DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION

Volume 10 Number 2 $3.00 Summer 1992

10th ANNIVERSARY ISSUE

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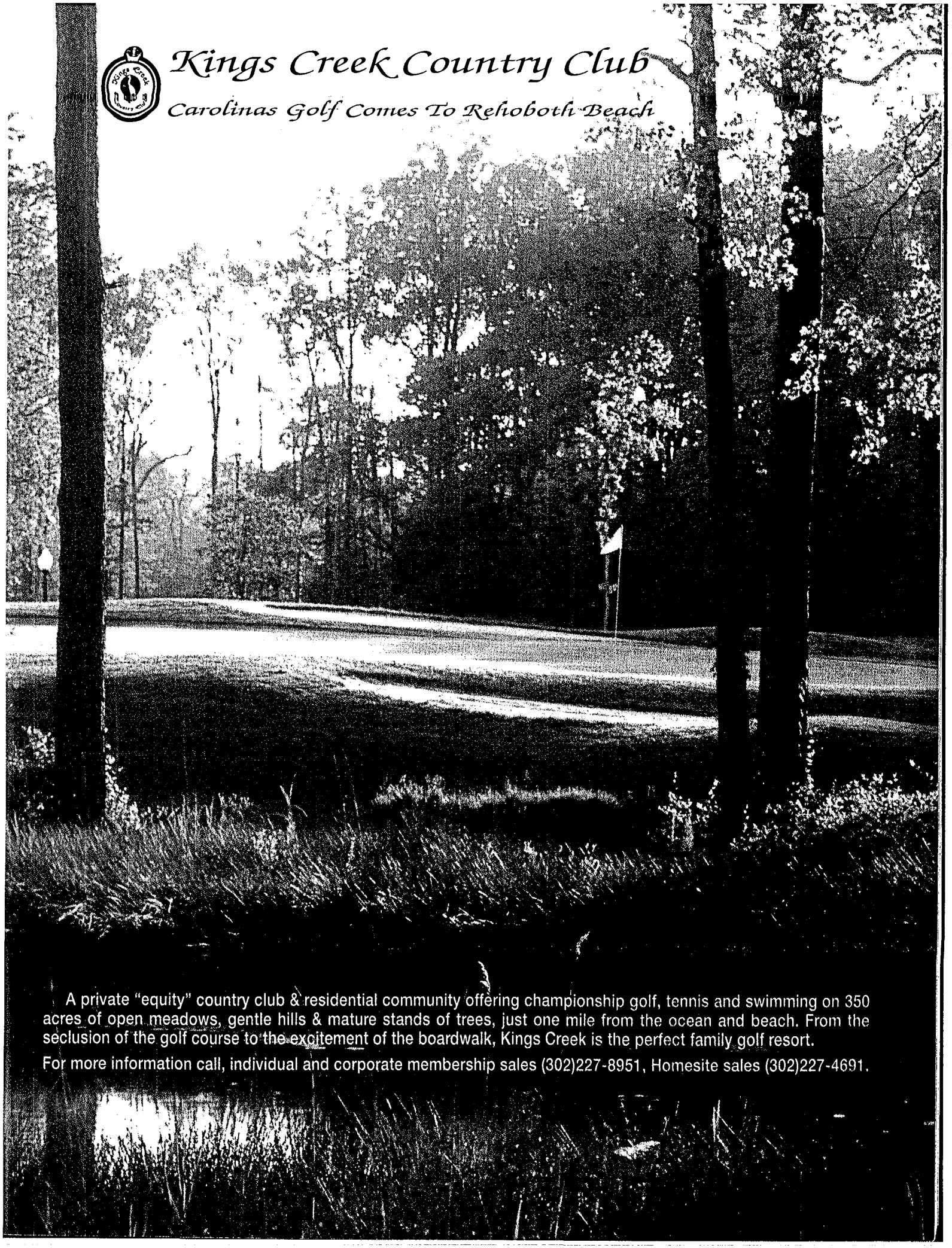
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REMARKS

First, let me offer my heartiest congratulations to DELAWARE LAWYER on its 10th Anniversary. I had the honor to be President of the Association ten years ago, so I was "there at the creation." This publication has a track record of excellence, and its editors are to be commended. Second, let me greet you in my role as the new Chief Justice. It is a high honor for me to hold this "awesome" office, and it is exciting and humbling to be handling its important responsibilities. I am deeply grateful to the Governor for appointing me, the Senate for unanimously confirming me, and for all of you who enthusiastically supported me.

On Law Day, May 1, 1992, I was privileged to address the Association on the "Struggle for Justice," in which speech I expressed some of my early observations and some philosophy. The speech was too long to repeat here, but I would like to mention a few concepts I observed on that occasion.

* * *

There is too much hostility in this world. Indeed, there is a cancer of incivility in our society and in our courts. We see its everywhere. The brutality of the Rodney King case and its violent aftermath constitute only one example. Look at the hostility and frustration we have in this election year. Good public servants have decided not to run for reelection, citing frustration and negativeness.

Our society cannot maintain a system where the rule of law is threatened by violence as a reaction to unpopular verdicts, as in the Rodney King case. While we cannot ignore the emotional and human anguish of these events, as lawyers we must try to lead our society in intellectualizing problems of society's ills and figure out better ways for our system of the rule of law to cope with them. That case demonstrates just how fragile our legal system is, and emphasizes the fact that we all have to work every day to strengthen it.

The new Chief Justice and Mrs. Veasey in conversation with retired Chief Justice Andrew D. Christie

I am particularly concerned about the incivility in our bar and in our courts. I will do my best to foster the spirit which I know exists here, that we *shall* have civility in our professional dealings, lawyer-to-lawyer, lawyer-to-witness, lawyer-to-client, lawyer-to-judge, judge-to-lawyer, and judge-to-judge. Lawyers should be vigorous and zealous in representing their clients. That means that they must be tough-minded, aggressive, skillful, and professional. That does not mean that they can be or should be hostile or rude. Judges are expected to be exacting in their requirements of lawyers. They should ask tough and penetrating questions, and require lawyers to follow the rules and toe the line, but always in a civil and polite manner. The vast majority of our lawyers and judges are always civil, and they lead us by example.

Lawyers have to be part of the solution, not part of the problem. Lawyers are the foundation of our rule of law and our civilized society. Without the lawyers, we would have anarchy. You will recall Shakespeare's one sentence quote from Dick the Butcher in *Henry the VI*, Part II (Act 4, Scene 2): "The first thing we do, let's kill all the lawyers." That was not a precursor of today's cursed lawyer jokes. Rather, it is a compliment to lawyers. In that little vignette, Shakespeare's characters were saying, before we can distort the society, we have to get the lawyers out of the way.

Yes, lawyers have to lead us out of this hostility. If we start with civility in our daily practice, I predict citizens, legislators, and lawyers will have more respect for each other, and mutual respect should replace hostility and sarcasm.

Perhaps we can then take a step in winning the struggle for justice.

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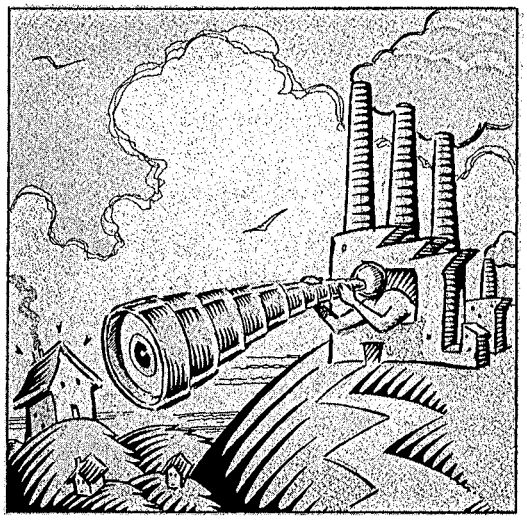

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COVER ILLUSTRATION BY PAUL DOLAN

Top Illustration by Jane Marinsky Bottom Illustration by Larry Knox

DELAWARE LAWYER
A publication of Delaware Bar Foundation
Volume 10, Number 2
P. O. Box 1709
Wilmington, Delaware 19899

Editorial inquiries should be directed to:

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Post Office Box 1709
Wilmington, Delaware 19899
(302)658-5278

Address changes, subscription orders, requests for information about advertising should be directed to:

SUBURBAN MARKETING ASSOCIATES, INC.
Three Christiana Centre
201 North Walnut Street, Suite 1204
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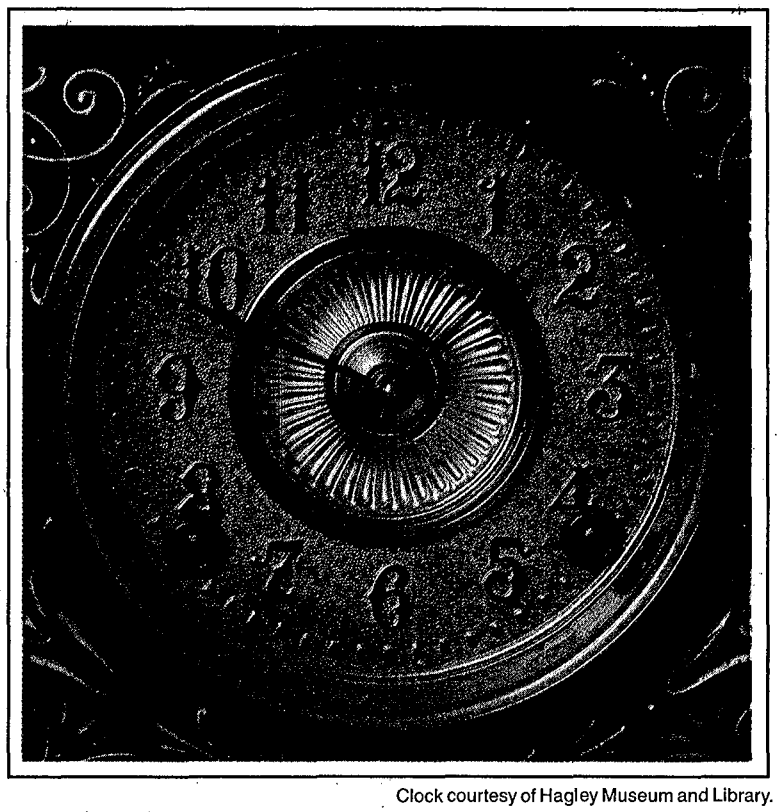

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EDITOR'S PAGE

One of the delightful things about living in Delaware is the ability to move about in governmental and agency circles, and yet remain in basically the same milieu. Twice before, I have been privileged to edit an issue of this publication, and each time I have done so from the perspective of my then professional position. The first topic I undertook in the mid 1980's was *Biotechnology and the Law*; this was done in conjunction with my role as Chief of Staff at the Delaware House of Representatives. The second topic, *Land Use Planning and Decision Making*, was completed during my tenure as Executive Assistant to the Delaware Secretary of Transportation. And now the subject has changed once more. I recently assumed the position of Director of Personnel at Delaware Technical and Community College in Wilmington and, as such, I have learned a great deal about the major roles that legislation, statutory edict, and government regulations play in our human resources system. It was with this in mind that I suggested to the Board of Editors that I design and edit another issue of *DELAWARE LAWYER*, this time addressing Employment and Labor Law. Fortunately, the board agreed and, thus, you have before you an issue on the legal aspect of human resource management.

It was fairly easy to find authors willing to write on this important topic. I attended a seminar last fall where I heard three members of the firm of Young, Conaway, Stargatt & Taylor wax eloquent on Personnel Law. I approached them then and there, and Jim Maher, Barry Willoughby, and Sheldon Sandler all soon said yes. Robert Stewart, a regular contributor to the Delaware Business Review, was also willing to write an article. Aida Waserstein, an old friend, decided to collaborate with Jim. On the advice of one of my associates at the college I spoke with Deputy Attorney General Loretta Lebar who recruited her colleague, Mark Conner. It remained only to call on University of Delaware professors Jan Blits and Linda Gottfredson, whose work in the field I had learned about shortly before, and my roster was complete.

The finished product is before you. From benefits to drug testing, from ADA to wrongful discharge, from sexual harassment to civil rights - you'll find it in these pages. I hope you enjoy reading this issue as much as we have enjoyed preparing it for you.

Paula Lehrer Shulak

THE FIRST DECADE

In the fall of 1981 Harold Schmittinger, a former President of the Delaware State Bar Association and Chairman of the Board of Directors of the Delaware Bar Foundation, spoke with E. Norman Veasey, then President-Elect of the Association, about the possibility of starting a Foundation-sponsored journal as a part of the Foundation's educational mandate.

At that time members of the Delaware bar, unlike lawyers in most other states, published no scholarly professional journal. Legal publication was confined to the Bar Association newsletter, a useful source of bread and butter information for members of the bar, but necessarily without pretensions to a more reflective analysis of the law and the professionals who practice it. Mr. Veasey, now Mr. Chief Justice Veasey, whose remarks appear elsewhere in this issue, agreed with Mr. Schmittinger's recommendation, and he became instrumental in creating the magazine you read today on its tenth anniversary of publication.

Plans for the magazine began in late 1981 with the enlistment of Mr. Edwin Golin of Gauge Corporation, whose talented and dedicated staff provided a new and somewhat amateur undertaking with the assurance and professional sheen of experienced journalism. Perhaps the most important decision in the early days of the planning process and the ultimate success of the magazine was the selection of Richard A. Levine as Managing Editor. His sublime common sense made DELAWARE LAWYER a realistic venture capable of surviving and even flourishing.

The availability of this magazine as a vehicle for writing on legal topics revealed within our midst a large and diverse group of literary talents. Of these many I arbitrarily single out a handful: Bill Prickett and his extraordinary series of humorous and instructive essays; Dave Drexler and his finely wrought and tactful editing of the otherwise hopelessly garrulous memoirs of Justice Pennewill; and Justice Quillen's brilliantly designed and executed issue of September 1987 in which we saluted the two hundredth anniversary of the United States Constitution.

DELAWARE LAWYER has been fortunate in its friends: the many and able contributors who have organized whole issues and written essays of superior quality, our friends at Suburban Marketing Associates who so skillfully assemble each issue, and especially the wise and generous leaders of the Bar Foundation who have made the magazine possible. We thank them all.

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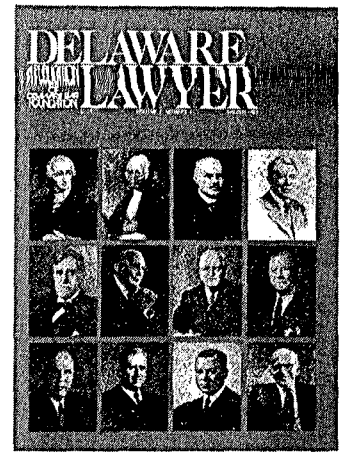

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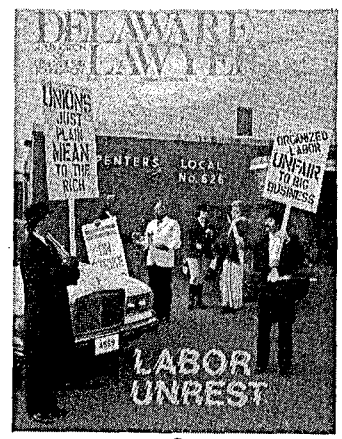

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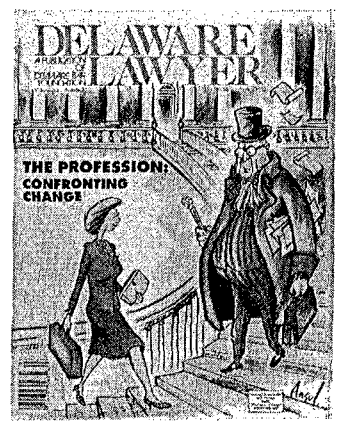

1992

DELAWARE'S WRONGFUL DISCHARGE CASES • BY SHELDON N. SANDLER

THE IMMINENT FLOOD

When I first wrote about wrongful discharge* employment at will was starting to fade. Now, the end seems near. If the volume of cases in the preceding hundred years is the measure, the explosion in employment litigation has already arrived. But several recent developments suggest that the future will bring an even greater onslaught, creating problems for employers and the court system and delay and ultimate disappointment for most employees, along with a few windfalls.

