual harassment should go to the personnel department. The employer should take the charges seriously and investigate them. The employer need not necessarily accept the word of the victim, but should certainly take reasonable steps to determine the truth of the allegations and to reach a solution acceptable to the parties. If, for example, after investigation the employer determines that sexual harassment did occur, it may be enough to counsel the offender and warn him against repetitions. In some cases the employer may have to go so far as to discipline or even discharge the offender, particularly for repeated misconduct. In no case should an employer discipline an employee who reports sexual harassment or other Title VII violation. Reprisals violate Title VII, *even if the employee's allegation turns out to be false.*

Title VII Relief And Possible Alternative Claims

There is a variety of relief available in Title VII sexual harassment cases, at once broader and narrower than that obtainable at common law. In a Title VII case injunctive relief is available for the reinstatement or promotion of a sexually harassed employee. The employee may get back pay, lost benefits, and other job-related economic losses. Unlike a common law tort, a Title VII claim can yield no award for pain and suffering or other compensatory damages unrelated to economic loss. Title VII, however, does provide for an award of attorney's fees to a prevailing plaintiff. They are not limited by the amount of cash recovery, but depend on the degree of success and the amount of work done by the plaintiff's counsel.

Delaware courts have not recognized a common law cause of action for sexual harassment. The New Hampshire Supreme Court in *Monge v. Beebe Rubber Company*, N.H. Supr., 316 A.2d 549 (1974) did recognize a common law tort claim against an employer for sexual harassment by a supervisor. The *Monge* case was decided in 1974, before the major developments in Title VII litigation. There has been relatively little activity since then on the common law front. If a common law cause of action becomes generally recognized, the usual kinds of compensatory damages available in other tort litigation, such as awards for pain and suffering and emotional distress will be recoverable.

Sexual harassment is a reality in the work place, always has been, and probably will continue to be. Those who advise the employer and the employed must know the applicable law. The EEOC guidelines make it plain that an employer's internal preventive measures are the best remedy for him and his employee. An employer alert to potential liability can take steps to avoid that lurking judgment for damages and — more important — loss of employee morale, a frequent consequence of uncontrolled on-the-job lust. Employees victimized by sexual harassment are also better served by internal remedies. They avoid litigation. But if all else fails, there is always Title VII. □

Delaware Law Firms In the Aftermath of "Hishon"

Richard G. Elliott, Jr.

When Elizabeth Hishon sued the prominent Atlanta law firm King & Spaulding, the yowls of affronted dignity from the Bar were terrible to hear. In making a case for sex-blind promotion, and by winning it in the United States Supreme Court, Hishon breached one of the last bastions of genteel high-handedness, the large, old line law firm. Most disinterested observers were pleased by her success, little realizing that the decision embodying her victory might apply to more than law firms. Have a care in your hiring and firing!

Last October 73 candidates passed the Delaware Bar Examinations. Almost 30 per cent of those who passed were women, many of whom are now employed by local law firms. How many will become partners remains to be seen, but they and other members of minorities are now assured that they will be given a fair shake when decisions about new partners are made.

On May 22, 1984, the United States Supreme Court ruled in *Hishon v. King & Spaulding*, ____ U.S. ____, 104 S.Ct. 2229 (1984) that opportunity to be admitted to a law firm partnership was a "term, condition, or privilege" of employment for associates at the defendant law firm. The Court concluded, therefore, that Elizabeth Hishon had stated a claim under Title VII of the Civil Rights Act of 1964 [1] when she alleged that she had been treated differently from other associates because of her sex.

The *Hishon* decision has major implications for Delaware law firms and other enterprises organized as partnerships, such as accounting and architectural firms. Before we analyze the Court's ruling, it will be useful to consider the much broader influence it may be confidently expected to exert.

Although *Hishon* deals with sex discrimination, it necessarily encompasses all the prohibitions of Title VII, including discrimination based on race, color, religion or national origin.[2] Furthermore, it probably embraces other fair employment laws such as the federal Age Discrimination in Employment Act of 1967.

It is also probable that Delaware courts will follow *Hishon* in applying state law.[3] Delaware's anti-discrimination statute, like federal law, proscribes discrimination against any employee with respect to compensation, terms, conditions or privileges of employment for reasons of "race, color, age, religion, sex, marital status or national origin".[4] If *Hishon* is followed by Delaware Courts, it will reach a much larger number of partnerships than Title VII covers, because the Delaware statute applies to employers with four or more employees. Title VII only governs firms with more than 15 employees. In determining what constitutes an employee for the purposes of Title VII, partners of a law firm and shareholders of a professional corporation, are not counted.[5] They are considered employers who own and manage the business. Presumably Delaware Courts would adopt this distinction.

The Hishon Decision

Hishon reached the Supreme Court on review of King & Spaulding's motion to dismiss. The District Court for the Northern District of Georgia had granted the motion, primarily on the ground that Title VII did not affect the rights of lawyers to freely associate with colleagues. Judge Edenfield observed, "To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings."[6] In a 2 to 1 decision, the Court of Appeals for the Eleventh Circuit agreed with the District Court. The majority concluded that they could not find the requisite congressional intent to permit Title VII's intervention in matters of voluntary association. The Court also rejected Hishon's claim that the application of an "up or out" policy by King & Spaulding, where an associate not chosen for partnership was not retained as an employee, served as the nexus between her charge and Title VII.

The United States Supreme Court's reversal of the Circuit Court's decision was unanimous. Chief Justice Warren E. Burger began his opinion by noting Hishon's allegation that all associate lawyers were promised consideration for partnership. He then declared that promise a term or condition of employment subject to Title VII scrutiny. The opinion goes on to hold that the partnership decision still falls within the domain of Title VII *even without such a promise* if consideration for partnership was a "benefit or privilege" of employment with the firm. On top of that, the Court declared that King & Spaulding's "up or out" policy warranted the application of Title VII to the partnership decision making process. The Court rejected the law firm's argument that partnership decisions were exempt from Title VII coverage because the ability to practice law would somehow be constrained or the right of association abridged by applying Title VII standards. The Court could find nothing in the history of Title VII to support such claims. Furthermore, the Court found no conflict between the right to associate freely and the requirement that the right be exercised in a nondiscriminatory manner.

Since *Hishon* deals only with the employment relationship between the associate and his or her law firm, certain activities are presumably exempt. For example, *Hishon* should not apply to

the considerations a law firm may entertain before offering a lateral entry partnership to a nonemployee, because the employment relationship is not yet formed at that stage. Nor does the decision apply to internal partnership decisions. However, a law firm should be mindful that if the newly made female or minority partner receives disproportionately lower pay than other new partners doing the same work, it may be inviting a decision that the partnership status is a sham.

Similarly, firms may avoid the effect of *Hishon* by developing a "permanent associate" position. It could be used by the firm to handle "specialties" outside its customary work but needed to provide full service to large clients. If staffing is nondiscriminatory and the firm honors the pledge that no permanent associate shall become a partner, the effects of *Hishon* can be avoided.

One of the more difficult questions left unresolved by *Hishon* is whether the consideration process will be judged by Courts under "disparate impact" or "disparate treatment" standards. Disparate impact analysis begins with the *results* of the selection process and if "impact" is shown, the Court works backwards to determine the cause. If the numerical results show impact by comparing the selection rate for female or minority partners relative to the selection rate for white males, disparate impact would be shown.[7] Under the disparate impact theory potential liability for law firms would be large.

However, the trend under Title VII litigation in cases involving professional employees has been to apply disparate *treatment* theory, which requires a plaintiff to show that the general criteria on which the employer based its decision were not uniformly applied.[8] Though statistics are relevant, they have less probative value than in disparate impact cases.

In any event, *Hishon* will require law firms to reanalyze their employment and partnership policies and standards so that they can articulate a rational basis for partnership decisions.

Suggested Guidelines

The Hishon court did not set forth any guidelines for reviewing partnership decisions. It did, however, recognize that partnership decisions were necessarily subjective. The qualities of a good lawyer and legitimate business considerations cannot always be measured and quantified. I suggest the following to minimize firm's exposure.

First, articulate the standards for making partnership and put them in writing. Standards will vary from firm to firm but should always include the ability to write and perform research, to advocate the client's case, and the ability to attract clients.

Second, once a firm has developed its standards, it should state them to recruits and present associates. (In view of recent erosions in the "at will" employment doctrine, firms should let prospective associates know that employment may be terminated voluntarily by either party.)

Third, those standards should be worked into an evaluation form. Associates should be judged in accordance with the standards that the firm has declared essential for becoming a partner. (A suggested evaluation form accompanies this article.)

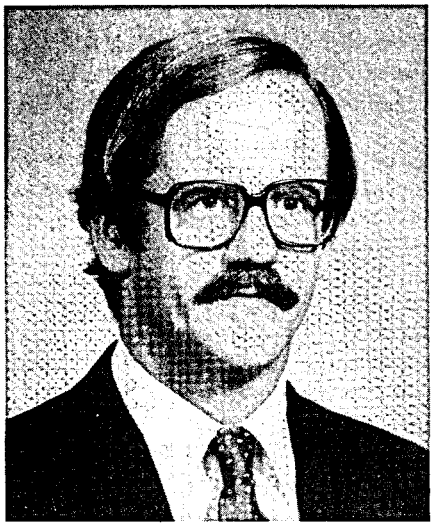
Fourth, the firm should evaluate each associate at least once a year, and preferably, semiannually. A thorough evaluation form will force the evaluator to consider all important aspects of an associate's performance.

Fifth, and most important, the firm should tell the associate the results of his evaluation. This can be done either orally or in writing. An associate who has been told clearly that his performance does not measure up to one or more of the firm's criteria is not likely to seek redress when he's passed over for partnership.

Sixth, the firm should document its evaluations. A paper record may be an administrative nightmare but it will prove invaluable when the disgruntled go to court. These records should be saved for at least two years.

Last, to ensure compliance with Title VII, other federal discrimination laws, and Delaware law, firms should subject their personnel policies to continual internal scrutiny. For example, job assignment, maternity leave, and work place harassment can affect decisions about creating partners and can lead to liability under the discrimination laws.