A SUCCINCT HISTORY OF EMPLOYMENT AT WILL

For one-hundred years, private employees in the United States worked under "employment contract(s)" of indefinite duration that can be terminated without reason by either party at any time." Employment at will has been the rule in Delaware since before the turn of the century, and remains the presumptive status of private employees. *Heideck v. Kent General Hospital: Research & Trading Corp. v. Powell; Greer v. Arlington Mills Mfg. Co.*[1] However, increasingly in recent years, employees have tried, with occasional success, to rebut that presumption.

COMMON LAW EXCEPTIONS TO EMPLOYMENT AT WILL

Express or Implied in Fact Contracts

The citadel of employment at will stood firm in Delaware until the mid-1980s, with one exception. In the 1973 decision, *Haney v. Laub*,[2] an employee at will who had been given a stock option, exercisable while he remained employed, was fired. He sued, claiming the dismissal was without cause and was intended to deprive him of the stock option. While the Court could have fallen back on his "at-will" status and dismissed the claim, it held instead that the relationship had been converted to one terminable only for cause, since otherwise the granting of the stock option would have been a meaningless charade, something the Court felt the parties could not have intended.

While *Haney* stood alone for over a decade, Delaware courts have come to recognize that statements and conduct by employers can alter at-will status and create binding contracts. The starting point in this important change was *L.H. Doane Associates v. Seymour*,[3] where the Delaware Supreme Court held that an employer was required to pay accumulated benefits to an employee who had resigned, because it had done so for other departing employees. Rejecting the

ILLUSTRATION BY TROY THOMAS

employer's insistence that at-will status allowed the company to withhold or distribute benefits as it chose, the Court said the employer's "course of conduct" had superseded handbook language negativing any entitlement to such payments and created a binding obligation. That decision significantly narrowed the holding of *Heideck v. Kent General Hospital, supra,* which appeared to have broadly stated that personnel manuals unilaterally issued by employers were simply not contractually binding. In *Doane,* whether an employer had altered at- will status through a unilaterally adopted policy, handbook, or "course of conduct" was found to be a fact question.

Following this lead, in *Crisco v. Board of Education of the Indian River School District,*[4] the Court of Chancery applied the *Doane Associates* reasoning to a discharge case, holding that a school board that issued a policy announcing that reductions in force would be by seniority was liable for failing to rehire a teacher who was not the least senior. The Board claimed it did not rehire the plaintiff because she lacked full certification, but the Court noted that the policy said nothing about certification. Accord *Brady v. Mapsco, Inc.*[5] (relying on *Doane,* held that a "course of dealing" can create an implied contract).

Several other cases also showed a willingness to impose limits on at-will status. In *Sturgess v. Negley,*[6] Judge Roth held that calling a position "Regular Permanent Part-Time" is "evidence that the employee is terminable only for cause" and has a protected property interest in his employment. And in *Sinha v. Board of Trustees of Delaware Technical & Comm. Coll.,*[7] Judge Bifferato found that where an employer's unilaterally promulgated master contract provided that after probation, an employee could be terminated only for "good cause," a dismissed educator's wrongful termination claim presented an issue for jury trial. *Accord, Goode v. Kinney Shoe Corp.*[8] (employment at will could be transformed into a binding obligation by an employer's promise to pay increased severance pay and bonuses to managers who remained until the completion of a reorganization. The employee claimed the employer had fired him shortly before the end of the reorganization to avoid paying the increased benefits); *Schreffler v. Board of Education of Delmar School District*[9] (oral representation to principal by school board members that his contract would be renewed if his performance was "satisfactory" created a legally protected interest).

To date, despite the above exceptions, Delaware state and federal courts have taken a realistic view of the effect on employment status of informal discussions and isolated words in a handbook. In *Rizzo v. E.I. Du Pont de Nemours & Co*[10] the Court refused to recognize an exception to the doctrine where the claim was that the employer had disregarded its declared policies.

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Citing *Heideck,* the Court said "[t]he Supreme Court of Delaware has concluded that claims based on company policies do not give rise to a cause of action for an employee at-will, who is terminated." Apparently, however, neither *Doane* nor *Crisco* was brought to the Court's attention. In *Mann v. Cargill Poultry, Inc.*[11] the Superior Court, in granting summary judgment for an employer, expressly disagreed with *Crisco. See also, Edwards v. Lutheran Social Services of Dover, Inc.*[12] (asking a prospective new Executive Director if he would be willing to stay more than two or three years, expressing the hope that he would be working with the agency for a long time, and extending his probationary period did not alter his at-will status); *Asher v. A.I. DuPont Institute*[13] (use of the term "permanent employee" in handbook not sufficient to overcome other language demonstrating intent to preserve at-will status. The Court cited cases equating the word "permanent" with an indefinite rather than protected status); *Shockley v. General Foods Corporation*[14] (permanent part-time employment not equivalent to lifetime employment); *Merrill v. Crothall- American, Inc.*[15] (reference to "permanent" employment creates only "indefinite general hiring terminable at the will of either party"); *Lilley v. Weyerhaeuser Mortgage Co.*[16] (employment application with disclaimer, and absence of any written or oral contract setting out specific term, causes Court to conclude that plaintiff was employed at will and could be discharged "on the slightest whim"; *Gaines v. Wilmington Trust Co.; Kerly v. Battaglia.*[17] Thus, the battle lines are drawn, and the careful plaintiff's attorney who scrutinizes all aspects of the employment relationship is more likely than ever before to hit pay dirt, though the odds remain long.

PUBLIC POLICY EXCEPTIONS

In *Petermann v. Teamsters Local 396,*[18] the California Supreme Court held that it was against public policy to allow an employer to fire an employee for refusing to engage in criminal conduct. Courts have since developed similar exceptions under the general heading of protecting public policy. Some states view the exception broadly, and find a clear mandate of public policy even in the absence of legislative pronouncements. Delaware courts have taken a narrower approach, only recognizing public policy exceptions where the policy is embodied in a statute or constitutional provision. *Gaines v. Wilmington Trust Co., supra* (public policy exceptions in Delaware "are very narrowly drawn and are generally statutory") The exceptions recognized around the country can be grouped into the following categories:

Performing Public Obligations

A variety of responsibilities have been identified as public obligations, the performance of which should not result in an employee's discharge. Under Delaware law, discharging an employee who is called for jury duty, 10 *Del.C.*4505(c), or military service, 20 *Del. C.*905(e) is prohibited, as is the discharge of an employee whose wages are garnished. 10 *Del. C.*3509. Delaware also protects public (but not private) employees who blow the whistle on wrongful conduct. 29 *Del. C.* 5115 *Cf. Jewish Federation of Delaware v. Collins*[19] (rejecting claim that discharged employee was a whistle blower and should be entitled to unemployment compensation on public policy grounds, where she had erroneously charged her employer with misusing public funds); *Asher v. A.I. DuPont Institute, supra* (court refused to adopt public policy exception where employee claimed he was discharged because he disclosed alleged health risks at a medical

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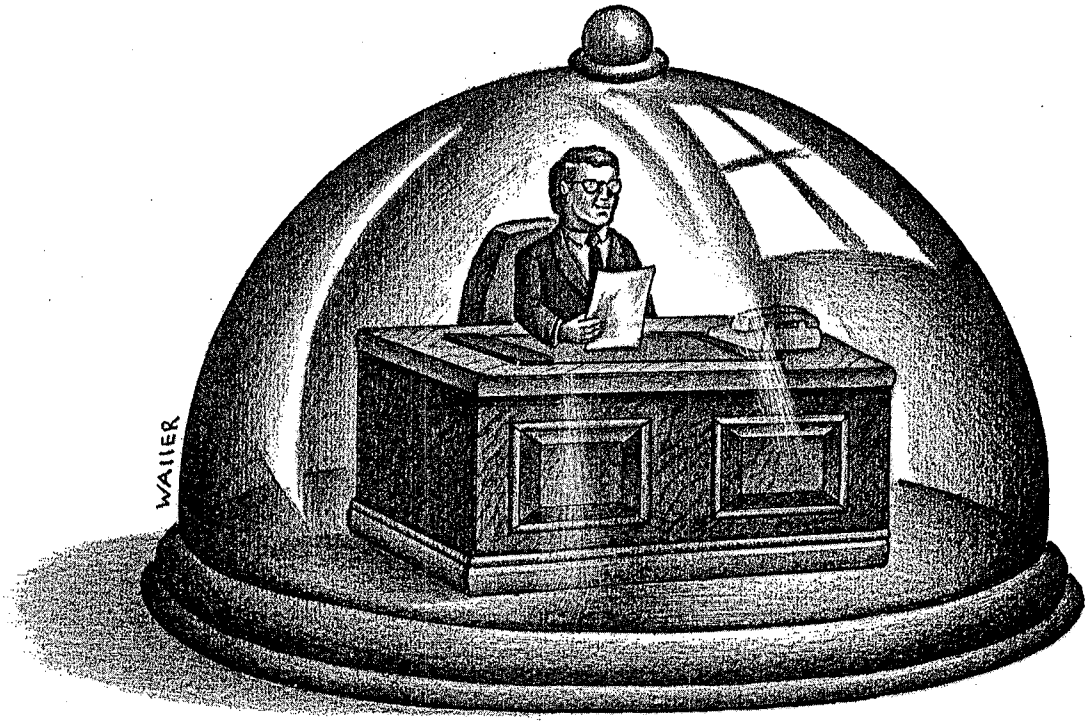

1 Always ask the "why?" question. You have to know why a client has chosen you. If it's because of your particular expertise or reputation—great. But, if it's because several other firms have withdrawn or because it's known that you're just a little too hungry—watch out!

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3 Be careful who you hire. You are responsible for the acts of your partners, associates, and employees. Period!

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Legal Rights or Privileges

Perhaps the most common public policy exception is where an employee is fired for filing for worker's compensation (*merely for filing, not for being unable to work because of the injury*). The theory is that if the state provides an entitlement, such as the opportunity to collect benefits for an on-the-job injury, an employee should not be penalized for exercising the right to obtain it. So far, this exception has been rejected in Delaware because the Workmen's Compensation statute contains no express prohibition against discharging employees who apply for benefits. *Emory v. Nanticoke Homes, Inc.*[20] (court refused to recognize public policy exception where employee claimed he was discharged for filing worker's compensation claim). *And see Irvine v. Potts Welding and Boiler Repair Co.*[21] (refusing to adopt public policy exception where plaintiff claimed she was discharged to avoid benefit expenses, after it was learned she was seriously ill). However, President Judge Ridgely, who decided *Emory,* has also ruled that an employee fired for refusing to take a polygraph test or for flunking it had a valid cause of action, distinguishing *Emory* by pointing out that the Delaware anti-polygraph statute expressly prohibits employers from giving lie detector tests to employees, while the Workmen's Compensation law does not address the propriety of employers taking reprisals against employees for filing a claim. *Heller v. Dover Warehouse market, Inc.*[22]

Crime, Industry Practice or Ethical Code

Employers who dismiss employees for refusal to commit a crime or deviate from an ethical code or industry practice have been held to have violated public policy in other jurisdictions, but Delaware has not yet recognized an exception of this nature.

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

There have been no new developments in Delaware under this heading since my 1985 article. While several plaintiffs have made implied covenant claims, this cause of action remains unrecognized in Delaware. *See Shockley v. General Foods Corporation, supra* (assuming, without deciding, that the Delaware Supreme Court would adopt the rule that breach of an implied covenant only occurs when the employer's conduct constitutes fraud or deceit, the Court holds that conduct of that nature was not alleged or proved by the plaintiff); *Mann v. Cargill Poultry, Inc., supra* (implied covenant theory rejected "out of hand").

TORT ACTIONS

The fourth group of exceptions are various employment related tort actions. These are, of course, very attractive to plaintiffs' attorneys because of the opportunity to recover compensatory and punitive damages instead of being limited to the "benefit of the bargain" measure of damages for breach of contract.

If the state provides an entitlement, such as the opportunity to collect benefits for an on-the-job injury, an employee should not be penalized for exercising the right to obtain it.

Intentional Infliction of Emotional Distress

In several Delaware wrongful discharge cases, claims of intentional infliction of emotional distress have been asserted against employers. The cause of action has been recognized in Delaware. *Correa v. Pa. Manuf. Assoc.; Mattern v. Hudson; Robb v. Pa. R.R.; Cosgrove v. Buymer.*[23]

To date, Delaware courts have rejected most intentional infliction claims in employment cases, either because the conduct was not sufficiently "outrageous," because it was preempted by the Delaware Workmen's Compensation Act, or because no physical injury was alleged. In *Battista v. Chrysler Corporation,*[24] the Court said the only basis for recovery for "personal injury" arising out of and in the course of employment was through a worker's compensation award. In *Rizzo v. E.I. Du Pont de Nemours & Co., supra,* an intentional infliction claim was barred since mental injury is compensable under the Workmen's Compensation law. The Court also pointed out that there must be an allegation of bodily harm to make out a valid intentional infliction claim in Delaware and granted summary judgment on that basis as well. *Accord, Shockley v. General Foods Corporation, supra,* slip. op. at 7 (negligent infliction claim defeated by admission that plaintiff had suffered no physical injury as a result of her employer's conduct); *Gaines v. Wilmington Trust Co., supra, Cf. Konstantonopoulos v. Westvaco Corporation*[25] (claim of sexual assault not preempted by Workmen's Compensation law since no causal link between her injuries and employment); McGeary v. Mellon Bank (DE)[26] (where announcement of discharge was made shortly after employment ended, *Battista* was inapplicable).

In other cases, intentional infliction claims were rejected because the conduct was not sufficiently "outrageous." *Avallone v. Wilmington Medical Center; Irvine v. Potts Welding and Boiler Repair Co.*[27] (firing plaintiff because of medical condition and then telling other employees of the termination held not so "outrageous" as to justify intentional infliction claim); Conner v. Rollins Telecasting, Inc.[28]

Defamation

In *Battista v. Chrysler Corporation, supra,* an action against an employer for defamation was held not barred by the Workmen's Compensation Act, since an injury to reputation is an injury to property rather than person. *Accord Rizzo v. E.I. DuPont de Nemours & Co., supra.* And in *Edwards v. Lutheran Social Services of Dover, Inc., supra,* a statement that an Executive Director's firing was "due to something in his past" was said to constitute slander *per se.*

Of course an employer is entitled to communicate even damaging facts about a present or former employee to persons who have a legitimate need for the information. *Battista, supra* at 290-91; *Gonzalez v. Avon Products*[29] (post-termination speech to employees about reason for termination); *Stafford v. Air Products and Chemicals, Inc,; See also Gonzalez v. Avon Products*[30] (granting judgment for defendant after jury failed to reach verdict). If the privilege is abused, however, the employer may be held liable.

A twist on the tort of defamation is compelled self-publication. Under this theory, an employer who fires an employee for reasons that, if disclosed, would be defamatory, is guilty of defamation even if it does not communicate the information, because the employee must disclose to potential employers the circumstances of the dis-

charge in order to explain his unemployment. The theory is asserted in several pending cases, but has not yet been addressed by the Delaware courts.