Though firms may find that *Hishon* creates administrative difficulties, in the long run the good personnel practices that the decision mandates should result in better management of associates. Difficult associates will be identified more promptly and the selection process of eligible associates who meet the firm's criteria will be fairer. →



Dick Elliott, a trial lawyer with Richards, Layton & Finger in Wilmington, has a sizeable labor practice. His article on the Hishon case and the creepy shadows it casts over the practice of law is his first contribution to DELAWARE LAWYER.

[1] 42 U.S.C. §§2000(e) *et seq.* (1976 ed., Supp V.).

[2] 42 U.S.C. §2000(e)-2(a) provides:
(a) It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

[3] See *Giles v. Family Court of Delaware,* Del. Supr., 411 A.2d 599 (1980); *National Cash Register v. Riner,* Del. Super., 424 A.2d 669 (1980).

[4] 19 *Del. C.* §711 (1979).

[5] 42 U.S.C. §2000 (e) (b); *EEOC v. Dowd & Dowd, Ltd.*, 34 FEP Cases 1815 (7th Cir. 1984).

[6] *Hishon v. King & Spaulding,* 24 FEP Cases 1303 (N.D.Ga. 1980).

[7] *Connecticut v. Teal,* 457 U.S. 440 (1982); *Hazelwood School District v. U.S.,* 433 U.S. 299 (1977); *Mason v. Continental Ill. Nat'l Bank,* 704 F. 2d 361 (7th Cir. 1983).

[8] *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5th Cir. 1982).

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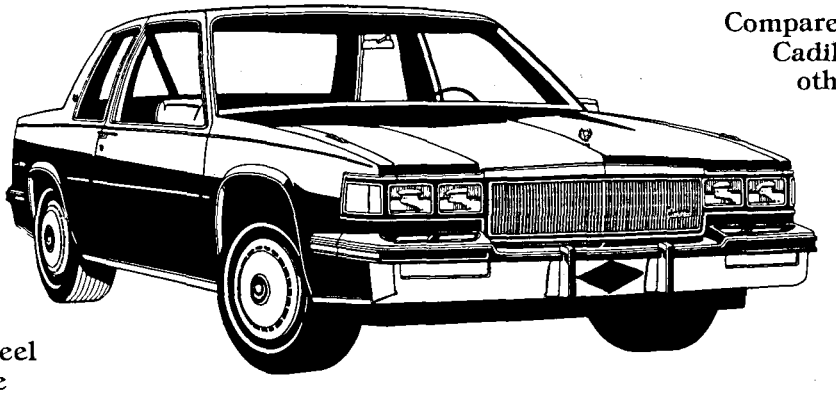

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ASSOCIATE: _____ EVALUATOR: _____ DATE: / /

SCALE: Rate Associate according to scale. Please provide specific comments where needed. Specific comments are needed to assist the reviewer. All blanks should be filled in.

5	OUTSTANDING:	Performance consistently and significantly above normal expectations. This performance level is only occasionally met in practice.
4	EXCELLENT:	Frequently goes beyond normal expectations. Effective and strong performance.
3	ACCEPTABLE:	Meets minimum requirements. No evidence of particular merit or serious defects or omissions.
2	NEEDS IMPROVEMENT:	Performance occasionally or frequently falls short of normal expectations.
1	UNACCEPTABLE:	Consistently fails to meet minimum standards of quality.

1. Technical Skills

_____ *Written work. Writes with clarity and precision. Final product is well organized. Needs only minor edit.

_____ Oral skills. Speaks with colleagues and clients in a clear, concise, persuasive and appropriate manner.

_____ Analysis/Research. Spots relevant issues. Research thorough and complete. Reasoning sound.

COMMENTS: _____

_____

_____

2. Judgment

_____ Knows when to make decision and when to ask for advice.

_____ Ability to work independently without supervision.

_____ Knows when and how to bring a matter to an acceptable resolution.

COMMENTS: _____

_____

_____

3. Work Habits

_____ Disciplined and organized.

_____ Ability to get work done on a timely basis.

_____ Ability to work under pressure. Quality of work does not diminish.

COMMENTS: _____

_____

_____

_____

A list of the matters worked on by the associate for the evaluator is attached. The evaluator should complete this form based on personal experience and not based on previous work or work performed by others.

4. Productivity

_____ Billable hours within limits.

_____ All time fully billed. Not necessary to write off time.

COMMENTS: _____

_____

_____

5. Attitude Towards Job

_____ Inclined to work hard.

_____ Interest and initiative. Will volunteer for projects.

_____ Willingness to delegate.

_____ Team spirit. Ability to work with others in office.

_____ Confidentiality.

_____ Tact and courtesy to others in office.

COMMENTS: _____

_____

_____

6. Personal and Firm Development

_____ Ability to attract and retain clients.

_____ Personality.

_____ Community involvement and contacts. Work for charities, politics, etc.

_____ Willingness to work on seminars, write articles and entertain clients.

_____ Has developed an expertise or specialty needed by firm.

_____ Ability to supervise others.

_____ Willingness to work on nonbillable firm administrative projects.

COMMENTS: _____

_____

_____

SUMMARY:

Please summarize your evaluation focusing on (1) significant strengths or potential, (2) areas that should be targeted for improvement, (3) contributions to the firm's business or reputation over the past year, and (4) areas where associate has developed (or is developing) areas of expertise.

If the Associate has worked for more than three years, please state your views on the Associate's long term prospect for eventual admission to the firm.

_____

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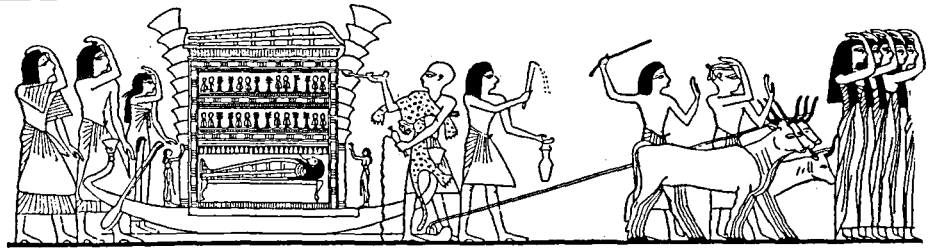
Signature

Pitfalls for the Unwary Employer



James F. Maher

Suppose your client asks you to review a temporary personnel agency contract. The contract he brings in looks like simplicity itself: in two pages it assures your client that the agency will take care of all taxes, reports and other details of personnel administration. While you're looking over the contract, your client mentions that he already has six employees from this agency working at his plant under a "hand-shake" agreement. He describes how, for a modest service fee, the agency sales representative has assured him of perpetual freedom from the nightmares' of interviewing and hiring, personnel administration, and the unpleasant tasks of firing or layoffs in the event of curtailed production. The client mentions that he has read in an article that the liabilities arising from employment are imposed only on persons who are considered to be "employers". Since the agency is the actual employer, he becomes positively lyrical in describing the new freedom of managing his business, forever rid of worries about a discrimination complaint, a union organizing drive or an unfair labor practice charge. He confides to you that when he wants a specific person for his operation, all he has to do is send him or her down to the agency, and a quick, confidential telephone call to the agency sales representative will assure that the person is placed on the agency payroll and promptly assigned to his account. To top it off, the agency's vacation plan and other benefits offered are less than his, so your client will enjoy real cost savings by not "employing" these people, but just by "leasing" them. Does he need more employees? One simple phone call will bring any number to the plant in a few hours. Does he need fewer? The same call takes care of that as well. And, since he can cancel the contract on a few days' notice, he can "clean house" whenever he wants to.

While you are talking, your client asks you to set up a new corporation that will operate a distribution business out of a warehouse a half mile away from his plant. As he describes it, about half the employees of the distribution company will work at the warehouse, while the other half employed at the plant will do work like packaging for shipment, loading and unloading trucks, and so on. Your client plans to handle normal variations in workload by directly employing some of the distribution employees and obtaining the rest from the agency. He wants the officers and directors of his current corporation to serve in the same capacity in the distribution company. He and his mother, who own the existing corporate business, will also be the sole stockholders of the new one. While you're considering the contract and corporate issues for your client, is there anything else you ought to tell him about? You may burst his bubble, but you'd better be ready to wave the red flag about the related principles of joint employer and single employer status.

"Joint Employer" Problems

Under the doctrine of "joint employership" (a detail the agency sales representative probably neglected to mention), your client and the agency can be considered *jointly* the "employer" of these "non-employees". This could make him share liability with the agency for unfair labor practices, obligations to bargain with unions, employment discrimination, sexual harassment, and even for criminal liability if wages aren't paid on time. Your client may be drawn into a maelstrom of problems caused by the agency's Neanderthal personnel policies over which he has no control. If a union is organized among the agency's employees, your client may have no opportunity to fight the organization drive and may be inescapably forced to participate with the agency in all its dealings with the union. And he may very well find that the agency has little motivation to control the costs of a union contract. Indeed, the agency's motivation may be pro-union because its service charge (15-19%) will simply be added to the wage and benefit charges in the agreement with the client. The ultimate escape clause of that agency contract may be unavailable if the National Labor Relations Board issues a bargaining order joining the agency and client as joint employers.

The first step in protecting your client from these perils, keeping him on the road to independence and prosperity, and making him thoroughly satisfied with his legal representation, is to avoid the snares that most commonly give rise to a joint employer relationship. Be most cautious where contract employees are going to be used for clerical work, truck driving, plant maintenance or janitorial work. These functions and any other integral to your client's primary business and not limited by the duration of a given project are the most fertile sources of this problem.

On the other hand, a joint employer relationship does *not* generally arise where, for example, a plumbing contractor is hired for a project. He is hired to achieve a certain limited objective, and as long as he completes the job on time and within budget, it isn't important whether he hires two men or twenty to help him, or pays them $4.00

King Tut's tomb: temporary agency help at the construction site.

or $40.00 per hour. The client has little to do with the contractor's employees.

In deciding whether your client has exposure as a joint employer, facts are paramount; the agency contract language is relatively unimportant when compared to the way the agency employees actually work. The standards by which your client's situation will be judged have been developed from cases decided by the National Labor Relations Board (NLRB) and have been adopted for use in other employment-related claims such as discrimination or wage and hour cases. As a rule, where there is a centralized control of labor relations or an intimate interrelationship of operations between the two businesses, the potential for a joint employer relationship is a real one. This check list highlights trouble spots:

1. Who assigns the work and directs the *means* of doing it? The more the agency employees are integrated into the central functions of your client's business, and the more closely they are supervised by your client's supervisors, the more likely a finding of a joint employer relationship.
2. Who initiates or carries out discipline—directly or indirectly? Discipline (such as warnings, suspensions, or dismissals) is one of the fundamental employer functions, and the more your client disciplines, the more risk he runs.
3. Can the contracting employer, without cause, reject employees hired by the agency or even control who the agency hires in the first place? Here again, if he does, the contracting employer is dominating a fundamental aspect of the employment relationship—hiring. Similarly, if the contracting employer is free to reject personnel hired by the agency without cause, that is evidence of his domination of the employment relationship.
4. Can the contacting employer establish wage rates, overtime pay or benefits? Many temporary agencies bill the contracting employer "anything you want plus X percent". The contracting employer should insist that, in the first instance, the agency rate the work that has to be done. Your client shouldn't be afraid to negotiate for a lower rate, so long as the agency remains independent.
5. Who controls changes in wages and benefits? When agency employees want a raise, it is typical that they approach the contracting employer. If the contracting employer feels that a raise is in order, he should only inform the agency that the employee's work has been good and that additional responsibility has been added. He should avoid suggesting that a raise of so many dollars per week be granted.
6. Can the relationship between the contracting employer and the agency be terminated at will or on very short notice? If so, the agency is deemed to have decreased economic power and, therefore, its ability to control its essential labor relations policy is questionable.
7. Does the agency carry substantial liability insurance for the work performed by its employees? If not, it is another sign that the agency is not truly independent of the contracting employer.
8. Does management of the contracting employer meet directly with the agency employees or otherwise communicate directly with them without intervening supervision by the agency? If so, and if the employees are thoroughly integrated into the basic operation of the business, it blurs the distinction between the employees of both agency and client.

You will need to decide whether the agency is sufficiently independent of your client, particularly in hiring, firing, discipline, and establishing wage rates and benefits, so that it can truly be said to control its own labor relations policy for the employees at your client's plant.[1]

If the careful attorney, after observing the operations at his client's site, and answering these eight questions, concludes that there is a risk of a joint employer relationship, he has two options to give his client: the first is to do nothing and accept the risk. (Remember that it is only *risky*, not illegal, to be a joint employer. The worst problems arise when employers mistakenly believe that they can treat the agency employees differently and still escape the consequences: unionization, discrimination charges, etc.). If your client concludes that there is no way for him to operate except by having temporary employees intimately integrated into his operation, he may simply decide that they will be treated like his regular employees. He can secure these employees from a high-quality agency so that the agency's approach to human resource management is at least some improvement over the way the pharaohs of ancient Egypt dealt with the building and construction trade on the pyramid project. Howevr, there isn't much reason for your client to use an agency if the legal effect is the same as if he hired his own employees.

If your client accepts your excellent advice and decides to avoid the joint employer issue by creating not merely the appearance but the reality of an "arm's length" relationship, the following precautions will not give him an absolute guarantee that a joint employer relationship will not be found, but will at least keep him from facing an open and shut case.

Isolating agency employees in self-contained functions or discrete physical areas of your client's place of business is one of the best ways to demonstrate that there is in fact an operational difference between his employees and the agency's. If this is not possible, any operational changes you can suggest to highlight the differences between agency employees and the client's (particularly as seen from the employee perspective) will be of some help.

→

The benefits and activities that your client extends to his own employees should not automatically be extended to agency employees. It may seem trivial, but it is helpful if agency employees are not invited to the annual company picnic. If your client's employees wear uniforms or coveralls, it is helpful if agency employees wear different ones. Likewise, identification cards should be different. If your client can isolate agency employees into certain functions or areas, he ought to consider obtaining a supervisor from the agency so that his management interaction is only through that individual. This helps to insure that within the general framework set by your client, the responsibility for assigning work and controlling the means of completing the work is left up to the agency. This is not to say that a little on-the-job, day-to-day interaction between your client's own employees and supervisors and those of the agency is going to be fatal to your strategy, but these contacts should be kept to a bare minimum.

The problem of temporary truck drivers is particularly troublesome. If your client's trucking operations are subject to regulation by the United States Department of Transportation (and almost all are), U.S. DOT regulations require him to control the total hours of work, maintain personnel files, and supervise other aspects of the driver's employment, particularly those related to safety. Until recently, the NLRB had concluded that the minimum amount of control required by U.S. DOT regulations was sufficient to establish a joint employer relationship. This left employers stuck with the classic Catch 22 situation where they were penalized for doing what another government authority compelled them to do.

In two very recent cases, one of them in Delaware, the NLRB has changed its position somewhat. Now, the NLRB will be assessing the contracting employer's role in the employment relationship, for example, hiring, firing, discipline, supervision, and direction. Your clients who use agency truck drivers should feel a certain degree of confidence in operating this way so long as they maintain an "arm's length" relationship with the agency in these work-related categories.[2]

The slightest taint of blurred distinction will not necessarily be fatal to your client's position, but the totality of his conduct is going to be examined.

If your client manages to avoid the joint employer relationship, he will indeed enjoy many of the freedoms that are touted as the advantage of using agencies — flexibility, ease of scheduling, minimized internal paperwork, etc. But even the best system, initially established to avoid a joint employer relationship, must be regularly monitored to insure that a casual course of dealing does not undermine your best management plans.

"Single Employer" Pitfalls

Of course, it's clear now that your client can get tripped up not only by a temporary agency but by his own efforts. (Clients have a way of doing that.) By becoming a victim of the "single employer" phenomenon clients find that the problems arising at one of their facilities spread like wildfire to their other operations. In the hypothetical example above, your client has *also* asked you to set up a distribution company that will have both a separate location and some presence at the client's existing plant.

Your client is most likely to face the "single employer" issue if a union organizing drive erupts at one or the other of his companies, assuming he is not presently unionized. If employees at his first company are represented by a union before the distribution company is established, the union may try to absorb the distribution company's employees as an "accretion" so that the tedious process of obtaining their consent to unionization can be avoided. If your client is in the construction industry, beware. The issue of "double-breasted" operations has received a great deal of attention. "Doublebreasting" is usually characterized by a single parent corporation with two subsidiaries, one of which has been formed to operate without a union. Although it would be a digression to explore "double breasting" here, you should realize that the "single employer" strategy is one of the most effective union tools to defeat this kind of corporate mechanism.

Since the NLRB has jurisdiction over most situations where these claims arise, it has established some presumptions about multi-location employers. They are not conclusive, but absent "unusual circumstances" they will apply. In a manufacturing business, it is Board policy that a single plant is generally appropriate for a single collective bargaining unit, unless it has been so effectively merged with another as to destroy its identity.[3] If your client is a retail outlet with multiple stores, the Board may well find that single store bargaining units are appropriate unless countervailing factors appear.[4] Because unions must show that they represent a majority of the employees in an "appropriate bargaining unit," employers have often tried to expand that definition to a wider, multi-location unit to defeat a claim of representative status. It is NLRB policy, therefore, to say that employees in a single location share a community of interest sufficient to bargain effectively with the employer.

If your client neglects the distinction between his two companies, he cannot expect the NLRB to be very much impressed by them. Check the factors below. They are going to be considered in making this determination in a typical industrial or service sector case. The more affirmative answers, the greater the risk that two companies will be deemed a single employer:

1. Do the two companies share common officers, directors and shareholders?
2. Does the same person make essential decisions regarding labor relations policy for both companies?
3. Do the two companies exchange employees temporarily or permanently?
4. Do the two companies exchange supervision?
5. Are the facilities of the two companies interdependent or are their functions closely integrated?
6. Are the skills and functions of employees in the two companies similar?
7. Are the facilities geographically close?
8. Is there a collective bargaining history that suggests the employer has considered the two groups essentially one?[5]

The slightest taint of a blurred distinction will not necessarily be fatal to your client's position, but the *totality* of his conduct is going to be examined.

If your client is faced with a union organizing attempt at his new warehouse, he will want to insulate his production plant from that challenge. If he has been careless about the distinctions between his companies, it is possible that the union will be able to show that it has substantial support (e.g., 30% of the work force) from both facilities considered as one, and that (because of your client's carelessness) the two constitute "a single employer". If the union prevails and your client then refuses to recognize the union at the distribution company, there could be lawful picketing at both companies. On the other hand, if there is a valid distinction between the companies, the client will have a good chance of getting an injunction to remove the pickets from the first company on the principle that the picket line is an unlawful secondary boycott against a neutral employer. If the two companies are arguably a single employer, forget about that injunction and face the dicey problems of getting materials, product, and personnel through a picket line.

For employers in a "controlled group," (e.g., parent-subsidiary, brother-sister companies with a common holding company, a joint venture and its →

partners, etc.) the best policy is to observe carefully the distinction between members of the group. Employees should be able to prove that personnel policies are set independently and that the authority for independent and substantial decision-making resides in each company. For example, if the "home office" decides that there will be eleven paid holidays during the year, each company should have the authority to decide *what* holidays. Moreover, your client should avoid a regular ebb and flow of employees and supervisors between companies. It is probably acceptable for one or two persons to be common officers of all the companies, but they should steer away from active roles in setting personnel policies. The best planned program will be useless unless there is regular periodic review of the operating details.

The most valuable, cost effective, and satisfying service you can give your client in the human resources counseling field is that of *preventive* labor relations. It has been said time and again that of all the problems a businessman faces with suppliers, customers, bankers and government regulators, the problems that he will find most frustrating and the ones that keep him up at night are the "people problems" that this kind of foresight and planning can help him avoid.

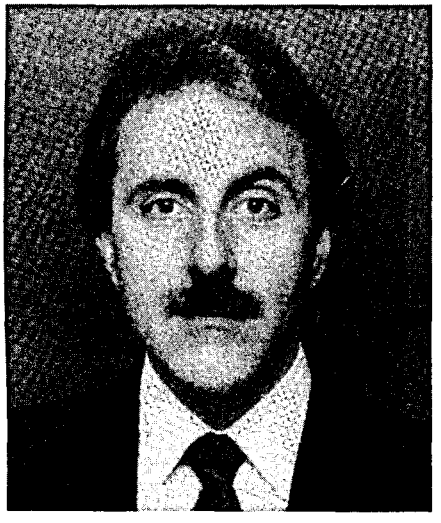
[1] *See NLRB v. Browning-Ferris Industries,* 691 F2d 1117 (3rd Cir., 1982) and related case authorities.