Fraud, Deceit or Misrepresentation

Delaware has long recognized causes of action for fraud and detrimental reliance, and this tort has been used successfully in the employment context, *Crisco v. Board of Education of Indian River School District, supra; Keating v. Board of Education of Appoquinimink School District*[31] Cf. Mann v. Cargill Poultry, Inc., supra.

False Arrest or Imprisonment

Charges of false arrest or imprisonment are often made in the employment context. A Delaware statute, 11 *Del. C.* 840, provides merchants and their agents with a privilege against claims of false imprisonment where there has been probable cause to believe that shoplifting or intentionally concealing unpurchased merchandise has occurred. The statute allows detention of a person on the premises for a reasonable time in order to call the police. In *O'Neill v. White, supra,* a Delaware Superior Court judge held that it is also proper to conduct a limited investigation pursuant to the statute in order to determine whether to call the police.

Prima Facie Tort

A few states recognize a catch-all-tort for conduct that does not fit into any other established mold but is, nevertheless, outrageous. In order to make out a prima facie tort claim, a plaintiff must show actual injury caused by an otherwise lawful act, done by the defendant with specific malicious intent to injure the plaintiff and without any economic or social justification. *Lundberg. v. Prudential Insurance Co. of America.*[32] The tort has been discussed in several Delaware cases but rejected on the facts. *Kaye v. Pantone; Nix v. Sawyer; Newell Co. v. Wm. E. Wright Co.*[33]

OTHER DEVELOPMENTS

The first limitations on employment at will were imposed by statute. Now, two recent federal laws, the Americans With Disabilities Act ("ADA") and the Civil Rights Act of 1991, seem likely to expand wrongful discharge litigation. The ADA, which takes effect for employers of 25 or more employees on July 26, 1992, and for employers of 15 or more employees two years thereafter, provides a cause of action to an estimated 43 million sympathetic potential plaintiffs. And the 1991 Civil Rights Act, which overturned a number of Supreme Court cases favorable to employers, easing the way for plaintiffs to succeed in discrimination cases, also makes compensatory and punitive damages of up to $300,000 available in discrimination cases under Title VII and the ADA, and establishes a right to jury trial in most discrimination cases. The opportunity to represent sympathetic plaintiffs before juries, with expanded damages potential, seems likely to open wide the floodgates of wrongful discharge litigation.

Delaware protects public (but not private) employees who blow the whistle on wrongful conduct.

A PROPOSED SOLUTION

The Supreme Court's recent opinion in *Gilmer v. Interstate/Johnson Lane Corp.*[34] suggests a means of resolving the problem of increased employment litigation, at least for companies prepared to abandon at-will status. *Gilmer* held that where a company and its employee had an individual employment contract providing that all disputes would be resolved through binding arbitration, the employee could not pursue independent litigation under the Age Discrimination in Employment Act. This was a departure from the multiple bites at the apple approach the courts had followed for many years. *See Alexander v. Gardner-Denver Co.*[35] An employer desiring to avoid open-ended damage litigation before juries might reasonably conclude that the time is ripe for jettisoning at-will employment in favor of limiting liability and attorneys' fees, and placing the issues before an experienced arbitrator rather than a jury of the fired employee's peers. To do so would require the execution of written employment contracts, preferably at the time of hiring, though the enhanced job protection and promise of continued employment would probably serve as adequate consideration for contracts with existing employees as well. Incorporating into the contract the procedures of the newly approved Model Termination Act would seem to make the most sense. This approach would result in quicker resolution of the issue of cause for termination, and would do so outside the court system, providing a significant ancillary benefit by relieving a source of otherwise increased pressure on our overburdened trial courts. The contract would aim to limit employees from multiple bites at the apple of wrongful discharge. Instead, the core issue of "just cause" would be decided one time, by an experienced arbitrator with the ability to address not only performance issues but also discrimination of various kinds. A quicker decision would result in less exposure for back pay, an advantage to employers, but would also be a great improvement for employees, whose lawsuits currently languish for years. With the flood tide rising, it is not too early for enlightened employers to consider this more rational alternative to expensive, open-ended litigation in several courts and agencies.

Constraints of space make it impossible to include the author's extensive footnotes. The full footnotes will be made available upon request to the offices of this magazine.

* "Employee Status in Delaware: Then, Now, and Tomorrow", Volume 3 DELAWARE LAWYER, No. 3.

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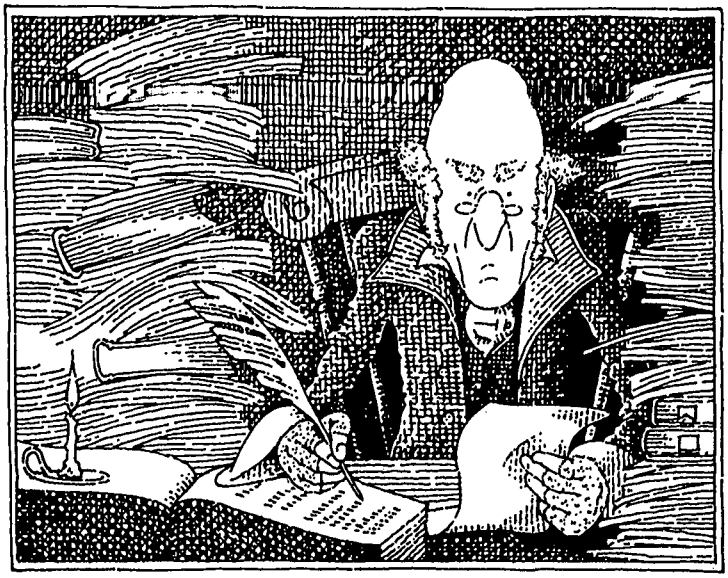

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BARRY M. WILLOUGHBY

Discrimination Law: Sexual Harassment After the Thomas Hearings

Although the recent Clarence Thomas confirmation hearings drew national attention to sexual harassment in the work place, the issue has long been a major concern. Anita Hill's graphic charges and Justice Thomas's vehement denials created a circus-like atmosphere all too common in proceedings in which sexual harassment allegations are aired. The Senate Judiciary hearings also underscored the extreme problems of proof that face employers and employees alike when such charges are made. As the proceeding demonstrated dramatically, it is the exceptional case that has more than "He said (or did)/She said (or did not)" testimony to support one party or the other.

The Thomas hearings clearly show that no one really "wins" when sexual harassment charges become public.

In addition to difficulties of proof, sexual harassment claims are legally complex. There is an assortment of claims that a victim may bring under the federal and state discrimination statutes as well as common law tort claims. Passage of the Civil Rights Act of 1991, perhaps spurred by the Thomas hearings, has broadened the available remedies making litigation a more attractive option to an aggrieved party. The public awareness heightened by the Thomas confirmation drama (not to mention the recent difficulties encountered by Senator Adams) and the greater legal remedies now available make it likely that the number of sexual harassment claims will increase.

What Constitutes Sexual Harassment in the Work Place?

The statutory basis for a sexual harassment claim is found in the prohibition against "discrimination based on sex" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1). It is firmly established, however, that the term "sex" in the statute means "gender" not sexual preference of activity. *See Ulane v. Eastern Airlines,* 742 F.2d 1081 (7th Cir. 1984). This has several important ramifications.

Sexual harassment violates Title VII *only if it is a term or condition of employment directed to one gender but not the other.* One of the oddities of the law is that if sexual advances are made by a bisexual supervisor to male and female subordinates alike, this is *no violation* of Title VII. *Barnes v. Costle,* 561 F.2d 983 (D.C. Cir. 1977). In addition, although Title VII does not prohibit discrimination based on sexual preferences such as homosexuality, *Summers v. Budget Marketing, Inc.,* 667 F.2d 748 (8th Cir. 1983), homosexual advances are actionable as sexual harassment so long as the advances are made only to members of one gender. *Wright v. Methodist Youth Services, Inc.,* 511 F. Supp. 307 (D.Ill. 1981).

The EEOC's guidelines on what constitutes sexual harassment give the following definition:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either ex-

Illustration by Jane Marinsky

plicitly 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 an 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. 29 C.F.R. 1604.11(a).

The courts have largely accepted this definition and identified two major types of sexual harassment actionable under Title VII - *"quid pro quo"* cases and "hostile environment" claims. *Meritor Savings Bank v Vinson,* 477 U.S. 57 (1986).

In a *quid pro quo* case there is a direct threat of a job detriment or promise of a job benefit in return for sexual favors. The classic example is a male supervisor requesting a "date" in return for promising a promotion or threatening discipline if the female subordinate does not comply.

A *hostile environment* claim asserts that the work atmosphere has been rendered unacceptable by sexually suggestive remarks and innuendoes. The principal difference between *quid pro quo* and hostile environment claims is that in the latter there need be no deprivations or tangible job benefits, such as loss of salary, for claims to be actionable. *Meritor Savings Bank, supra.,* 477 U.S. at 67-68; *Bundy v. Jackson.* 641 F.2d 934 (D.C. 1981). Furthermore: "Every sexual innuendo or flirtation is not an actionable wrong." The conduct complained of "must be sufficiently pervasive so as to alter the condition of employment and create an abusive working environment." *Ferguson v. DuPont,* 560 F. Supp. 1172, 1197-98 (D. Del. 1983).

Another major difference is that the employer is usually vicariously liable for the harm to an employee in a *quid pro quo* case. *Craig v. Y. & Y. Snacks, Inc.,* 721 F.2d 77, 81 (3d Cir. 1983). Most courts, however, hold that the employer is not vicariously liable in a hostile environment case. *See. Broderick v. ruder,* 685 F. Supp. 1269 (D. D.C. 1988). There usually must be evidence that the employer knew or should have known about the misconduct.

In deciding what is or is not "offensive" behavior creating a hostile environment, a "reasonable woman" or "reasonable victim" standard applies. *Ellison v. Brady,* 924 F.2d 872 (9th Cir. 1991); *Andrews v. City of Philadelphia,* 898 F.2d 1469 (3d Cir. 1990); *Yates v. Avco Corp.,* 819 F.2d 630, 637 (6th Cir. 1987). The rationale for this standard is that it removes "male stereotypes" about what is or is not offensive from the determination of what constitutes offensive behavior. *Id.*

Remedies For Sexual Harassment

Section 102 of the Civil Rights Act of 1991, amending Title VII, provides that successful plaintiffs may recover compensatory and punitive damages in cases of intentional employment discrimination. Sexual harassment claims are covered by this section.

Both employers and employees are best served by preventing from occurring or, at minimum, stopping such conduct before it goes too far.

Before the recent amendments, a plaintiff could not recover compensatory damages for "emotional distress" or "pain and suffering" but was limited to monetary losses such as back pay, attorneys' fees, and, in some cases, injunctive relief. A female plaintiff who was successful in bringing a "hostile environment" claim based on allegations like those made by Anita Hill would thus not be entitled to a damage award for "emotional distress" or punitive damages. The most she could expect was an injunction prohibiting such conduct and an award of attorneys' fees.

A variety of tort claims, such as claims for employer "negligence," intentional infliction of emotional distress, assault and battery, and invasion of privacy, also exist as remedies for sexual harassment. *Kyriazi v. Western Electric Co.,* 461 F. Supp. 894, (D. N.J> 1978) *subsequent opinion* 476 F.Supp. 335 (D.N.J. 1979). Tort claims do provide compensatory and punitive damages in appropriate cases. Frequently, however, tort claims for sexual harassment against the employer fail because the employer is not strictly liable for all work place misconduct by its employees. The victim therefore often has a tort claim only against the harasser.

This limitation on remedies under title VII greatly affected the handling of such claims before the passage of the recent amendments. For example, I recently represented an employer charged with discrimination consisting of alleged sexual misconduct by a supervisor. The allegations amounted in some cases to outright sexual assault.

Since the case arose before the passage of the Civil Rights Act of 1991, I advised the employer to unilaterally pay the four female plaintiffs and their attorney a total of approximately $3,500.00 in monetary losses and attorneys' fees. The EEOC then dismissed the plaintiffs' charges because they had been fully compensated under the Act. See *Ford v. EEOC.* 458 U.S. 219 (1982).

The alleged victims responded by filing tort claims in the Superior Court alleging that the employer was negligent in not knowing about the harassment. There was no evidence, however, that the alleged victims had ever reported the misconduct to anyone in management. The record also established that the employer was unaware of the alleged misconduct until a terminated female employee sent the company President a letter. The Superior Court granted the employer's motion for summary judgment because there was no evidence of employer negligence.

Under the Civil Rights Act of 1991, however, the result might have been entirely different. Had the plaintiffs been able to establish a *quid pro quo* claim, the employer might have been held vicariously liable. The availability of damage awards would have made pre-litigation resolution of the case improbable, or at least, much more costly to the employer. The compensatory and punitive damage claims would have been so high that the employer would probably have been forced to litigate its responsibility for the harassment instead of paying a relatively small amount to avoid suit.

The Act does contain a provision setting a cap on compensatory and punitive damage awards based on the number of employees as follows:

15 to 100 employees	$50,000.00
101 to 200 employees	100,000.00
201 to 500 employees	200,000.00
more than 500 employees	300,000.00

The second major change created by the Civil Rights Act of 1991 that affects sexual harassment claims is that jury trials are permitted when the plaintiff seeks a damage award. With few exceptions, the federal courts had previously held that Title VII did not permit jury trials. The Act now specifically provides for jury trials in employment discrimination cases if the plaintiff seeks compensatory or punitive damages, or both.

The conventional wisdom is that jury trials favor plaintiffs in Title VII cases. Since the prospective damage awards are higher and it is more likely that a plaintiff will be successful in proceeding with such an action, it is probably that there will now be more sexual harassment actions brought under Title VII.

Prevention The Best Medicine

The Thomas hearings clearly show that no one really "wins" when sexual harassment charges become public. Both employers and employees are best served by preventing sexual harassment from occurring or, at minimum, putting a stop to such conduct before it goes too far. There are a number of steps that both employers and employees can take to prevent or reduce work place harassment.

First, a policy statement or other communication from the Chief Executive Officer (CEO) should make it clear that the employer does not tolerate sexual harassment.

Second, the employer should educate supervisors and employees about conduct that constitutes sexual harassment. Supervisors should be alert for situations that constitute potential hostile job environments.

Third, employees, especially women, should be told that they need not submit to such conduct. They should be advised of strategies to deal with actual or perceived harassment or discrimination. For example, in its handbook on sexual harassment the Pennsylvania State Education Association suggests that a woman confronted with work place advances or offensive behavior respond as follows. When faced with unwelcome requests to "date," she should say, "No, I don't want to go out with you. I do not mix my work and personal life." Similarly, if offensive jokes are being told in her presence in the work place, she should say, "I don't think such jokes are funny. Please don't tell them when I am present."

Fourth, the employer should establish a "grievance" procedure as part of its

policy forbidding sexual harassment. The procedure should allow confidential complaints to a high level manager, preferably in the company's human resources department. There should also be alternative avenues for complaints so that alleged victims do not have to initiate their complaint with the alleged harasser.

Fifth, complaints should be treated with sensitivity and with due regard for the privacy interests of all concerned, but a thorough investigation should be conducted. The victim and alleged harasser should be separately interviewed.

Finally, prompt remedial action should be taken once the investigation is completed. The remedial action should be appropriate to the degree of the offense. Overreaction should be avoided. The alleged harasser need not be disciplined for the first offense unless it involves serious misconduct, but he should be counseled that if such conduct is repeated, he may be discharged.

The fair and consistent application of such an approach is far better for all concerned. Most victims of harassment just want such conduct to stop and would much prefer an internal remedy to litigation. Employers are likewise better served. Costly litigation and embarrassing public spectacles like the Thomas hearing can thereby be avoided.