[2] *TLI, Incorporated and Crown Zellerbach Corporation,* 271 NLRB 128 (1984) and *Laerco Transportation and Warehouse,* 269 NLRB 61 (1984). As the recent shift in position is still subject to appeals, further substantial changes are still possible.

[3] *Temco Aircraft Corp.,* 121 NLRB 1085, 1958; *Penn Color, Inc.,* 249 NLRB 1117, 1980.

[4] *Hagg Drug Co.,* 169 NLRB 877, 1968.

[5] *Trustees of Columbia University,* 222 NLRB 309, 1976.



James F. Maher joined the Hercules Incorporated Legal Department in 1980 after five years of representing management in employment law issues in New York City and Philadelphia. He is currently serving as Secretary to the Delaware Bar Association Section on Labor and Employment Law, and has contributed to the Association's Continuing Legal Education Program in a seminar on wrongful discharge. He recently lectured at the Wharton School of Economics.

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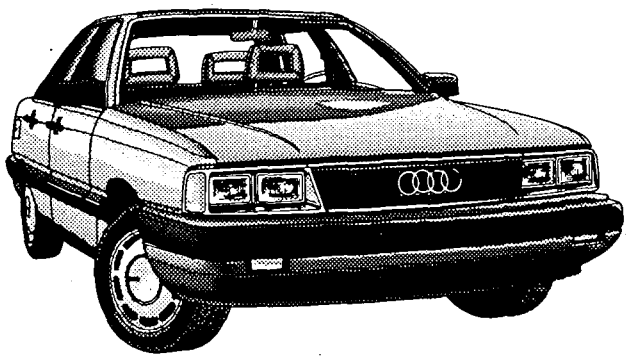

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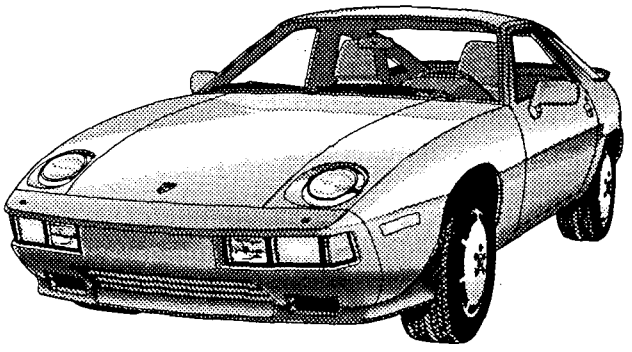

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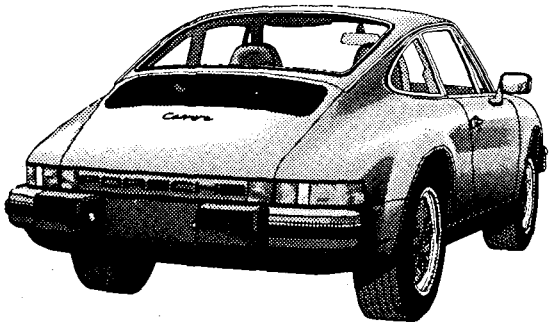

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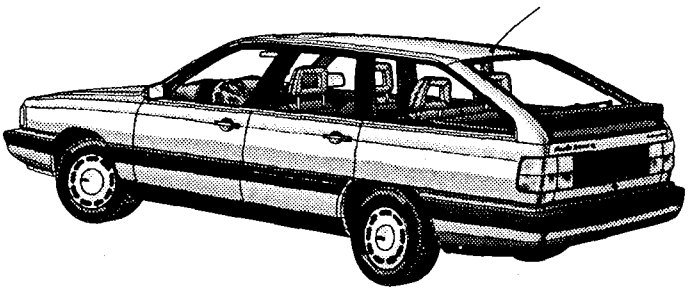

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Preserving the Constitution: The Autobiography of Senator Sam Ervin

The Michie Company
Charlottesville, VA
1984 (436 pages)
$19.95

Senator Sam Ervin's national prominence during the Watergate scandal displayed him as consummately charming and cagey, a lovably theatrical old pro, a sort of Joe Welch of the nineteen seventies. Once again a trial lawyer of the first rank gave the performance of his life before a riveted national audience. What that star turn did not disclose is that Senator Sam is an exceptionally knowing and acute critic of constitutional adjudication. His autobiography, perhaps his valedictory to the American people, is a splendid gift to us on the eve of the Constitutional Bicentennial.

It is the Senator's thesis that the three branches of national government, the Executive, Congress, and worst of all the Supreme Court, have engaged in the subversion of our fundamental law to accomodate transitory and subjective notions of social betterment. He makes a persuasive case, unflinchingly, if grievingly propounded. To be sure, he takes one side in a legitimate dispute over constitutional philosophy. One hopes that when issue is joined his adversary will bring the same degree of intellectual honesty to defending affirmative action, forced busing, and bills of attainder masquerading as guarantors of voting rights that Ervin brings to attacking them. This reviewer is not impartial and should show his cards face up. He has long considered the manufacture of hitherto unsuspected "constitutional rights" the most pernicious cottage industry in a republic increasingly balkanized by strident and petulant minorities.

In a most interesting passage Ervin makes a surprising and provocative point: we may well subvert civil liberties (i.e. constitutional ones) in order to advance "civil rights". The latter, a class of preferences extended to a vocal and picturesquely beleaguered minority, are granted at the expense of those less effective at lobbying. Evenhanded treatment of the majority, mandated by the Bill of Rights, may bow to minority groups who exploit old grievances.

One of the Senator's better aperçus is that the Supreme Court, by pretending to apply *Brown v. Board of Education* (an opinion he has come to admire strongly), has managed to eviscerate its one intellectually respectable holding.

Of course Ervin's arguments will infuriate a great many people - the very people he will delight with his attacks on such threats to civil liberties as "no knock" laws that many of us have accepted with perilous docility. I suspect that Ervin will be alternately embraced and reviled by those he seeks to protect, that is *all* of us.

A full dress debate on the issues Ervin has raised would be a splendid 200th birthday present to our national charter. Those of us who regularly genuflect before the Constitution might even begin to understand it. One also imagines that Mrs. Reagan might slip a copy of the Senator's book into the President's next Christmas stocking. He should find it of considerable interest when he gets to fill those expected vacancies on our highest court.

The book is rounded out with a good deal of pleasant autobiographical material —good to read and helpful in understanding the gradual formation of an intellect and character so fiercely dedicated to the Constitution he celebrates.

WEW

Sources of Law Legal Change and Ambiguity

Alan Watson, Professor of Law
The University of Pennsylvania
University of Pennsylvania Press
1984 (156 pages)
$22.50

Professor Watson's book combines genuine philosophic interest with an acute examination of a measurable reality - the "sources" of law. His premise is creative: law in any country at any time may be understood by examining those sources, whether they be custom, juristic commentary, legislation or judicial precedent. Each source has advantages and detriments. By studying both in their historical settings, it becomes possible to formulate a model for rational lawmaking and reform that will avoid the defects of past and present legal systems.

Watson gives a valuable perspective to those of us who reflexively equate the law with statutes and court decisions (an historically inaccurate view). In Roman times sources of law consisted of juristic commentary, beginning with the College of Pontiffs, continuing with lay jurists such as Cicero, and ending (during the Empire) with edicts, decrees, and epistles. The inherent defects of each created its own brand of legal confusion. Public access to law was limited or nonexistent, and there was no generally accepted method of determining which jurist's opinion was authoritative. Lawmaking by legislators was rare, and courts as we know them did not exist. Legal growth was stunted by increasing reliance upon the irrelevant opinions of ancient jurists.

Watson next examines Germany and Northern France during the 13th through the 15th centuries, where legal systems rested upon an entirely different source: local custom. It varied from town to town and was often not reduced to writing for years. That reduction — when it came — was sporadic and unofficial, and it was often difficult to establish with

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Sources of Law Legal Change and Ambiguity

precision the law of any locality. Difficulty deepened when one town "adopted" laws of another. Although responsive to the local community's needs, law based on custom was neither comprehensive nor in many cases even comprehensible.

The 17th century marked the "reception" of a newly-revived Roman law in northern European countries. Reception reintroduced the ancient and quite vexing problem of choosing among different jurists' differing pronouncements. It was also bedeviled by inaccuracies in translation from ancient texts and conflicts between Roman law and local custom.

Finally, Watson turns to mid-18th century England, which had developed "modern" sources of law, statutes and judicial decisions. These, too, had imperfections: obsolete statutes remained unrevised or unrepealed. Judicial decisions, though written, were infuriatingly unclear about what they really held or why. Moreover, Parliament would often fail to address entire areas of private law, withholding needed reform.

In Watson's hands a "source of law" becomes an analytic tool for devising better means of making laws and avoiding errors inherent in a source. He asks three questions to determine the adequacy of a source: (1) Is it responsive to the community's needs? (2) Does it cover all necessary subjects? and (3) Can people understand it? The answers (tantalizingly withheld until the last chapter) permit assessment of the virtues and vices of the source prevailing in any historical period. For example: judicial opinions and customs are responsive to community needs. So is reform legislation. However, decision and custom are specific and local and not necessarily illuminating. Furthermore, custom is hard to prove and leads to judicial opinions of uncertain rationale. Juristic commentary lacks authority, unless there is some agreement about an accepted commentator. Statutes, while capable of embracing an entire branch of law, may fail to respond to community needs, because of obsolescence or legislative unwillingness to reform or codify.

The book concludes with a proposal for lawmaking that satisfies Watson's three criteria by combining two different legal sources: "first rank" law, consisting of a written code for all branches of public and private law and "second rank", an extensive commentary on that code, a commentary entitled to the force of law and subject to continual revision. Under this scheme judicial opinions would *not* be a source and one could not cite them as precedent. A special committee of the legislature charged with continual revision of the commentary would obviate reliance on judicial decisions. The scheme would be comprehensive: all public and private law would be codified, and the code would be revised every four years. By Watson's prescription it would have the virtue of being readily accessible to ordinary citizens, because code and commentary would be clearly and simply written. Clarity and simplicity are indeed attractive virtues, especially after one finishes this book.

We must risk sounding ungrateful for Professor Watson's very substantial achievement, the work of a first class intellect with considerable imagination. We must take that risk, however, if we are to play fair with those who rely on book reviews. Watson's style is daunting, if not impenetrable. Perhaps his formidable erudition so cowed his editors as to deflect them from their duty to insist that he stoop to a level of popular lucidity. We do not suggest that a book of this complex profundity can be hammock reading, but we are fearful that Watson, the academician, subscribes to the view that the reader should work just as hard as the author, and that nothing readily grasped is worth grasping. That view is mistaken: it puts real excellence off limits to many intelligent readers.

JBJ

SCHOOL WILL KEEP?

New Educational Labor Law in Delaware

David H. Williams

The Public School Employment Relations Act of 1982 was the most significant development in public employment relations in Delaware since 1965, when the General Assembly passed a law permitting certain public employees to bargain collectively. The 1982 act (hereinafter "the Act"), which applies to public school teachers, creates the Public Employment Relations Board, establishes the scope of collective bargaining, defines the acts that constitute unfair labor practices, and provides the Board with tools for resolving a collective bargaining impasse.

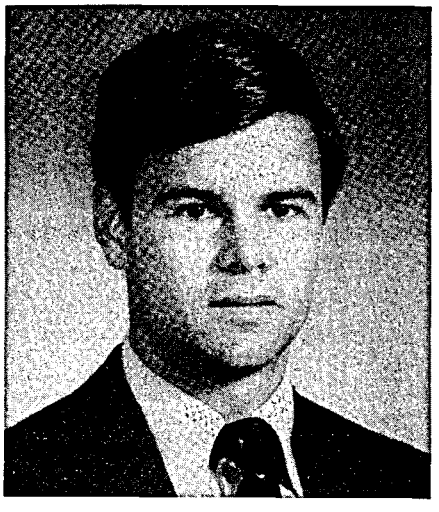
At common law public employees had no right to bargain collectively. In 1965 the General Assembly carved out an initial exception by adopting the Delaware Right of Public Employees to Organize Act, which covers the employees of the State (exclusive of teachers, any person elected by popular vote, and any person appointed to office by the Governor), of any county, and of any municipality that elects to come under that statute. Employees have the statutory right to elect an exclusive bargaining representative and employers must bargain collectively with the exclusive bargaining agents that represent their employees. In 1969 the General Assembly gave public school teachers the right to bargain collectively by adopting the Professional Negotiations and Relations Act.

Although Delaware's public employees now have the same right to organize and bargain collectively that private sector employees have had for several decades, there is a fundamental difference. Employees in the private sector have the right to strike. Delaware's public employees do not. Such strikes conflict with the public policy established by the General Assembly. The primary reason for this legislative prohibition is that a teachers' strike deprives the students of an education during the course of that strike. The difference between the private sector and Delaware's public sector is critical because the right to strike is labor's primary economic weapon. By the same token, employers have obvious economic weapons. Stated simply, risk of loss to both parties is so great that compromise is normally cheaper than economic strife. It is the absence of these economic weapons that creates the need for third party intervention when a school board and its teachers reach an impasse. The 1969 statute did not provide an effective mechanism.

Shortly after 1969 teachers in the various school districts elected representatives and negotiated collective bargaining agreements. It was not long, however, before the collective bargaining process broke down in several districts, most notably the former Wilmington School District, which suffered through a long, bitter teachers' strike in September, 1975.

The 1978 consolidation of eleven school districts in Northern New Castle County set the stage for a teachers' strike that eclipsed the 1975 Wilmington strike and forced attention on the issues surrounding the collective bargaining process between teachers and school districts. It was obvious to even the casual observer that the Board of Education of the New Castle County School District and the New Castle County Education Association (the union representing teachers employed by that district) faced a difficult task in negotiating a collective bargaining agreement that would establish a uniform salary schedule and uniform working conditions for teachers from eleven district previously covered by eleven different salary schedules and a wide assortment of working conditions. The six week teachers' strike of October-November 1978 was predictable. The strike was also unprecedented in scope. It affected 60,000 students constituting two-thirds of the public school population of the State and nearly 4,000 teachers. It became apparent that the existing statute did not provide the means of avoiding or resolving such conflicts. In short, the time was ripe for a substantial revision of the collective bargaining statutes covering public employees.

Governor duPont seized the initiative. Working closely with Dennis Carey, the Secretary of Labor, the Governor's Office proposed a series of bills for the General Assembly's consideration. Carey had a unique insight into the problem because he had been the administrative assistant to the Superin-



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tendent of the New Castle County School District at the time of the 1978 strike. After several years of debate on this politically sensitive subject the Act finally emerged and the Governor signed it on July 7, 1982. The legislative battleground involved such issues as: Should arbitration be binding or advisory? Should arbitration be limited to the interpretation and application of the contract or also apply to negotiations? Should teachers be required to pay dues as a condition of employment? Was it necessary to create a State agency to referee disputes between employers and unions? Should various subjects be classified as mandatory, permissive, or prohibited topics of collective bargaining? Representatives of the Delaware State Education Association and the Delaware School Board Association were the principal players in the lobbying that addressed these issues.

In addition to the debate over substantive issues, there was a threshold controversy: *which* public employees would be covered by the new legislation? Teachers were clearly in from the outset, but the American Federation of State, County and Municipal Employees, the predominant union representing public employees other than teachers, successfully opposed the inclusion of State, county, and municipal employees. The union representing many police officers successfully resisted efforts to bring their number under the Act. For the time being the Act is limited to teachers.

Given the difficult issues the Act presented, it is a credit to the General Assembly that it was adopted. Political compromise, however, resulted in a statute that is less than crystal clear in delineating the scope of bargaining. This apparently reflects the attempt to make the Act palatable to a majority of legislators by avoiding sharp lines that would polarize, rather than create a consensus. Voting on the Act ultimately went along geographical rather than party lines. Most legislators from above the Canal voted for the Act, with the exception of a pocket of resistance from several Brandywine Hundred legislators. Most legislators from below the Canal voted against the Act. Although there are certainly several factors accounting for this split, a history of educational labor problems largely confined to Northern New Castle County may furnish a partial explanation.

At the same time the General Assembly was putting the finishing touches on the Act, the Delaware Supreme Court was hearing arguments over the scope of bargaining permitted under the predecessor statute. The Board of Education for the Colonial School District, created in 1981 as a result of the reorganization of the New Castle County School District, took the position that the 1969 statute prohibited school boards from negotiating a contract covering any subject other than salaries, employee benefits, and physical working condition. The Colonial Board advanced this argument, although virtually every teachers' collective bargaining agreement in the State included many items that the Colonial Board contended were unlawful. In its August, 1982 decision the Delaware Supreme Court ruled in favor of the Colonial Board. The effect of this decision was to declare that most of the provisions of the existing teachers' collective bargaining agreements in the State were illegal. Moreover, because the Act, signed by the Governor less than a month earlier, did not apply to any contract negotiations initiated, pending, or in litigation before the Act became law, the Supreme Court decision strictly limited the scope of bargaining in the round of negotiations that preceded the 1982-83 school year. The Supreme Court opinion, together with the less than precise definition of the scope of bargaining in the Act, thrust the scope of bargaining issue to the top of the list of issues to be decided by the Public Employment Relations Board (the "Board") during the round of bargaining that commenced in the Spring of 1984.

It is the creation of the Board that marks a turning point in public sector labor relations in Delaware. For the first time Delaware has an agency with powers and responsibilities akin to those of the National Labor Relations Board, which services employers and organized employees in the private sector. The Board has the power to adopt rules and regulations, hold hearings, rule upon unfair labor practice charges, determine and certify exclusive representatives, and assist in the resolution of collective bargaining negotiations through mediation and fact-finding.

The Board is composed of three members appointed by the Governor and subject to confirmation by the Senate. Those presently serving on the →

Board are all graduates of law school and two of them practice law in Delaware. Chairman Arthur T. VanWart has extensive experience as an arbitrator. Barbara-Cherrix O'Leary practices law in Rehoboth, and Charles Toliver is a Wilmington attorney with a background in labor relations and education law as an assistant City Solicitor of Wilmington.

The Board's first significant act was the appointment of Charles Long as Executive director. Long, a graduate of the Delaware Law School, holds a masters degree in labor law from Temple Law School, and has several years of experience in labor relations. Because the Board adopted regulations that establish the Executive Director as the initial decision maker, this administrative officer plays a pivotal role. The Executive Director's decision is subject to the Board's review upon the request of either party, and the Board's decision may be appealed to the Court of Chancery.

In the Spring of 1984 it appeared that Charles Long and the Board would be in for a busy year. Of the nineteen school districts in the State sixteen districts were in the process of negotiating collective bargaining agreements with teachers. However, as of October 4, 1984 negotiations in eleven districts had produced contracts. During this period of intensive negotiations throughout the State, the Board has received only five unfair labor practice charges. They have resulted in two decisions, the withdrawal of one charge, and the dismissal of another. One charge was pending as of this writing.

The ambiguity of the Act on such critical issues as the scope of bargaining, and the lack of a forum of asserting charges of unfair labor practices before 1982 suggested a potential flood of unfair labor practice charges. The flood never came. Several factors may account for this. First, in most school districts the parties negotiated essentially the same topics that were the subject matter of collective bargaining agreements before the Supreme Court decision in the Colonial case and before the adoption of the Act, and disputes over the scope of bargaining did not surface. Second, it was apparent that the assertion of an unfair labor practice charge would in all likelihood delay the collective bargaining process. Third, there may be some reluctance to test the waters, given the absence of any significant experience with the Executive Director or the Board.

In any event, there is one significant decision (the Appoquinimink dispute) that draws a line between the items school board *must* negotiate and the permissive topics a board *may* negotiate. The Executive Director has concluded that the General Assembly intended to broaden the scope of bargaining. Accordingly, in his judgement a broad range of issues involving teachers' working conditions are mandatory or permissive bargaining topics, in addition to salaries, hours and grievance procedures. In the Executive Director's view, the adoption of the Act legislatively overruled the Supreme Court decision in the Colonial case. Since neither party to the Appoquinimink case requested Board review of the Executive Director's decision, the Board's view on the scope of bargaining, as well as other issues, remains unknown. Moreover, the categorization of bargaining topics as mandatory or permissive will have to be refined and developed case by case. Nonetheless, the Appoquinimink decision is an important first step in defining the scope of bargaining under the Act.