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LINDA S. GOTTFREDSON AND JAN H. BLITS

Legislated Lawlessness on Civil Rights

"If you like laws and sausages, you should never watch either one being made."
(attributed to Otto Von Bismarck)

In October, 1991, after two years of rancorous debate, Congress passed and the President signed the Civil Rights Act of 1991. All sides took credit for having demonstrated their commitment to civil rights. Moreover, everyone reported with satisfaction that the compromise bill was not a "quota" bill.

Although some civil rights and other national leaders proclaimed a new national consensus on civil rights, the only consensus among scholars, journalists, lawyers, and others who scrutinized the Act was that the new law was ambiguous and confusing. For example, the Act clearly states that hiring practices leading to disproportionate results by race or sex ("disparate impact") are discriminatory unless an employer can demonstrate the "business necessity" of the hiring practice. Yet the law fails to define the term "business necessity," except to refer to a string of previous Supreme Court decisions (before *Wards Cove v. Atonio*[1]) in which the meaning of the term remained largely unsettled. Moreover, although the law explicitly claims "to codify the concepts of 'business necessity' and 'job related' [as] enunciated by the Supreme Court" in those decisions, its own language on business necessity departs from them. Whereas under those decisions "job relatedness" is evidence of "business necessity," the new law disjoins the two terms. An employer must show that a challenged practice is "job related for the position in question *and* consistent with business necessity" (emphasis added). Among other ambiguities, the Act also leaves unclear which of its provisions, if any, are retroactive.

The greatest confusion in the new Civil Rights Act, however, concerns not the definition of critical terms, but the intended effect of the law itself. The law is confusing, even self-contradictory, on the central and most divisive issue in civil rights today, the use of preferential treatment in employment. One section of the Act explicitly prohibits the consideration of race, sex, or religion in hiring or promotion. A practice is unlawful, it says, "when ...race, color, religion, sex, or national origin was a motivating factor for [that]...practice, even though other factors also motivated the practice." But another section of the Act apparently gives its blessing to the consideration of race and sex: "Nothing in...this act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." Whether "in accordance with the law" refers to the new law itself or to past Supreme Court decisions upholding particular uses of race and sex in hiring and promotions (or to something else) is left unclear. The difference is crucial, for the new law's ban on race - and gender-conscious practices would prohibit many affirmative action plans and consent decrees, while past Supreme Court decisions might exempt them from the ban.

It is of course true that all new laws, no matter how carefully written and thoughtfully deliberated, are considered more or less obscure and equivocal until their meaning has been rendered and fixed by a series of particular court decisions. Some degree of imprecision, hence uncertainty, is unavoidable in any public law, particularly one as broad in its purpose as the 1991 Civil Rights Act.

Last year's civil rights law, however, is different. Following an unfortunate

recent legislative practice, it is deliberately obscure. Congress and the President, like the Republicans and Democrats in Congress, were deeply divided over the basic principles to be embodied in the bill. Some favored a group rights approach, emphasizing equal results; others a traditional individual rights approach, emphasizing equal opportunity. While the former were often accused of supporting quotas, the latter were just as often accused of ignoring discrimination. Despite these differences, each side felt politically constrained to enact civil rights legislation - but without appearing to have capitulated to the other side. The lawmakers therefore fashioned a bill that embraced all sides, and whose self-contradictions were concealed by intentional obscurity.

The resulting bill - a mixture of ambiguities, inconsistencies, and omissions - was one that each side could plausibly claim reflected its intent. Democrats justifiably claim that the new law makes it easier to sue employers for discrimination (and win) when they don't hire enough women and members of minority groups. Republicans can claim, with equal justification, that certain forms of preferential treatment (for example, race norming and other forms of race conscious scoring and use of tests) are now illegal.

The major source of the law's confusion is that both sides have tacitly agreed to maintain a politically expedient myth about equality in employment. The myth is that it is possible to bar preferential treatment and at the same time eliminate disparate impact. The truth they avoid is that equal opportunity often leads to unequal, not equal, results. Employment data indicate that prohibiting race and sex preferences virtually guarantees disparate impact, while prohibiting disparate impact usually requires using race and sex preferences.

The reason for the conflict between equal opportunity and equal results is that the race and sex composition of the most qualified job applicants typically does not mirror the race and sex composition of the population. For various reasons, blacks, Hispanics, and certain other minorities tend to come to the labor market with weaker job-related skills and abilities than do Asians and whites. Similarly, women often arrive in the job market with somewhat different job-related goals and constraints than do men. Although educators frequently emphasize these disparities when seeking public funding to eliminate them, proponents of both sides in the civil rights debate have generally ignored them. One side fears losing its claim to equal results; the other side fears being labeled "racist" or "sexist." The burden of the employment myth has fallen chiefly on employers, who must deal with a contrary reality. Now, with the passage of the new civil rights law, their difficulty has greatly increased. Since the Supreme Court's 1971 *Griggs v. Duke Power Co.*[2] decision, disparate impact in hiring has constituted prima facie evidence of employment discrimination, relieving plaintiffs of the necessity of proving an employer's *intent* to discriminate. Employers could rebut this presumption of discrimination only by demonstrating the "business necessity" of the hiring procedure in question, or, more specifically, its "manifest relation to the employment in question."

The major source of the law's confusion is that both sides have tacitly agreed to maintain a politically expedient myth about equality in employment. The myth is that it is possible to bar preferential treatment and at the same time eliminate disparate impact.

Such a demonstration, however, has been costly and sometimes impossible. Moreover, the requirements for "a manifest relation to the employment in question" have never been clear or consistent. The Supreme Court, from *Griggs* on, has provided only a general definition of "manifest relation," deferring to federal agencies and employment testing experts for guidance on specific requirements. Thus, the adjudication of disparate impact cases has usually turned not on law, or even on business practice, but rather on highly technical, arcane, and ever-changing issues in the science of employment testing - a science which, it should be added, is (probably predictably) becoming increasingly politicized as some proponents seek to advance their political agenda in the use of abstruse new technical arguments.

Rather than risk potential litigation (and unfavorable publicity), many employers since *Griggs* have hired by the numbers. Whether openly or secretly, they have "corrected" their color - and gender-blind hiring number by using quotas (euphemistically "targets" or "goals"), different hiring standards for women and minorities, and other forms of preferential treatment, most recently in the name of work force "diversity". Even employers who could defend their selection procedures have often chosen to balance their work forces by race and sex to avoid litigation.

While the new civil rights law increases the pressure on employers to hire by the numbers to avoid disparate impact, it also makes it far more dangerous for them to yield to that pressure. The new law places employers in a double-bind by making it easier for plaintiffs to sue and prevail (and collect large damages) when work forces are unbalanced by race or sex, while preventing employers from using race or sex as "a motivating factor" in hiring or promotion decisions.

First, in disparate *impact* cases, the law's new standard for demonstrating business necessity is more confusing and probably more demanding. It requires employers to "demonstrate that the challenged practice is job related for the position in question *and* [not 'or'] consistent with business necessity." Whereas under *Griggs* employers could show business necessity by showing job-relatedness, under the new law employers (presumably) will have to show business necessity in addition to job-relatedness whatever "business necessity" may now mean. Moreover, compounding the confusion, the law also fails to define the term "position," which it substitutes for the previous term "employment." This change suggests that employers might now have to demonstrate the job relatedness of a challenged practice, not for the class of jobs in question, but for the particular position being filled - a much more stringent and perhaps impossible

standard.

Second, and this is even more important, the law establishes new remedies in Title VII disparate *treatment* cases that increase the likelihood that plaintiffs will sue employers and win. For the first time, the law allows plaintiffs in Title VII disparate treatment cases to seek punitive as well as compensatory damages and to recover fees for experts as well as lawyers. It also introduces jury trials, which traditionally favor employees over employers, to determine both liability and damages. Employers should take no comfort from the fact that punitive damages are limited to disparate treatment claims. Already plaintiffs' lawyers have begun to remove the distinction between intentional and unintentional discrimination, by arguing that, given what is known about the "problems" of employment tests, use of tests known to have disparate impact amounts to evidence of intentional discrimination. Although employers are often able to rebut charges of "problems" with their tests, rebuttals are usually highly technical and less likely to convince a jury than a judge.

Employment data indicate that prohibiting race and sex preferences virtually guarantees disparate impact, while prohibiting disparate impact usually requires using race and sex preferences.

While increasing the likelihood that employers will be sued, will lose, and will pay more for work place imbalance, the law also prohibits them from using race or sex as "a motivating factor" in any employment practice, even if "other factors also motivated the practice," to avoid such imbalance. Ironically, this prohibition on all forms of race and sex preference was placed in the 1991 civil rights bill by Democrats at the behest of feminists, who sought

to nullify the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*[3]. In that case an employer declined to promote a woman to firm partnership at least partly because of sex stereotyping. The Court ruled that the employer could defend its failure to promote her only if it showed that it would have made the same decision had it not taken her gender into account. The provision in the law was meant to eliminate that defense. In so doing, however, it outlaws racial preference in favor of women and minorities as well as bias against them. Employers now become just as liable for intentionally favoring women and minorities as for intentionally or unintentionally disfavoring them. Reverse discrimination, previously the easiest solution to disparate impact, has now been made a risky practice.

A law should enable people to know their rights, duties, and obligation. But the new civil rights law leaves precisely these things in doubt. Employers are damned if they do and damned if they don't. Confronted with a law that seems to require just what it prohibits, employers face the unhappy prospect of having to choose which section of the new law to violate or evade.

* * *

(FOOTNOTES)

1. *Wards Cove Packing Co. v. Atonio* 490 U.S. 642 (1989)
2. *Griggs v. Duke Power Co.* 401 U.S. 424 (1971)
3. *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989)

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AIDA WASERSTEIN AND JAMES F. MAHER

How Long Is The Boss's Arm?

An Exploration of Law and Policy

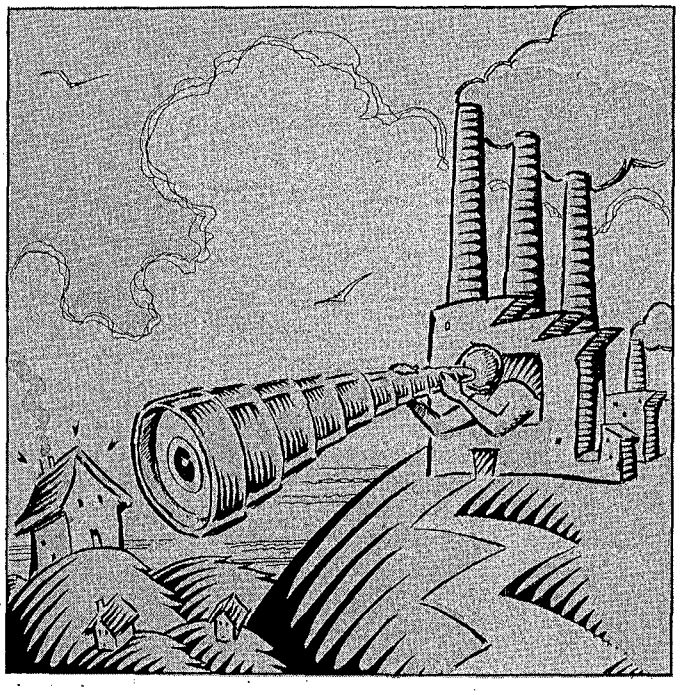

Illustration by Larry Knox

Significant questions regarding the permissible range of an employer's infringement on an employee's life style

Our society guarantees us a reasonable zone of privacy, which is, obviously, strongest in the home. See e.g. *Griswold v. Connecticut,* 381 U.S. 479 (1065) (Use of contraceptives is protected by the "penumbras" of the First, third, Fourth, and Fifth Amendments as covered by the Ninth Amendment of the United States Constitution),[1] and Delaware Constitution, Article I, Section 6's prohibition against unreasonable searches and seizures.

However, as one steps outside the home into the work force, the expectation of what is to remain private diminishes and the employer's interest begins to bear upon one's right to be free from interference. For example, the employer has an interest in insuring a reliable, competent work force and in containing costs. To what extent, however, do employers' interests justify reaching outside the work place into areas that have traditionally been more private? Can they, for example, require employees to submit to drug tests? Can they demand that employees refrain from smoking, either in the work place or outside it? Can they require participation in programs to preserve health and increase physical stamina? Can they base employment decisions on employees' needs to be available for dependent family members? We examine here these issues from a philosophical perspective in the hope of developing a reasoned public policy in this highly important topic in our working lives.

The Public v. The Private Employer

The United States and Delaware Constitutions restrict the public employer's right to use screening programs that may interfere with freedom from unreasonable searches and seizures. Private employers do not face such a restriction unless they act as agents of the government. Constitutional provisions would, for instance, apply to a private employer who engages in a cooperative search with the police or who refers an employee who tested positive for drug use for criminal prosecution. The purely private employer, nevertheless, must be careful not to interfere with an individual's common law right to privacy. Although Delaware case law is sparse, that right has been held to protect against intrusion into physical solitude, publication of private matters that violate ordinary decency, being put in a false position in the public eye, and deliberate harassment. Furthermore, slander and libel laws protect the person from public dissemination of falsehoods that adversely affect one's name and reputation. The private employer must keep these principles in mind in the conduct of daily business. Failure to do so could expose the employer to an expensive jury trial and civil damages.

Drug Pariahs in the Workplace

Drug testing is an accepted fact of employment in Delaware. For public-sector employees, the constitutional protection against "unreasonable searches and seizures" has proved a flimsy curtain. Courts are ruling that the operant term is

unreasonable and when employees hold jobs that affect public safety or law enforcement, even random testing (done in a discreet medical setting) is allowed. See *Skinner v. Railway Labor Executives Association,* 489 U.S. 602 and *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989). Lower courts have approved testing of public employees on "reasonable suspicion" (note - not probable cause or even reasonable cause) even where the work has no immediate effect on public safety: *Connelly v. Newman,* 753 F. Supp. 293 (N.C. Cal. 1990).

Private sector employees don't have the permeable protection of the Constitution. Most major private employers routinely drug test final candidates for jobs. Employers who don't will have more than their share of the chemically-impaired. Even unions have been unable to block pre-employment testing: *Star Tribune,* 295 NLRB No. 63 (1989). Employers establishing or changing test programs for current employees must at least bargain in good faith with their unions: *Johnson-Bateman Co.,* 295 NLRB No. 26 (1989). Once agreement is reached, if it is, the program would be effectively fixed for the duration of the labor agreement.

Drug use detected in the workplace is not a casual matter. It may start that way, but if the reader is unacquainted with the power of addiction, a chat with someone who is having a hard time giving up smoking will be instructive. Getting fired in Delaware for violating the company drug policy (i.e., failing the drug test) usually means losing the social safety net of unemployment benefits. As a species of "gross misconduct," it jeopardizes continuation of health care coverage under COBRA. Access to employment equals access to health care today. With all that, there is a little understood fact of drug testing: not one single chemical drug test measures work *impairment.*

Drug tests only show that drugs have been used. Depending on the drug, detection can occur for as little as 8 hours for alcohol, or up to 30 days for heavy marijuana use, with the average for all drugs being 7 to 10 days. The hallucinogenic drugs like LSD can't be detected at all. This means that drug use off the job will result in losing the job if it is detected. Until recently, an employee's off-duty behavior was considered none of the employer's business unless it directly and adversely affected the work (e.g. making it difficult to maintain discipline as the employee interacted with co-workers or bringing grievous public disrepute to the employer). The unstated social policy assumption has become that detectable drug use is equivalent to job impairment. Behaviorists in the social sciences have published on both sides of that issue for years.