The Act remains untested in one critical respect. Does it provide an effective mechanism for resolving an impasse? It provides for mediation, but mediation has not been particularly effective in the past. The new tool available to the Board under the Act is *fact-finding*. If nothing else, fact-finding is designed to identify the issues and expose the bargaining process to public scrutiny by publishing the fact-finder's conclusions and his recommendations for resolving the dispute. This assessment by a third party is one step short of submitting to binding arbitration.

Blinding arbitration of the outstanding issues would obviously provide a sure resolution of a collective bargaining impasse, but binding arbitration is at odds with the notion that school boards are autonomous governing bodies with the ultimate responsiblity for the fiscal operation of their districts. A school board would necessarily lose some control over its budget if economic issues were submitted to binding arbitration.

Teachers Strike Rally, Rodney Square, September 24, 1975

At this point, it is too early to tell whether the Act will improve labor relations between teachers and school boards. The strong leadership of the Board's Executive Director in promptly, objectively deciding unfair labor practice charges has been a good first step. However, the Board is writing on a clean slate. It will take several decisions on the critical issues to put flesh on the provisions in the Act addressing unfair labor practices. The net critical test for the Act will arrive when the Board must attempt to resolve a bargaining impasse between a school board and its teachers. The Act will probably work if effective people construe and apply the Act and the parties are really searching for a solution. □

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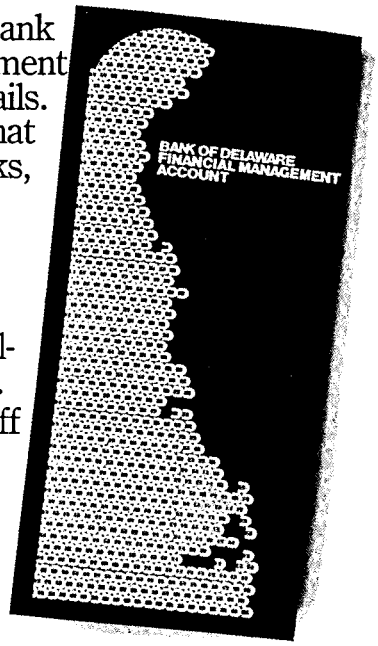

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Murder in the Forest

(or "The Sapling's Revenge")

William Prickett

As I trudge up the hill from our law offices to the State or Federal Courts beyond Rodney Square, I often set down my heavy briefcase and wearily stoop over to pick up hamburger wrappers, old newspapers and whiskey and beer bottles. I dump this litter in trash cans or in the backs of pick-up trucks if there happen to be any out on the street. However, quite often, I show up in Court with a briefcase in one hand and a fist full of dirty trash in the other hand. My associates and law clerks believe that I am turning dotty and now have some sort of a fetish about picking up the trash discarded in our streets. I have shamed some occasionally into helping me in these pious tasks. However, behind my back, I sense the smirks and winks of those who are really "trashers" at heart rather than "pickers-up".

However, this is not a plea for civic cleanliness: indeed, it will take far more than the efforts of Mayor Wilson Goode or a homily or tract such as this to reverse the vast tide of filth that Americans freely toss about their streets, highways, movie theaters and elsewhere. Rather, it is to explain why I have trouble going by paper or trash without bending over to pick it up no matter how dirty or disgusting it is. I was not always this way. Like other liberty loving Americans, I grew up confident that gravity would always dispose of whatever dropped from my mouth, my hands or my car. Now in some sense now I am like a Flying Dutchman sailing under a curse: my curse is to pick up municipal garbage. This little note is to explain to those who have not already been turned off by this somewhat trashy beginning why I do it.

Some years ago, I bought the very pleasant house in Greenville that I now live in situated on a high hill overlooking the public woods that surround the reservoir. One of its principal attractions is that it was built in a rare stand of original woods of giant old oaks and towering tulip poplars, with an occasional wood beech whose white bark stands out from its darker neighbors. From the terrace through the lower second growth could be seen the vague outlines of the reservoir. One of the first things that I did to improve the new property was to take my pruning clippers, my two-headed axe and my Canadian timber saw and remove the stubble of second growth on my property that stood between me and my view of this expanse of municipal water. When the work was done, I found that I did have a pretty good view, but across the road and fully fifty feet into the public parkland, there stood a solitary six-inch sapling, whose spreading branches impeded my view of the public lake. I knew that it had been forbidden, at least since the time of King Richard I, to cut down trees in the royal forest, and it still is. On the other hand, others with houses surrounding the reservoir had unabashedly cut down the whole public woods, right down to the very water's edge. Good wrestled with evil: evil won. One dark and stormy February night about midnight after a few belts, I took out my trusty Canadian timber saw. I trudged across the silent snow covered road and onto the adjoining parklands to the sleet and snow covered tree. A score of singing strokes with my blue-cold saw was all it took to cut the offending sappling about three feet above the ground. I left the tree where it fell. The wicked deed had been quickly done. I looked guiltily around but there was no one out at that ungodly hour in such weather to protest. I trudged sneakily homeward with my "bloody saw", content that I had quietly "murdered" the last impediment to my own view. However, the next day to my disgust I found that behind where the sappling had stood, but between it and the lake, there was yet another impediment: a cluster of mature pin oaks! Another arboreal head had to roll. I pondered about how I could do this second crime.

In the meanwhile, to my utter surprise and consternation, in the Spring of the year, I got a phone call at my office. The gruff voice at the other end announced in stentorian tones that the caller was the Head of the County Parks System. His stern talk went somewhat as

Photo by Eric Crossan

follows: "I am the Head of the County Park System. There are many, many people who destroy our beautiful parks in various ways. There are litterers, there are garbage dumpers, there are beer can throwers. Of course, drug users think that our parks were made for their disgusting practices. However, some crazy went into my woods last Winter. For a reason unknown to me, this looney took a timber saw and cut down one of my fine young trees. Whoever he was, he did not even carry the tree away or use it for anything: he simply cut it down and left it there. If I could find out the name of the criminal who committed this outrage, I would make such a public example of him that neither he nor anybody else would ever dare do something like that. Do I make myself clear?" He was breathing hard by now and virtually shouting. I could tell that I was dealing with someone who was very, very angry. My own heart was pounding. I stammered words to the effect that I could quite understand his righteous rage at this act of barbarism. I hastened to assure him that I was quite, quite certain that no one would ever dare to repeat such a dastardly act. He paused ominously. After a while, he concluded our little conversation by slowly and pointedly saying, "I am certain I have made my point absolutely clear." He then hung up.

I was shaken. For a while I simply thanked my lucky stars that I wasn't in the local lock-up. However, it still left me with the nagging unresolved problem of the clump of pin oaks. In order to catch a view of the simmering expanse of water, it was necessary to get rid of this further impediment. Pretty soon, the devil was at work again. The impediment was no mere six-inch sapling: rather, it was a mature spread of pin oaks consisting of three separate trunks, each measuring perhaps 12 to 14 inches at the butt. No mere twenty strokes by a Canadian timber saw by moonlight would get rid of these giants. Furthermore, this clump of trees had a good health and with exposure to sun, wind and water, they would grow year by year and in a short time would surely close off all my view of the lake. Thus, I began again to plot how to rid myself of the arboreal intruders. First, I told all friends and visitors to the house in detail about my problem. I had done favors, both fair and foul, for many. I hoped that at least one would take my broad and repeated hints. Perhaps like the dutiful courtiers of Henry II one would suddenly do the desperate deed that I wanted done. Then, I could plead innocent to the actual deed (though I would, Like President Carter, be guilty of the act in thought at least). Many were sympathetic and talked bravely over cocktails about how and when it could be done. Not one had the skill, energy or perhaps the courage or taste to really do the deed.

However one day, a friend who works for a midwestern agricultural company came for a drink. On hearing and seeing my plight, he suggested that his company had a jim-dandy little remedy in the form of a new and very powerful herbicide (poison). All that was required was that a few drops be sprinkled on the ground around the clump of trees. The trees' days would be numbered: like magic, they would quietly wither away. I decided to risk the ire of the County official. I asked this obliging poisoner to obtain a single cupful of the lethal potion. However, several days later, he called me. In a shaken voice he suggested that his remedy would not do at all. When I demanded angrily why not, not wishing to be lightly done out of something that seemed to answer my every need, he explained. Though it was not as deadly as Agent Orange, this vigorous little herbicide had been used with outstanding success in Southeast Asia during the Vietnamese incident. In fact, it had felled miles of jungle and forest, including every living thing in and about the area. However, if it were to be used to rid me of a few offending trees, it might well trickle down into the reservoir. If it did so, it would risk killing perhaps as many as 40,000 to 50,000 inhabitants of Wilmington, besides all of the fish and wildlife in and around the reservoir. When I said, "You're kidding", his frightened reply →

was "Not at all." Even to me, use of the herbicide clearly seemed like risking something by way of overkill.

Foiled again! For a year, I sat on my terrace and looked glumly out, my impatience growing as the branches of the trees grew bigger. However, I could not think of a safe means to rid myself of these trees. But, I was as patient as a wronged Venetian, sure that some means would present itself to expunge the exuberant pin oaks.