Drugs affect different people differently. Heavy drinkers can function fairly well after consuming enough alcohol to drop most people in their tracks. One reason why teenage drinkers have more serious auto accidents is that they have not yet acquired the skills needed to drive while impaired by alcohol. The comfortably-accepted highway standard of alcohol intoxication is a legally-enacted approximation. Studies of performance in drivers tested after measured doses of alcohol have shown that people are more than twice as "impaired" at any point on the increasing side of the bell curve of blood-alcohol concentration than they are at the same point on the decreasing side.

The General Assembly, acting on good scientific approximations of a mythical average has chosen a blood-alcohol content percentage to represent presumptive impairment. This percentage is changed from time to time as legislators react to political dynamics. Other than for alcohol, no credible science has emerged to persuasively correlate a detected drug trace with any degree of impairment. Since there is also none to correlate with a presumption of *no* impairment, the decision by default is to equate a detectable trace with impairment.

Other social policy issues lurk in the term "drug testing". Major tranquilizers like Valium and Librium are among the most commonly prescribed and abused drugs. Valium abusers may experience psychotic episodes, but if one applies for two jobs in a single day, one at a major industrial employer, and one at a major trucking company, he has a good chance of being turned down by the first, but employed by the second. Why? Because the U.S. Department of Transportation's Federal Highway Administration set up a strict system for regulated trucking companies to run their drug testing. The system allows for testing for only 5 of the 7 major groups of abused drugs, and the tranquilizer and barbiturate groups are not included.

Another odd point: There is no universally accepted standard for what constitutes a test result showing evidence of drug use. An employer and his laboratory are free to set the "dials" where they wish. On marijuana testing, set points of either 20, 50, or 100 nanograms/milliliter are typical. A tested concentration of 49ng/ml would be positive if the test is set at 20, but negative for the other two set points. (Readings at between 150 - 300 ng/ml are usually found in employed marijuana users.[2]

The boss is free to mark the boundaries of the playing field, and the transgressor loses even the minimal protection of unemployment compensation. The employer may run the most vigorous anti-drug campaign and completely ignore the much greater impact of alcohol. Those most needing medical intervention are losing insurance coverage. How is it then that our notoriously litigious society, spurred on by an assumed glut of lawyers, has produced so little litigation? Assuredly, the displaced worker with a $50-a-day habit is not the most appealing plaintiff.

Since the technology that detects illegal drugs, can detect drugs like caffeine, nicotine, steroids, and so forth, the employer motivated enough to pay a laboratory's bill can find out a lot. Is the consent an employee or applicant gives to permit the widest-range of testing really knowing and voluntary in the circumstances in which it is commonly obtained? Perhaps job applicants should have the same rights: it might be helpful to know that one's potential co-workers are all heavily into Tums, Maalox, and Pepto-Bismol.

This battle of the War on Drugs uses medical technology to further a social policy of separating drug users from employment, thereby (it is hoped) choking off the income stream that funds a demand for drugs. This fervent hope underscores the general failure of import interdiction and penal enforcement. Since the United States is now the nation with the highest percentage of its population in jail, and more than half of the prisoners in the federal penal system are there for drug offenses, the day of social reckoning on this policy is coming.[3]

The U.S. Government and major users of subcontractors have made drug testing a condition of doing business with them. Someone may ask "What business is it of theirs, anyway?" Nonetheless, placid acceptance brings us to the next step: will the quest for a healthier, more alert, efficient, reliable work force lead employers to apply life style criteria in selecting applicants? An employer might credibly argue that hunters get more colds and flu, skydivers

more sprains and breaks, rock musicians more hearing loss, and bicyclists more head injuries. Furthermore, sailors (such as co-author Maher) are obviously crazy! Employers should not be allowed to exclude those people, should they? The next rapidly approaching frontier is psychological testing that promises a uniformly harmonious, compatible, and productive work force.

Disparate Impact

As noted in Sheldon Sandler's article elsewhere in this issue, employment at will is the rule in Delaware. Basically this means that the employer can take action against an employee for any reason, so long as it is not one of a narrow list of impermissible reasons and so long as the employee is not protected by contract. But even absent an employment contract, the employer should beware of applying what seems to be a facially neutral policy that discriminates in practice. For example, can an employer refuse to hire an obese woman? Is the employer justified on the ground that an obese employee may incur more expenses and health insurance costs, or create an unfavorable appearance to the public" or, is the employer guilty of sex discrimination? Moreover, does the nature of the employer's business affect the decision? For example, may a diet service refuse to hire the obese?

Health Insurance and other Employment Benefits

Given the high cost of health insurance and related benefits today many work to insure such benefits for themselves and their families as much as they do for the wages. It is not unusual for potential employees to select one job over another because of the benefit package. Employers also have a high stake in cutting costs. They want to attract the most competent employees by offering the best packages and, at the same time, they are very mindful of the rapidly escalating cost of health insurance. Although employers do not have a lot of control over the packages offered by the various health plans, nonetheless decisions based on cost often have much wider implications and can functionally affect the health product available to the employee. For example, HMO type plans often restrict the medical providers available under the plan. This obviously controls whom the employee sees for major decisions regarding, for example, life threatening surgery. While in the past, Americans felt they had unfettered discretion in selecting medical care providers, that discretion is increasingly restricted by decisions made in the work place. Similarly, there is a difference among plans as to whether they will cover therapy provided by social workers. The employee is, therefore, often forced to rely on psychologists or psychiatrists or forego the therapy benefits payable under the plan. At a time when the AIDS virus is reaching epidemic proportions, health care issues become crucially important. While Robert Stewart's article on disability covers this issue in more detail, it is noteworthy that limitations and exclusions in medical coverage will have an immeasurable impact on the work place.

Smokers Need Not Apply?

In Delaware the range of social policy on this topic is broad. For example, Executive Order No. 71 allows smoking only in designated areas in public buildings and in some state-maintained pool vehicles and prohibits smoking in all vehicles used to transport clients or the general public. Proponents of the law have argued that it creates a healthier work environment because of the dangers of passive smoke. For example, the Executive Order estimates that 15% of all deaths in Delaware in 1985 were attributed to smoking and that these deaths caused a loss of almost 10,000 years of potential life. The Order relies on the Governor's responsibility to protect the health, safety, and well-being of Delaware citizens. Opponents have just as strongly argued that they have been denied one of their basic rights.

The Executive Order also prohibits discrimination as a result of an employee or applicant's smoking habits. The Order applies only to state departments and agencies and sets no statutory framework for enforcement of the non-discrimination provision. 11 *Del. C.* 1327 prohibits smoking on trolleys and buses used as public conveyances for carrying passengers within the state. It provides for a fine of between $5.00 and $25.00.

In New Jersey, however, the law required employers with 50 or more employees in a structurally enclosed location not usually frequented by the public to designate either no smoking or limited smoking areas. The New Jersey State Department of Health is given the responsibility for monitoring enforcement of the law and can sue employers who are in violation.

New Jersey also prohibits employment decisions based on an enployee's smoking habits outside the work place unless the employer has a rational basis reasonably related to the employment. An aggrieved person may file in court within a year following the alleged violation. The court can order injunctive relief, compensatory and consequential damages, attorney's fees, and costs. There is a $2,000.00 penalty for the first violation and a $5,000.00 penalty for each subsequent one.

Which is the better social policy? Should Delaware follow the New Jersey lead? Should it strengthen its anti-smoking stance by, for example, giving tax credits to employers who provide smoke-ender programs as a benefit to their employees?

Family And Medical Leave Act

For six years Congress considered some form of legislation and in late 1991 the Senate passed S.5, The Family And Medical Leave Act by a vote of 65-32 and the House passed the Gordon-Hyde substitute to H.R. 5 by a vote of 253-177.*

Both bills basically cover employers who have more than 50 workers. This would cover approximately 46 million employees. The bills will not, however, affect 95% of the businesses and 44% of the employees.

The bills provide for up to three (3) months of unpaid leave per year for the adoption or birth of a child or a serious illness suffered by an employee or a member of the immediate family. The term "immediate family" covers a child, a spouse, or a parent. It also includes a legal ward under 18 or one who is over 18 and incapable of self care because of a mental or physical disability. The term "parent" means the biological, foster, or adoptive parent, a parent-in-law, a stepparent, or a legal guardian. The bills cover employees who worked at least 1,250 hours during a preceding 12 month period.

The bills permit an employer to require the employee to substitute any of employee's accrued vacation leave, personal leave, or family leave for the leave provided under the bills. They require employees both to give at least 30 days notice of the intention to leave where the necessity for leave is foreseeable and to make reasonable efforts to schedule treatment so as not to unduly disrupt the operations of the work place. There are provisions for the employer to require certification from the health care provider. Both bills require restoration of the employee to the position held before the leave or an equivalent position with

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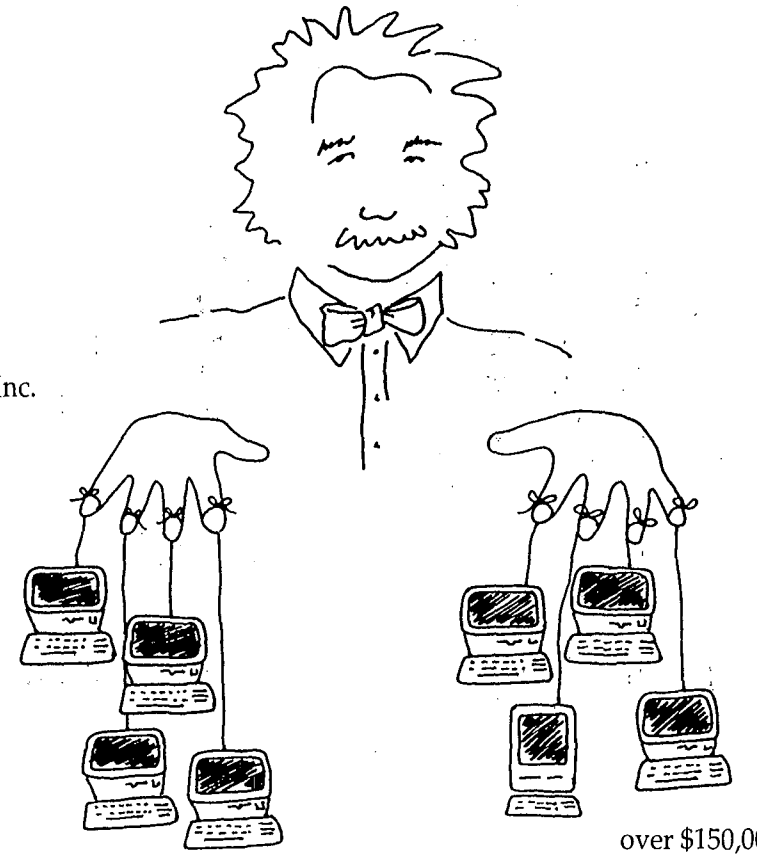

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Both bills provide for damages equal to any wages, salary, benefits, or other compensation denied by reason of a violation, monetary losses such as the cost of providing care up to 12 weeks of the employee's wages or salary, lquidated damages, equitable relief such as reinstatement and promotion, attorney's fees, and costs.

The debate has continued for at least six years and will obviously be ongoing. We, the authors of this article, endorse some form of family leave legislation because, as noted in the House Bill preamble, there is a need to ..."balance the demands of the work place with the needs of the families, to promote the stability and economic security of families and to promote national interests in preserving family integrity..." Senators Biden and Roth and Congressman Carper voted in favor of family leave legislation. The American Bar Association has supported both bills, as well.

Although fairness to employers and employees argues for uniform application so competitors have similar burdens in the market place, it is understandable that the federal legislators have undertaken to start with approximately 5% of the businesses to see how it works in a more limited context before embarking on wider coverage.

Balkanization Of The Work Place

Diversity of religion has always been a fact of American life, but the pace is quickening. The impact on the work place is growing too. An employer has to find the undefined balance between reasonable accommodation and undue hardship to make an effort to accommodate the increasingly diverse Sabbath and religious observances of his employees. This weights heavily on businesses with rotating shift or continuous operations. See *Philbrook v. Ansonia Bd. of Ed.*, 2nd Cir, 757 F.2d 476, affirmed and remanded 479 U.S. 60, appealed after remand, 925 F.2d 47 (1991).

The greater diversity of the work force and emerging nationalist move-

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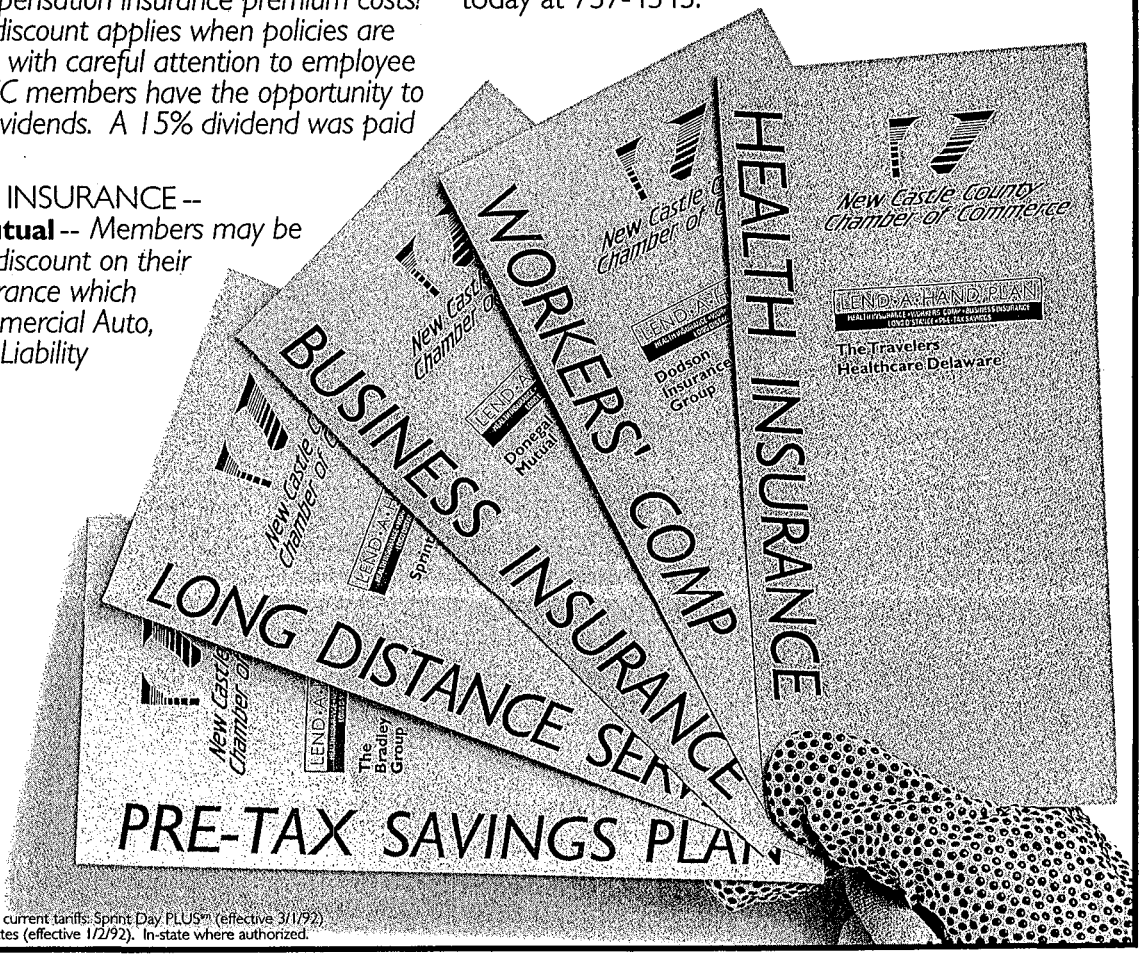


† Rate comparison based on current tariffs: Sprint Day PLUS℠ (effective 3/1/92) vs. AT&T basic interstate rates (effective 1/2/92). In-state where authorized.

ments in the world means that ethno-religious conflicts previously obscure to managers of enterprises in the U.S.A. may increasingly crop up in the work place. An employer was held accountable for the job discrimination practiced by a Pakistani supervisor on his Indian subordinate. The employer had no idea that discrimination was occurring, or even that the two groups were different, let alone historically antagonistic.