Patience seemed to be its own reward. One frosty January day, my savior and what appeared to be the trees' downfall magically appeared. The County itself had let a contract to a tree company to decapitate the trees that had the effrontery to impinge on telephone and electric lines. Here, then, was an entity that had a continuing license (nay, a mandate) to do exactly what I was so expressly forbidden to do. I walked over to the crew and asked to speak to their foreman. A great hulk of a man with a red face and long greasy blond hair curling out from under his orange helmet lumbered forward. In a hangdog manner he asked what I wanted. (A perfect villain ready to carry out my cruel wishes!) I took him privately aside and mentioned that I had a nasty job to be done. Since he didn't seem put off at all, I led him up onto the terrace and pointed down at the offending clump of trees. I asked whether he could see his way clear to eliminating those trees. He pointed out to me that the trees were standing well clear of the road and the wires. There was absolutely no reason on God's green earth why he could and should cut them down. However, at that point, his hand and mine crossed: twenty pieces of paper engraved with a picture of our first President (also a hatcheter of trees) slid into the pocket of his greasy overalls. At that point, he saw the light: I had not mistaken my man. He said that all things were possible. With a wink and a nudge, he fell readily into my plan. He himself suggested that the trees, though in their prime, might indeed fall down or be blown down. If that were indeed to happen, he continued, not only would it take out the phone but the electric wires and thus, our neighborhood would be in darkness and without the pleasures of telephone. It might even (God forbid!) cut the T.V. cable. That would leave the area in cultural darkness and without benefit of such triumphs as Hawaiian Five-O, Dynasty and even Knotts Landing. Rather than have such a disaster inflicted on the community, he said that he saw it as his moral duty to cut down this potentially dangerous clump of trees. I sealed our conspiracy with one more touch of green. Then I went off to my office with a smile on my face. My illicit design was being accomplished by an instrument of the County's own creation. That night, I could hardly wait to get home to see the result. In the darkness, I peered from my terrace. I could see nothing at all. However, when I stood on the terrace early the next morning, I saw to my dismay the trees which I had carefully pointed out to the woodsman were still there, their branches like fingers starkly outlined against the wintery sky and the icy waters of the reservoir. The forester in whom I had put so much trust and confidence and indeed had plied with hard-earned after-tax dollars had shortchanged me. However, he had done so in such a way that I could not complain. He had indeed cut down a tree but it was much smaller than my clump. It was not in my view at all. In addition, it was much, much closer to the power lines and could indeed have fallen on them. Thus, I could not complain at all. Indeed, with whom could I lodge a complaint at not having a crime committed?

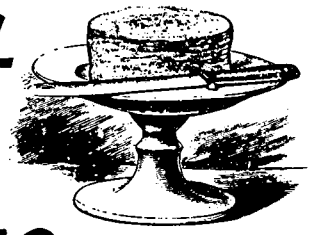
Finally, as I was about to give up, the very forces of nature appeared miraculously. I thought at first that they would do the job for me. I speak, of course, of that scourge, the Gypsy Moth. Suddenly, the magnificent stand of trees around my house became a creeping, crawling mass of Gypsy Moths who descended at night on their own watery skeins, climbing back up again by daylight to eat and desecrate my beautiful trees. In time, though I sprayed and prayed on my own side of the road, many ancient trees that have lived for 150 years died. They had to be cut down and sawed up for firewood. But, as if to mock me, the clump of pin oaks flourished. On that side of the road nary a Gypsy Moth ever appeared. (I even sympathized a little with the wicked old Pharaoh when Egyptian first born were all killed by the Angel of the Lord.)

Thus, I sit with my view of the reservoir increasingly blocked by the pin oaks, which have spread upward and outward. But I was further punished by a midnight visitor. Not too long afterwards, I lay asleep after a heavy bout with beer and pizza. My slumbers were disturbed by a ghostly visitor, some-

what like the one who visited old Scrooge in the Christmas Carol. This nightly monster appeared in the shape of a sapling tree with a bleeding stump. the sapling stood by my bedside and told me that it was the ghost of the trees that I had murdered simply for selfish aesthetic pleasure. It told me that it had the power to inflict the punishment that seemed appropriate not only for the crimes committed but those plotted as well. It also hinted that the plague of Gypsy Moths that had destroyed so many of my own fine trees was nature's retribution for what I had already done, what I had tried to do, and what I had in mind to do. It then warned that it would send the Gypsy Moths again and destroy *all* of my prized trees, one by one, unless I submitted to the punishment it was going to mete out. I agreed — what could I do? Its sentence? I am compelled for the rest of my days to do penance by picking up all manner of trash. This, then, explains the reason why I some times show up for Court even in the most serious cases clutching in my hands a load of grimy, dirty papers, bottles and other trash.

Since this is Bill Prickett's forth appearance in the pages of this fortunate periodical, we shall not waste time on superfluous introduction. Many and repeated thanks, William!

Sweet Revenge



Evelyn Marie Walsh

The blast of the morning train approaching the crossing stirred Jennie's conscience. "Do unto others as you would have them do unto you," Grandmother always advised when Jennie brought problems to her. Putting the chocolate cake in the oven Jennie asked herself, How do I know what my mother would do? Anyway, I've made a plum kuchen—Mother loves that. You approve, don't you, Grandmother? Jennie asked looking heavenward as the train chugged by.

For the last month Jennie had been between tears and smiles when she thought of Grandmother. A month ago for the first time since she was three and came to live with her grandmother she woke to a chilly house. She woke Jim, jumped out of bed, and ran barefoot down the hall to Grandmother's room. She was still in bed. She had on the pink flannel nightgown she had been saving in case she had to go to the hospital. Grandmother's hands were folded on the counterpane, her white hair ringed her head like a halo, and her eyes were closed in the prayerful look she wore in church. Jennie knew she was gone before she touched her cold hand. The thought came to her unbidden—Grandmother knew she was going and managed to die as neatly as she had lived. The thought brought a smile to Jennie's face, but when the six o'clock train announced it was nearing the crossing, she broke into sobs.

Jennie knew she would never forget her grandmother as long as there were trains hooting and whistling. Since she was a little girl she had heard the stories of the hoboes Grandmother had fed. If she didn't have leftovers she'd make them bacon and eggs. There was always homemade bread and a choice of dessert. Grandfather enjoyed telling about one old codger who became angry when Grandmother insisted he wash before eating. (Grandmother always kept a clean towel and soap in the garage.) The old fellow sat on the porch and ate heartily. When Grandmother asked what he would like for dessert he looked at her with watery eyes and said, "The trouble with you is you're too damn pious!" and stalked off.

People were always asking Grandmother why she put up with the constant stream of tramps. A Mr. Corby came to Grandmother's funeral. He had seen the name and address in the newspaper. He told Jennie it took him back to when he was seventeen and decided to see the world. He remembered the meals he had eaten at Grandmother's. "Your grandmother was a kind woman and good cook. When we would arrive in a town there was always the question of where we could get a meal. Your grandmother was at the top of the list in Morristown."

Then she remembered Mr. Corby scratching his head and asking, "Do you know why she did it? I know when a train came in from the West she'd get three or four of us a day."

Mr. Corby laughed when Jennie told him her grandmother thought one of the hoboes might be an Angel of the Lord in disguise.

Rinsing the baking utensils Jennie thought about *her* mother who was coming today to visit Grandmother's grave. She had been on tour and unable to come to the funeral. It seemed to Jennie her mother was always on tour when anything important happened. "When I was confirmed it was *Tosca* and when I graduated, *Gotterdammerung*. I wonder if mother would have made my wedding if she hadn't been the soloist," she mused.

"What's going on here?" Jim asked coming into the kitchen.

"I made a plum kuchen for Mother and your favorite chocolate cake is in the oven."

"I thought Grandmother had risen from the dead when I got a whiff of the smells rising to the bedroom. I was sure of it when I saw those damn antimacassars back on the furniture. I thought you hated them." Jennie smiled but didn't answer. "Have you forgotten your mother is allergic to chocolate? And why are you ironing those altar cloths? You've never done *that* before."

"Oh, I thought Grandmother would be pleased if I took the altar cloths back ironed and mother loves plum kuchen almost as much as chocolate cake."

"You have been cleaning and starching all week. That can't be for your mother. You know she thinks cleanliness is next to devilishness. Are you feeling guilty because we're planning to change everything around?" Jim asked, easing himself into the bench behind the kitchen table.

"Don't be silly," said Jennie as she poured them both cups of coffee. "Eat your breakfast."

Giving Jennie a concerned look he persisted, "I think your grandmother expected we would make some changes when she left you the house and her 'nest egg,' as she put it." Jim concentrated on his toast for awhile. Then he said, as if he had the answer, "It's your mother coming that's upset you, isn't it? She'll just take the diamond brooch and the pearls Grandmother left her and scoot. She doesn't want to go to the cemetery."

"She's going to the cemetery," said Jennie firmly, as she picked up Jim's breakfast dishes.

"Hey, I'm just getting used to not hanging on to my dishes . . . are you all right?"

Continued on page 72

"I'm fine. Go to work!"

After Jim left Jennie rushed around the kitchen. By the time she was finished the cake was covered with a double thick chocolate fudge frosting and the kitchen gleamed. She was dressed in her new black suit when the door bell chimed.

Her mother was no sooner in the door than she demanded, "When are you going to do something about your hair? I think red hair looks better short and curly. And you can get cream to cover those freckles, you know." Looking Jennie up and down, she added, "And a purple suit would have been a better choice with your coloring."

"Next time I'll try purple, Mother," Jennie said smiling.

Glancing into the living room her mother shook her head. "Why don't you get rid of those awful antimacassars? And nobody," she continued "has three piece mohair suites and red at that—it's so Victorian." Passing through the dining room she sniffed, "Get rid of those dusty paper roses, too!"

"How about coffee before we go to the cemetery?" Jennie asked.

"The cemetery?" Jennie's mother looked at her blankly.

"Grandmother's grave."

"Oh yes." Her mother's eyes lighted on the altar linens. "For God's sake, Jennie, you aren't going to follow in my mother's footsteps and iron those blasted altar cloths! I think seeing Mother iron those month after month was one reason I turned away from the Church."

"Grandmother thought it was her duty—and she liked to iron. Don't worry, Mother, they have someone else doing them now. Anyway, I sort of enjoy ironing them."

"Oh Lord, I should never have left you here with your grandmother." Jennie's mother gave way to tears and she dabbed at them with her napkin. "I do need a cup of coffee. Are the brooch and pearls here or do we have to go to the bank?"

"I got them for you—I'll bring them down as soon as we get back from the cemetery."

As Jennie started to cut into the kuchen, her mother said, "Is that a chocolate fudge cake I see in the pantry?"

"Yes, it's Jim favorite."

"Give me a very tiny piece of that."

"But Mother, I thought chocolate made you break out in hives. I made the kuchen especially for you."

"I haven't had any in so long. The doctor said I might become desensitized by now. Just a *little* piece."