Perhaps the most interesting cases arise from Scientology. A burgeoning sector of the State Department of Labor's case load concerns employers who have joined the Church of Scientology. It is claimed that they have occasionally pressured their employees to convert. In some ways, conversion may only mean acceptance of life style and work ethics advanced by the church of Scientology, but the cases are treated as religious discrimination. This brings to the work place questions like "What is Religion?" Employment lawyers are not usually philosophers: *The Founding church of Scientology v. United States,* 409 F.2d 1146 (D.C.D.C. 1969). Would a company that assigned its managers to a retreat where they were led in meditation or yoga exercises as stress-relief and productivity enhancement be trying to force conversion to Buddhism? Is it any wonder that employers seem gun shy?

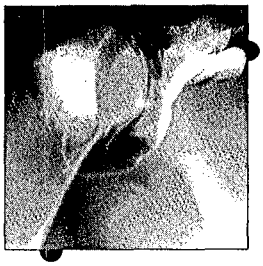
We have attempted to raise significant questions regarding the permissible range of an employer's infringement on an employee's life style. We attempt no definitive answers. We hope that these questions will promote public discourse with an attendant development in social policy.

* The Family Care Act of 1991 (S.B. 122) has also been introduced in the Delaware State legislature.

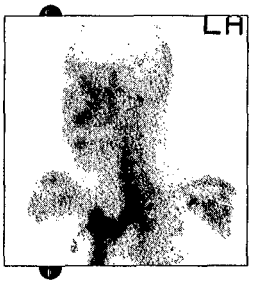
(FOOTNOTES)

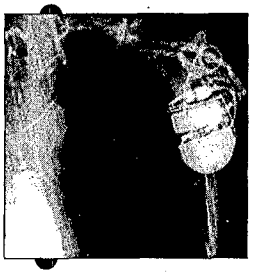
1. The right of privacy in the abortion context is expected to be weakened as the Supreme Curt considers new cases in the coming term. The First Amendment right to freedom of speech has already suffered a blow in the abortion context in *William L. Webster v. Reproductive Health Services,* 109 S. Ct. 3040 (1989). An analysis of this development is, however, outside the scope of this article.

2. By way of general explanation, these tests detect very small concentrations of substances dissolved in a urine specimen. 50 ng/ml is roughly equal to an ounce of salt dissolved in a 35,000



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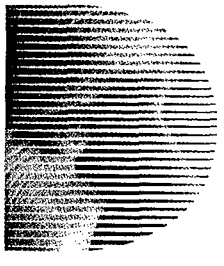

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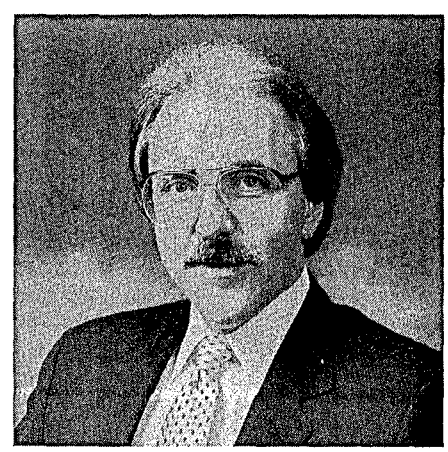
3. Perhaps a more effective way would be a federal Addictive Substance Control Board that would retail all psychoactive drugs like tobacco, alcohol, cocaine, heroin, etc. Purchases could be made only by major credit card (thus eliminating under-age purchasers and those unable to simultaneously indulge and keep a job). This would also cripple the cash network supporting illicit sales. If the user's monthly bill were also sent to his employer, the data supporting an employment decision unquestionably would be better.

Aida Waserstein is a partner in the firm of Waserstein & Demsey, where she conducts a general practice with an emphasis on family and labor law. She is a graduate of the University of Pennsylvania Law School. She belongs to the Family Law and Labor Law Sections of the Delaware State Bar Association.



James Maher joined Young, Conaway, Stargatt & Taylor as a partner in the Labor and Employment Law Section in July, 1988, after eight years as chief labor counsel in the Legal Department of Hercules Incorporated. Before joining Hercules, He practiced in New York City and Philadelphia representing management before agencies such as OSHA, NLRB, EEOC and before various courts.

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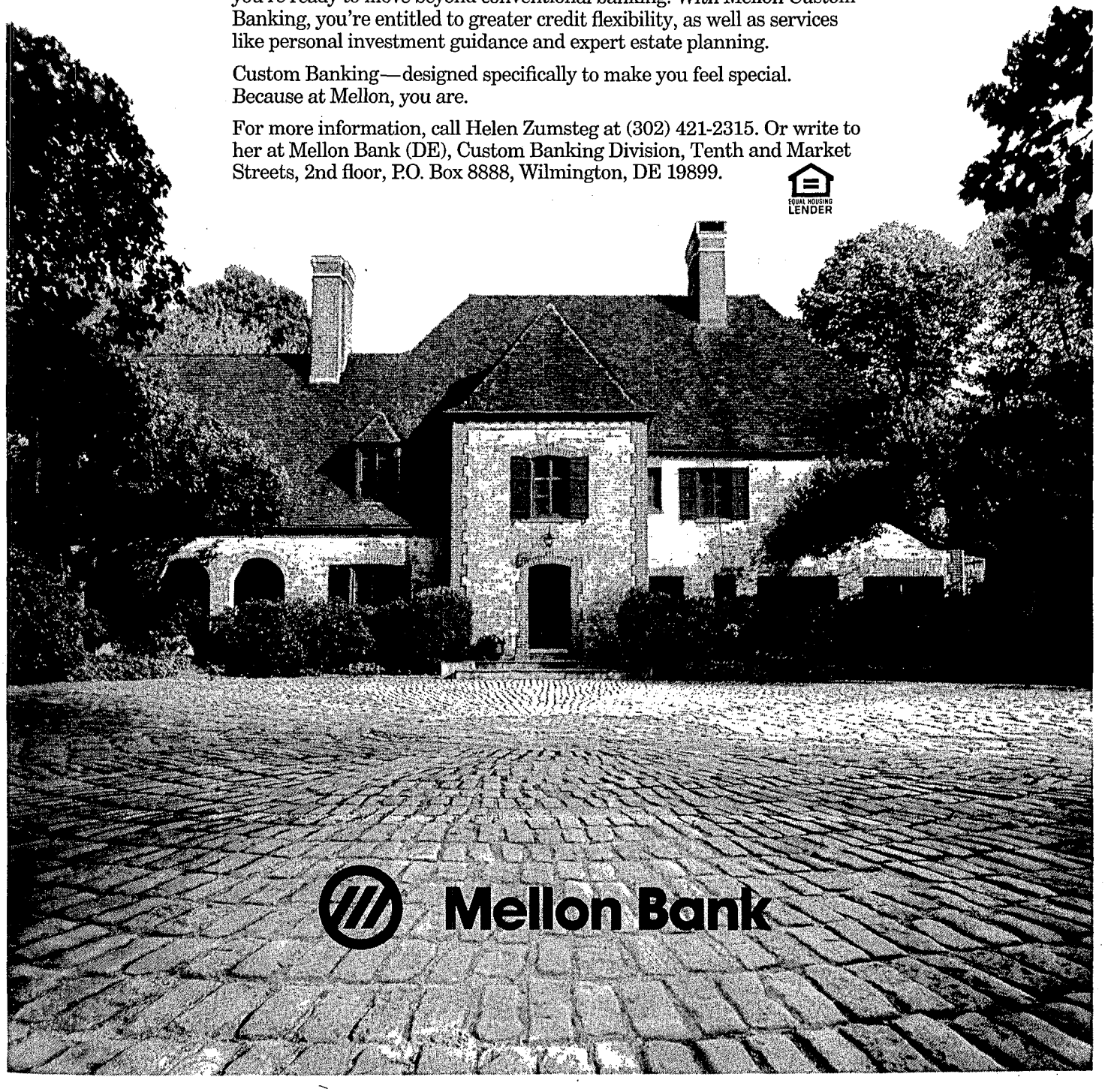

ROBERT F. STEWART, JR.

The Americans With Disabilities Act

Coming to Grips With the Law

In July 1990 when 3,000 people, many with disabilities, gathered on the White House lawn for the largest bill-signing ceremony in the history of our country, they saw President Bush ink what The National Law Journal aptly termed the "most sweeping civil rights law in a quarter century." The Americans with Disabilities Act ("ADA") became law that day because 43 million Americans could no longer be denied their fair share of a pie cut by Congress into four slices: employment, public services, public accommodations, and telecommunications.

Illustration by Juliette Borda

Public accomodations are now under the gun to ensure access to services for a whole new range of customers.

But Congress thought that it would take time for the country to gear up for compliance with this comprehensive law. As a result we have been treated to an extraordinarily long lead-in period before enforcement begins. It was not until early this year that the public accommodations requirements took effect, while the employment rules do not become effective until July or reach their full coverage until 1994. This "time-delay fuse," as *The National Law Journal* put it, "will explode if the gradual phase-in lulls employers into procrastinating over making the required changes."

Indeed, some raise the specter of "a nuclear litigation explosion" as a result of this legislation. While that may be good news for lawyers, employers and purveyors of public accommodation (including *law firms* and others who offer services to the public) can hardly be pleased.

Clearly, the time to prepare is now, though Delaware employers should already be there since a Delaware enactment, the Handicapped Persons Employment Protections Act, which in many ways parallels the new federal law, has been on the books since 1988. Virtually every aspect of the employment relationship will be affected, from job applications and pre-employment physicals to job descriptions, drug testing, and the structure of the work place itself.

Summarizing the most widely applicable portions of this "sweeping civil rights law" is no small task, but we shall try:

EMPLOYMENT

Title I states that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." This provision takes effect on July 26, 1992 for employers with 25 or more employees. In July 1994, ADA will apply to those with 15 or more employees. Employment agencies, labor organizations, joint labor-management committees, and state governments are also covered by the Act. The United States and federally owned corporations are excluded, as are bona fide private membership clubs. Religious organizations enjoy a limited exemption.

Defining disability: a physical or men-

tal impairment that substantially limits one or more of the major life activities, a record of such impairment, or being regarded as having such an impairment. "Major life activities" include not merely walking, talking, seeing, hearing and the like, but *working*.

Not every disabled person is protected. The law covers only the "qualified individual with a disability," one who satisfies the requisite skill, experience, education, and other job-related requirements of the job and who, with or without reasonable accommodation, can perform its essential functions.

Reflecting national priorities, the *current* use of illegal drugs disqualifies one from protection. Seemingly giving a nod to drug testing as a means of determining "current use" regulations under ADA allow disqualification if the illegal conduct has occurred recently enough to suggest that the applicant is still actively engaged in it. However, one who is enrolled in a drug rehabilitation program or who has successfully completed such a program is protected, if he is no longer using illegal drugs.

Also excluded from the definition of "disability" are such conditions as homosexuality, bisexuality, transvestism, compulsive gambling, kleptomania, and pyromania. At the last minute Congress removed a provision from the bill that would have allowed employers to reassign employees with AIDS to other jobs, if their duties included food handling. Instead, ADA will permit reassignment from such duties only if the the employees have infectious or communicable diseases that appear on a list promulgated by the Secretary of Health and Human Services. AIDS is not on that list.

Pre-employment Inquiries and Medical Examinations

Pre-job offer inquiries into the existence, nature, or severity of a disability are prohibited. Under the regulations this includes questions about workers' compensation claims. Employers may, however, ask applicants about ability to perform essential job functions and even to demonstrate that ability.

Prehire medical examinations are not permitted, except that an employer may condition a job offer on passing a physical required of all applicants for the same job. All physical exams must be job-related and consistent with business necessity. Notably, drug tests are not considered medical exams under the Act so they can be administered before any job offer is made.

Reasonable Accommodation

Employers are required to make "reasonable accommodations" to the known physical and mental limitations of an otherwise qualified applicant or employee with a disability. This includes modifying or adjusting the job application process, the work environment, or the manner or circumstances under which the job is customarily performed. The employer must be prepared to make existing facilities readily accessible to and usable by persons with disabilities and to restructure jobs, acquire or modify equipment, and modify examination and training programs.

Employers are required to make "reasonable accommodations" to the known physical and mental limitations of an otherwise qualified applicant or employee with a disability.

The duty to accommodate applies, however only where the disabled candidate for employment could perform the essential functions of the job, i.e. those fundamental job duties intrinsic to the position. Accommodation is not required if it would impose an undue hardship on the employer, but this will not be readily found. "Undue hardship" means significant difficulty or expense, taking into account not only the nature and cost of the accommodation but also the overall financial resources of the facility and employer involved. Other factors, according to the regulations, are the type of operation, including the composition, structure, and function of the work force, and the impact of the accommodation upon the operation of the facility, the ability of other employees to perform their duties, and the facility's ability to conduct business. Lacking a cost formula for determining the reasonableness of any particular accommodation, such as the 5% of annual salary test found in the Delaware law, the required case-by-case approach no doubt will contribute mightily to the expected litigation burden under ADA.

An employer's primary defense will be to show that the criteria used for employment decisions are job-related and consistent with business necessity and that satisfactory work performance cannot be accomplished through reasonable accommodation. Also, employment is not required either with or without reasonable accommodation, where it would pose a significant risk of substantial harm to the safety or health of others or, according to the regulations, to the disabled employee.

Enforcement

The remedies and procedures of Title VII of the Civil Rights Act of 1964, including reinstatement, back pay, injunctive relief, attorneys fees, and enforcement by the Equal Employment Opportunity Commission, which last year issued the regulations under the Act are incorporated into it. As in the case of Title VII, employers must post notices informing employees of their rights under the law.

PUBLIC ACCOMMODATIONS

Title III prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." This applies to the broad spectrum of private entities considered public if their operations affect commerce. These include places of lodging, establishments serving food, places of exhibition or entertainment, places of public gathering, sales or retail establishments, service establishments, stations used for public transportation and privately operated public transportation systems, places of public display, places of recreation or amusement, sites of education, social service center establishments, and places of exercise. It does not apply to private clubs or establishments or religious organizations.

Prohibited Discrimination

The Act generally prohibits public accommodations from denying the disabled access to goods, services, or facilities and from providing separate and unequal accommodations. Purveyors of public accommodation may not impose eligibility criteria that tend to screen out the disabled unless such can be shown to be necessary for the provision of goods or services.

Failure to make reasonable modifica-

tions in policies, practices, or procedures will constitute discrimination unless such modifications would fundamentally alter the nature of the goods or services provided. Also, public accommodations must provide auxiliary aids and services necessary to prevent the exclusion or unequal treatment of the disabled unless these steps would fundamentally alter the goods or services.

Such goods, services, and facilities need not be provided for one who poses a direct threat to the health or safety of others. Such a "direct threat" is only present, however, when there exists a significant risk that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

ADA also mandates the removal of structural, architectural, and communications barriers in existing facilities and transportation barriers in existing vehicles where such removal is readily achievable. It will constitute discrimination to fail to design and construct public accommodations and commercial facilities (for first occupancy after January 26, 1992) that are readily accessible to and usable by the disabled, except where it is structurally impracticable to do so. It will also constitute discrimination to alter existing facilities so that the altered portions are not readily accessible to the disabled.

Enforcement

Title III may be enforced through lawsuits brought by the Attorney General or by private parties. Public accommodations may be ordered to make them readily accessible to the disabled and usable by them. Injunctive relief may also include requiring the public accommodation to provide an auxiliary aid or service, modify a policy, or provide alternative methods.*

The court may grant monetary damages to the aggrieved (when requested by the Attorney General) and may impose civil penalties up to $50,000 for the first violation and up to $100,000 for subsequent violations. Punitive damages, however, are not available. The prevailing party (other than the United States) may also be awarded reasonable attorneys fees.

Though effective on January 26, 1992, no civil action may be brought under this title until July 26, 1992 against any business that employs 25 or fewer persons and has gross receipts of $1,000,000 or less, and until January 26, 1993 against businesses with 10 or fewer employees and gross receipts of

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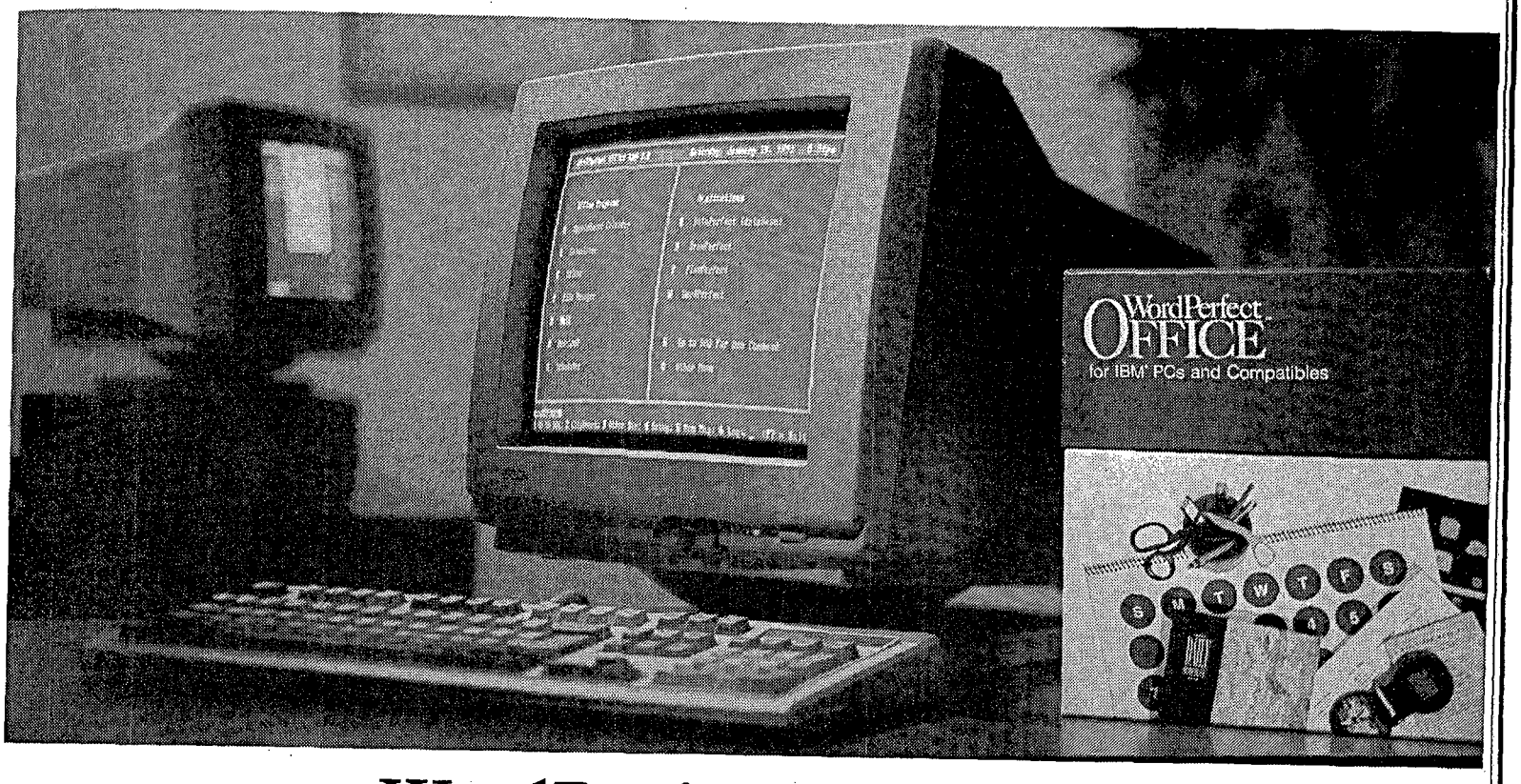

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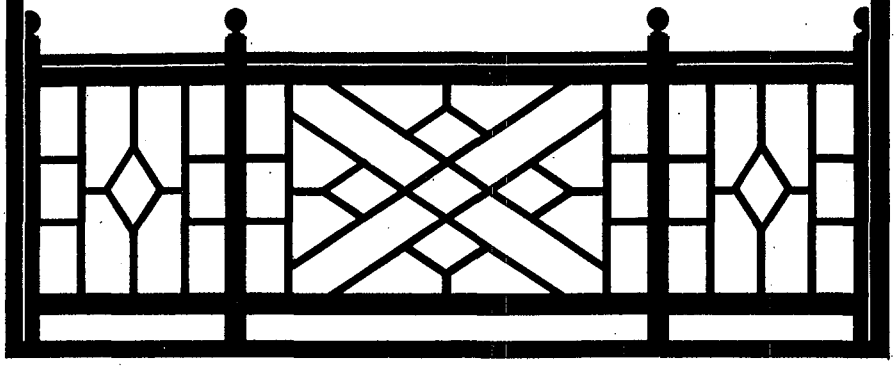

$300,000 or less.

PUBLIC SERVICES

Nondiscrimination by Public Entities

Under Title II, no qualified disabled person shall, for that reason, "be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity or be subjected to discrimination by any such entity." This provision protects the rights of the disabled who, with or without reasonable modification of rules, policies, or practices, the removal of architectural, communications or transportation barriers, or the provision of auxiliary aids and services, meet the essential eligibility requirements for receipt of services or participation in programs or activities provided by the public entity. The applicable remedies and procedures are those of the Rehabilitation Act of 1973. This section became effective January 26, 1992.

Public Transportation Services

Title II sets out detailed rules for the nondiscriminatory treatment of the disabled by public transportation services. Thirty days after the enactment of the law, all new vehicles purchased or leased by public transportation companies or by intercity or commuter rail companies must be readily accessible to the disabled. Those companies may buy or lease used vehicles only if they have demonstrated a good faith effort to purchase one's readily accessible to the disabled, including ones using wheelchairs. Existing vehicles may be reconditioned if they are made readily accessible to the maximum extent feasible.

Trains operated by a light or rapid rail system, an intercity or commuter rail system, or a public entity will be required to have at least one vehicle accessible to the disabled, including those using wheelchairs.

As of January 26, 1992, public entities operating fixed route public transportation systems must provide the disabled (including those in wheelchairs) paratransit or other special services with a level of service comparable to that offered users without disabilities. If the public entity can demonstrate to the satisfaction of the Secretary of Transportation that providing such services would impose an "undue financial burden" on the public entity, then, at the Secretary's discretion, it shall be required only to provide services that do not impose an undue burden.

Public Transportation Facilities

New facilities constructed for use by public transportation or commuter or

intercity rail services must be readily accessible to the disabled. Furthermore, alterations to existing public transportation facilities must be made in a manner that, to the maximum extent feasible, renders the altered portions readily accessible to and usable by the disabled including those using wheelchairs. On top of that, all existing stations in intercity rail transportation systems and key stations in commuter light and rapid rail transportation systems must be made accessible and usable. Intercity stations have 20 years to comply, while key commuter and rapid rail stations must comply within 3 years, subject to a maximum of 17 years of extensions from the Secretary of Transportation where extraordinarily expensive structural changes are necessary.

* * *

Delaware employers must be concerned with their obligations under state and federal law: ADA states that whichever law provides greater protection for the disabled will prevail. Public accommodations in Delaware are now under the gun to ensure access to services for a whole new range of customers and clients. The time for preparation is over. The time for compliance is now.

*The statutory language ends tantalizingly here, leaving one to wonder methods of *what.*

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PATRICIA H. HIGH

To Be Taxed Or Not To Be Taxed: That is Often Your Choice

If you were to ask, "What does an estate planning attorney do these days?," and, if you were I, you might well answer, "Show clients how to save lots of money." Well, DELAWARE LAWYER did ask, but the editors wanted a little more explanation - in written form, and with examples, naturally. So, for those of you who have not recently consulted your attorney about the disposition of your assets, read on to find out why that appointment should not be put off.

Author Patricia High interviews estate planning clients Brenda and Glenn Chisholm

Attorneys have traditionally been involved in estate planning, planning for the disposition of a client's assets during lifetime and at death. Given the complexity of the tax laws* and the attendant variety of vehicles available for informed individuals to use to transfer assets, that involvement continues to be a necessity for those who want to maximize the assets actually distributed to their chosen beneficiaries (as opposed to state and federal governments in the form of inheritance, estate, or generation-skipping taxes).

We attorneys must draft appropriate documents a Will and frequently one or more trust agreements that state the client's intention in an unambiguous fashion so that resources won't be consumed in a post-mortem determination of that intention. The greatest challenge is often getting the client to plan for circumstances that usually would not be considered without an experienced advisor: an unusual order of deaths; the future disability of someone who is very much alive and competent at the time; the tax and other financial consequences of death; and the application of intestacy laws.

In addition to drafting one or more unambiguous documents, the skillful attorney will be able to draft to take advantage of tax deductions, credits, and exemptions. The attorney's repertoire will include a number of types of transfers to a spouse that will qualify for the marital deduction and several types of transfers that qualify for the charitable deduction. But drafting is not the most important role for the attorney. Usually it is the attorney who must suggest to the client tax efficient ways to hold and transfer assets, such as when and how to make a charitable transfer (e.g. in a lifetime or testamentary charitable lead or remainder trust) and when not to take advantage of the marital deduction (e.g. in order to take full advantage of the unified credit or the generation-skipping transfer tax exemption).

We are also finding that clients of our estate planning practice often need us to be knowledgeable about managing financial resources for lifetime enjoyment - often called financial planning and investment management. Not that an estate planning attorney must have the ability to sell life insurance or select stocks or bonds; however, we believe that the most effective estate planners will recognize the need for, educate the client concerning, and assist in obtaining the services and products necessary for maximizing lifetime financial security,

Our goal as estate planning attorneys is to add value far beyond our fee by foreseeing problems and helping the client to plan for them or to avoid them.

Photograph by Carl Kleinschmidt

including appropriate forms of insurance and investment management.

The process of advising clients requires us to have keen ears, the ability to spot potential problems, and knowledge of the law and of available products and services. We also must educate the client and be diligent in following through with the client to accomplish what needs to be done (e.g. restructuring ownership of assets and obtaining life insurance or investment advice).

It is not enough to ask a client, "To whom do you want to leave your house, your tangibles, and your securities?" and thereafter record the client's intentions in a Will. After all, we are advisors, not mere scriveners. The client's financial circumstances, life style, and relationships must be discerned if we are to provide effective advice. That questioning and listening process should alert us to potential challenges and opportunities the client might face: Are there minors or otherwise incapacitated individuals the client wants to provide for? Can the client afford to make lifetime gifts? Is there a spouse, other family member, or friend who is reliable regarding money management? Are there appreciated or illiquid assets that are not fully benefitting the client? Is there sufficient liquidity in the client's estate? Is the client ready to turn over the management of a family business or a portfolio to a younger generation or a professional money manager? Has the client planned for possible disability? Can an "estate freeze" be accomplished, at least in part?

Once we understand the client's situation, the education process begins. The client should be alerted to the potential problems and possible opportunities. One potential problem everyone needs to plan for is disability. We routinely suggest the client consider using a durable power of attorney or a revocable trust to avoid the more expensive guardianship should disability materialize. (See John Herdeg's article in the June, 1989 issue of DELAWARE LAWYER.)

The lifetime gift is an opportunity to minimize total transfer taxes. We encourage financially able clients to establish gift programs to take advantage of the annual $10,000 per donee exclusion from transfer taxes. In appropriate cases we suggest that a client transfer significantly larger amounts during the client's lifetime to the chosen beneficiaries.

Lifetime transfers are tax-wise because they can leverage significantly the client's transfer-tax credit and generation- skipping tax exemption. For example, a healthy 70 year old client might transfer $630,000 in cash to her three daughters ($210,000 each) in 1992. No federal tax would be payable, because of the annual exclusion and the client's unified credit. The client must pay $22,500 in Delaware gift tax. If the daughters invest in a growth stock that appreciates at 8% per year for sixteen years (the mother's life expectancy), each daughter's gift will have grown to $719,448 by her mother's death in 2008. (We consider the 8% projection quite realistic; a more aggressive investment could produce significantly more growth.) If the mother invested the $652,500 (gift plus gift tax paid) in the same stock in 1992 without transferring the assets to her daughters at that time, died in 2008, and left the investment to her daughters, each daughter would receive $470,731 after federal estate and Delaware inheritance taxes were paid (assuming the mother's unified credit were applied towards the tax on this transfer). The lifetime transfer increased the family's wealth by $746,151 more than the mother's investment and transfer at her death.

Of course, if it became necessary to liquidate the portfolios in 2008, each daughter's portfolio from the lifetime gift would incur $142,645 of capital gains tax at today's maximum rate of 28%. The portfolio distributed to each daughter from the estate would have no capital gains tax to pay; however, the daughters would still be ahead with a lifetime transfer since their net, after paying capital gains tax, would be $576,803 each, assuming the tax rates are the same in 2008, versus the after estate-tax net of $470,731.

Life insurance is a tool that the attorney often suggests to obtain leverage in a gift program. If the daughters in the above example had determined they were unlikely to obtain the hypothetical 8% annual return for 16 years, or that their mother might die sooner than 2008, they could have used their gifts in 1992 to purchase a life insurance policy on their mother's life. By purchasing a combination whole life policy and single premium term policy, which would remain in force for the duration of the mother's life, they could obtain a guaranteed death benefit of $2,023,086 from a mutual life insurance company with an AA rating from Standard & Poor's and Moody's and an A+ rating from Best. Each would receive proceeds of $674,362, free of both estate and income tax, at her mother's death, whether or not the mother attained her life expectancy. Furthermore, if the policy were a joint and survivor policy purchased on the lives of both the mother (age 70) and father (age 72), each daughter would receive $838,382 in proceeds (again free of estate and capital gains tax) at the death of the second parent.

One problem estate planners often encounter when advising married couples is that one spouse has more assets than the unified credit and generation-skipping transfer tax (GST) exemption will shelter, while the other spouse's assets are not sufficient to fully use the credit or exemption. A couple whose joint net worth is $1.2 million will have to pay the U.S. government $235,000 at the death of the surviving spouse if the assets are held jointly, whereas a couple with the same net worth can avoid paying estate tax altogether if each spouse owns half of the assets. (And if one spouse dies several years before the other so that assets appreciate before the second spouse dies, tax will be paid on appreciation that could have been sheltered from estate tax had half of the assets been held by each spouse and a trust used to keep those assets out of the estate of the surviving spouse). In our practice we would assist the couple holding assets jointly to restructure assets and provide trusts so that both the surviving spouse and the children (or other beneficiaries) can benefit from the couple's total wealth, and in the process save $235,000.

A circumstance we encounter from time to time is the client who has accumulated, inherited, or been asked to serve as trustee for a significant portfolio, but needs assistance in maximizing its potential. We often participate in the search and negotiate for available, cost efficient, professional expertise.

An array of services is obtainable from registered investment advisers, banks, and brokerage houses. Clients with investable assets in excess of $1 million are able to engage an investment advisor to manage the portfolio. Clients whose assets exceed $5 million often wish to engage a consultant to provide asset allocation and to select a variety of managers to manage portions of the portfolio in a variety of styles, e.g. value equity, growth equity, international equity, fixed income, total return and cash management.