While her mother devoured her small slice of cake Jennie gave her a detailed account of the funeral—who was there, the flowers, the eulogy, and Mr. Corby.

"This *is* delicious, Jennie. If nothing else, your grandmother made a cook out of you. I'll have another piece."

"Are you sure, Mother?"

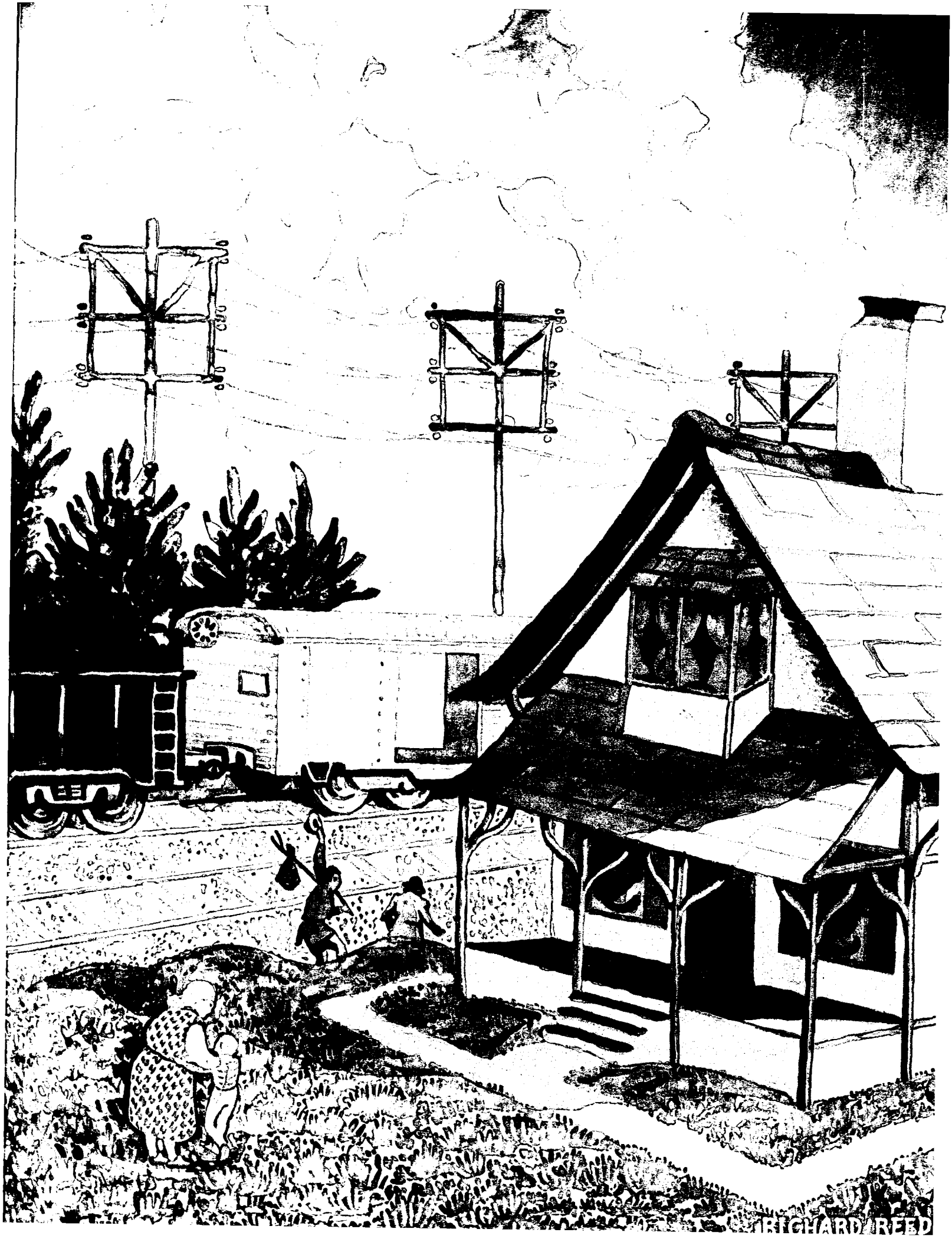
"Of course, and make it a wee bit larger this time."

Jennie thought the 10:03 gave an extra hoot as it sped toward the crossing.

This story has nothing to do with the law (although assault with a deadly pastry may be cognizable in the criminal courts). We are unrepentent: DELAWARE LAWYER speaks to a larger audience than the Bar, and will continue to do so.

Illustration by Richard Reed, a native Delaware artist.

EVELYN MARIE WALSH is the pen name of Mrs. Melford Teitze of Alapocas. In the fall of 1983, the University of Delaware offered a writing course taught by Sir Angus Wilson, a dominant voice in English fiction since the end of World War II. Evelyn enrolled and submitted, among other things, the story you have just read. Sir Angus admired it and urged Evelyn to seek publication. We are happy to oblige.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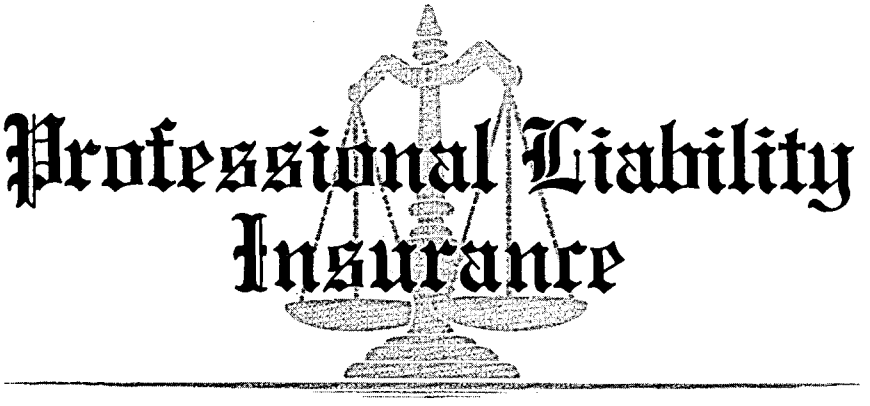

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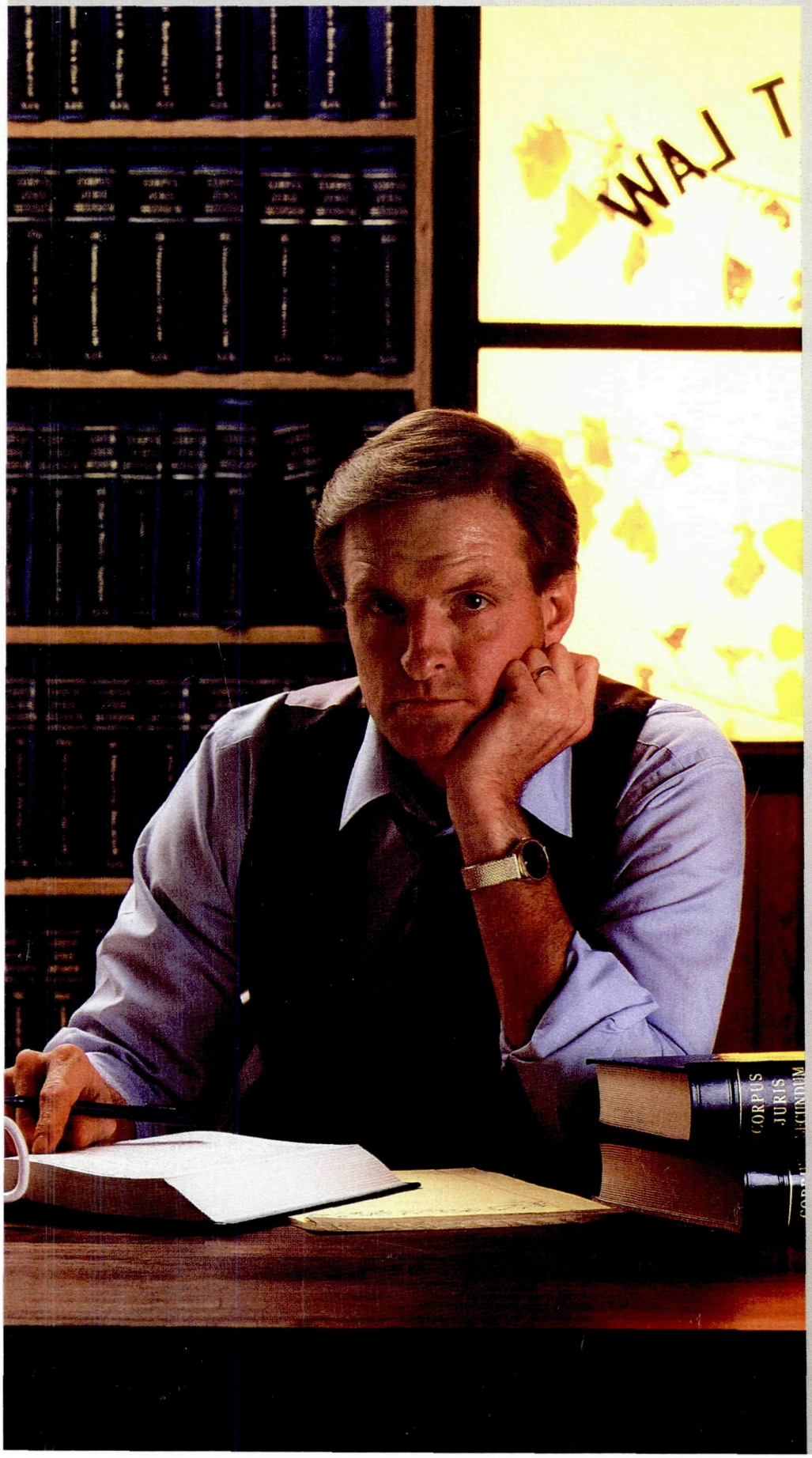

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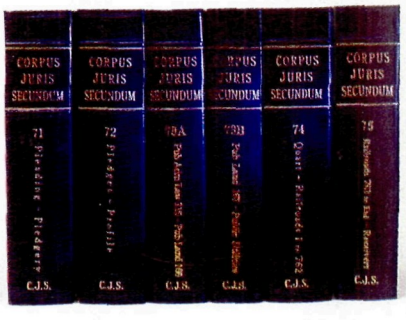

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