There are many quality money-managers in the region, but their minimum account sizes may prevent clients with smaller portfolios from obtaining their services. An investment product that became popular during the 1980's, the "wrap-free" program provided by several large brokerage houses, is ideal for many of our clients who want professional management but whose portfolios do not meet the minimum account sizes of the desired money manager. These wrap-free programs typically accept accounts of $100,000 or more. For a single fee, which is agreed to at the inception of the account, the client obtains individualized money management from a nationally recognized investment adviser (not the brokerage house), the services of a professional custodian (the brokerage house) who holds the securities, executes all trades directed by the adviser, collects all interest and dividends, processes bond calls, etc., and provides the client with regular statements of activity. (There are no separate brokerage commissions charged on trades.) In addition, the brokerage house should provide the client with a quarterly analysis of the account's performance, including an analysis of the investment adviser's performance vis a vis its peer group and vis a vis a comparable market. There is no additional charge for this analysis and reporting.

Many clients do not want investment advice, but need a custodian to hold securities, execute trades, and collect income. Banks and brokerage houses provide these services and monthly or quarterly statements that summarize the account's activity. Fees vary, according to account size (in the case of banks) and trading activity (in the case of brokerage houses).

Some clients will engage corporate trustees for themselves or for trusts for future generations. Corporate trustees will not only invest assets, hold securities, collect and distribute income, but will also make fiduciary decisions concerning distribution of principal to or for the benefit of trust beneficiaries.

Our goal as estate planning attorneys is to add value far beyond our fee by foreseeing problems and helping the client to plan for them or to avoid them altogether, and by foreseeing opportunities and showing the client how to take advantage of them. We trust this article has enlightened those of you not experienced in this arena about many planning topics and will cause you to ask ques-

tions and find answers. If so, our goal this time around will have been accomplished.

* Space constraints prevent a full explanation of the tax consequences of an estate plan, but a summary of the federal scheme and some of the terms used herein may be helpful.

Transfers of assets, whether during one's life or at death, are subject to a federal transfer tax: the gift tax or the estate tax, respectively. An individual's transfers are cumulative and are subject to a graduated tax at effective rates ranging from 37% to 60% (55% after 1992). Each individual has a credit towards this tax (the "unified credit") of $192,800, which will shelter transfers totalling $600,000. Certain, but not all, transfers to a spouse qualify for the "marital deduction" and are not subject to the transfer tax. Certain, but not all, transfers to a charity qualify for the "charitable deduction" and are not subject to the transfer tax.

In addition, transfers to a person two or more generations younger than the transferor are subject to the generation-skipping transfer tax, which is imposed at a flat rate equalling the maximum estate tax rate. Each individual has $1 million exemption to allocate to transfers otherwise subject to this tax.

Patricia High received her undergraduate degree from Duke University, and taught elementary school in Utah and New York before settling in Newark, Delaware in 1974. She began her legal career in the tax department of Richards, Layton & Finger while a student at Delaware Law School of Widener University, where she earned her J.D. degree and received the Zelda K. Herrmann Memorial Cup Award in 1981. In 1985 she joined the legal staff of the Trust Department of Wilmington Trust Company. She was a co-drafter of the 1983 Delaware Allocation of Principal and Income Act and drafted a major revision to the Delaware fiduciary statutes in 1986. She joined John Herdeg and William duPont in their private fiduciary practice in June 1991. She is a member of the Delaware, Pennsylvania, and American Bar Associations, the Delaware Court of Chancery Fiduciary Rules Committee, the Estate Planning Council of Delaware, and the Wilmington Tax Group. She chairs the Estates and Trusts Section of the Delaware State Bar Association.

MARK H. CONNER

The Work Place Rights of Public Employees in Delaware

The author wishes to acknowledge an indebtedness to Loretta G. LeBar, a Deputy Attorney General, for her invaluable research and editorial contribution to this article.

The Merit System provides the State with a well documented record to substantiate discharge or disciplinary actions rather than on pretext, as so often is alleged by aggrieved employees.

There are major differences between the rights afforded private sector employees and those in the public sector. A comparison of Delaware's employment-at-will status with the State's Merit System exemplifies the vast differences between the two. The present status of the "employment-at-will" doctrine in Delaware is explored in depth in Sheldon Sandler's article, which appears elsewhere in this issue.

Although Delaware Courts still recognize employment-at-will, specific termination of employment status appearing in employee handbooks may be eroding this strict rule.

In Delaware discharged employees are now asserting that they have obtained certain contractual rights stemming from their employee handbooks. Recently, several Courts have entertained these claims, rather than dismissing the cases summarily pursuant to the at-will doctrine.[1]

In contrast to private sector employment law the Due Process clause of the Fourteenth Amendment has afforded public employees protection against discharge without cause. The United States Supreme Court has ruled when a public employee is disciplined or discharged, the state is obliged to establish and maintain "procedural due process" with the intent to protect the life, liberty, or property interests of the employee. The public employee's due process rights have been both clarified and strengthened by the holding of *Cleveland Board of Education v. Loudermill* 470 U.S. 532 (1985), in which the Supreme Court ruled that the Due Process Clause establishes certain premises and requirements that must be adhered to before discharge or even discipline. First, the employee must be informed or given notice of the charges brought against him, including an explanation of the employer's evidence and a statement of the infractions that contributed to the grounds for the charges. The form of the notice given to the employee is flexible: it may be either oral or written. In *Loudermill*, the Supreme Court directed that certain administrative remedies precede the loss of protected employment rights. The first step in such proceedings is commonly referred to as "the pre-termination hearing."[2] After the employee is given notice of the charges and an explanation of the employer's evidence, he must be afforded the opportunity to respond and explain why his dismissal, suspension, or other discipline is not justified. *Loudermill* creates a fundamental due process right, the opportunity to present reasons either in person or in writing why the proposed action should not be taken.[3] While the employee's comments and statements are generally given orally, written responses may be submitted. Basically, "[t]he pre-termination 'hearing,' though necessary, need not be elaborate."[4]

Loudermill deems the "pre-termination hearing" important not only to the employee, but also to the employer.[5] After balancing the governmental interest in terminating immediately against providing the employee an opportunity to respond, the Supreme Court found that the employer would also benefit in providing employees with a pre-termination hearing. The Supreme Court commented that an informal pre-termination hearing would not impose a significant burden on the government, while providing some immunity to both parties from disruptive and erroneous decisions.[6] The Supreme Court therefore adopted a public policy rationale by stating that the requirements of notice, response,

and hearing would deter a public employer from forcing its employees into the welfare lines.[7]

In Delaware, there are basic types of public employees. Not all of them, however, enjoy the security and protection of the due process procedures described above. Pursuant to 29 *Del. C.* 5903, all positions of state employment are "classified service" or "state service" unless specifically excluded by 5903. Only public employees in the classified service (known as Merit System employees) enjoy the benefits and protection of the Fourteenth Amendment. State employees occupying positions specifically excluded are known as exempt employees, who are not in the merit System and who are provided only with the limited protection afforded private sector employees.

On July 1, 1966, Chapter 59, Title 29 of the Delaware Code was enacted instituting a unified Merit System in Delaware.[8] Through Chapter 59 the General Assembly established "a system of personnel administration based on merit principles and scientific methods governing the employees of the State in the classified service...."[9] In layman's terms, the Merit System provides the State with a method to evaluate the performance of its employees and establishes a progressive disciplinary system affording the employees an opportunity to correct their deficiencies or modify their behavior. Significantly, the Merit System provides the State with a well documented record to substantiate discharge or disciplinary actions rather than on pretext, as so often is alleged by aggrieved employees.

Any analysis of an effective Merit System must include whether a clear mandate from the law exists. In Delaware, 29 *Del. C.* 5914 specifically requires the creation of rules covering State employees in classified service. These "Merit Rules" develop and set forth in detail the procedural rights of employees facing discharge.

In discharge or disciplinary cases, the Merit Rules provide classified State employees with the proper pre-termination procedures mandated by the United States Supreme Court in *Loudermill.** For example, in dismissal cases, Merit Rule 14.0610 requires that the employee be provided with proper notice of the charges against him and the right to request a pre-termination hearing. The Rule provides that an unbiased hearing officer is then designated and that officer conducts the pre-termination hearing which is not required to be transcribed. At this hearing, the employee is afforded the opportunity to hear the charges and present reasons why dismissal

or other proposed discipline is not warranted.[10]

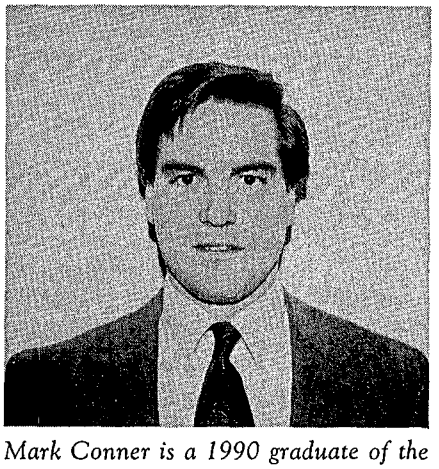
After receiving an adverse decision upholding a dismissal, the employee is entitled to appeal the dismissal at the third step of the grievance procedure or take a direct appeal to the State Personnel Commission.[11]. Should the employee elect that third step, a hearing is conducted by the agency head, such as the Cabinet Secretary.[12]. If the employee is not satisfied with the step three decision, he can request a fourth step hearing with the State Personnel Director.[13] At each step, both the employer and employee must adhere to certain procedural requirements and time limitations, the most important of which requires written requests and decisions be issued within either five or ten days. If the employee is still not satisfied after the step four decision, he may appeal to the State Personnel Commission within fifteen days.[14]

The State Personnel Commission has a very active role and makes the final decision on appeals from disciplinary action.[15] The Commission is one of the numerous State agencies governed by the *Delaware Administrative Procedures Act*, 29 Del. C.Chapter 101. In practice, Commission hearings are very similar to a bench trial in that the commission is both the judge and the jury. A verbatim record of the hearing is made. In disciplinary cases, the Merit Rules provide that the "moving party" shall be the appointing authority, employing agency, which is required to open the hearing and make the first presentation of evidence supporting its case.[16] In cases concerning discharge or discipline, the employee may elect to have the hearing closed in executive session.[17] Opening statements are made and evidence is produced by both parties in support of their cases in the order described above. Although the Commission is not bound to follow technical rules of evidence, it may exclude evidence in its discretion.[18] Any member of the Commission may examine any witness — often a useful tool for the Commission to narrow and define issues.[19] At the conclusion of the hearing, closing arguments and briefs may be presented at the discretion of the Chairman of the Commission.[20] The Commission may deliberate and announce its decision at the end of the hearing or reserve decision. All decisions are reduced to writing.[21] If either party is still not satisfied with the Commission's decision, there is an appeal procedure direct to the Superior Court. Notice of appeal must be filed with the Court within thirty days after the final written decision is mailed.[22]

At this time,the *Loudermill* standard of protection against discharge in non-discrimination cases, does not extend to State employees excluded from the Merit System or to private sector employees. Since the Courts have been reluctant to interfere with the rights of these employees, private sector employees and exempt State workers still labor under the weight of their lack of procedural rights.

(FOOTNOTES)

1. S. Sandler, *Delaware Supreme Court Affirms Summary Judgement to Wilmington Trust in Wrongful Discharge Case*,10 Delaware Employment Law Update 3 (Winter 1992)
2. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985)
3. *Id.*
4. *Id.* at 545
5. *Id.* at 544
6. *Id.*
7. *Id.*
8. 29 *Del. C.* 1953, 5901; 55 *Del. Laws.* c. 443.
9. 29 *Del. C.* 5902
10. Merit Rule 14.0620.
11. Merit Rule 20.0370.
12. Merit Rule 20.0330.
13. Merit Rule 20.0340.
14. Merit Rule 20.0340.
15. 29 *Del. C.* 5907.
16. Merit Rule 21.0230.
17. 29 *Del. C.* 10004(b)(8).
18. 29 *Del. C.* 10125(b)(3); Merit Rule 21.0220.
19. Merit Rule 21.0230.
20. Merit Rule 21.0240.
21. 29 *Del. C.* 10128; Merit Rule 21.0240.
22. 29 *Del. C.* 10142.



Mark Conner is a 1990 graduate of the Widener University School of Law. He clerked for The Honorable Charles H. Toliver, IV in the Superior Court of Delaware in 1990-1991. Since 1991 he has worked in the Attorney General's Office where he represents the State Personnel Office and the State Personnel Commission, among other Boards and Committees.

* This article only addresses the *Loudermill*, supra, standard with regard to termination of public employment. The article takes no position as to the *Loudermill*, supra, standard with no reard to "suspension without pay" as provided for in the Merit Rules.

Book Reviews

Rights: Are Americans Victims of Their Own Rhetoric?

"Rights Talk: The Impoverishment of Political Discourse," by Mary Ann Glendon, $22.95, The Free Press, New York, 1991

Harvard Law Professor Mary Ann Glendon's book has an interesting thesis: the rights rhetoric of American public discourse is absolutist. American courts are unwilling to examine the rights declarations of other countries and the nuances of foreign court decisions. The result is that Americans and American law are held back in the quest to resolve serious social problems. As she puts it, "The new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires."

When she speaks of the absolutist rights rhetoric as unrealistic and exaggerated, and when she cites the balanced language of rights and responsibilities in foreign declarations, readers steeped in American rights talk may find their knees jerking. For example, an interviewee on National Public Radio defending flag burning says, "The way I see it, I buy a flag. It's my property. So I have the right to do anything I want with it." Glendon points out that the man "probably does not have the right to burn dead leaves in his own back yard." and dubs him a "property rights enthusiast."

Some readers may find alarming her citation to the Canadian Charter of Rights and Freedoms of 1982 for its strong but not absolute statements of rights. After noting that the Charter guarantees rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," she informs the reader of something else. "[T]he Charter establishes a legislative override procedure through which the entire group of what we would call First Amendment rights, as well as a wide range of other rights including equality and the rights of criminal defendants, may be limited by Parliament or the legislature of any province." As she observes elsewhere in her book, if the legislature is supreme "a whole regiment could march through this saving clause."

Legislation and constitutional amendment (and perhaps even revolution) can always change the articulation of rights and the extent to which they are actually protected. American court decisions demonstrate that the exercise of nearly all rights is subject to various legitimate restrictions, even though the restriction language hasn't been incorporated into the public rights rhetoric. Therefore, the provisions of the Canadian Charter are more realistic, pointing the way to more refined debate and discouraging the deadlock of absolutist positions.

Her discussion of judicial activism illustrates the complexity and difficulty of working out the process of protecting rights. She states:

> Our justifiable pride and excitement at the great boost given to racial justice by the moral authority of a unanimous Supreme Court decision in *Brown [v. Board of Education]* seems, in retrospect, to have led us to expect too much from the Court where a wide variety of other social ills were concerned. Correspondingly, it seems to have induced us to undervalue the kind of progress represented by an equally momentous social achievement: the Civil Rights Act of 1964. The time-honored understanding that difficult and controversial issues should be decided by the people through their elected representatives, except where constitutional text and traditions clearly indicated otherwise, began to fray at the edges.

Professor Glendon thinks the "right of privacy" cases in general, and *Roe v. Wade* in particular, are symptomatic of existing problems and have created new ones. In finding a constitutional right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy..." [*Roe*], she asserts, "The Court proceeded to strike down, not only the old strict Texas law, but also the more liberal abortion laws toward which the legislatures in other states were tending." She argues that "[t]he judicially announced abortion right in 1973 brought to a virtual halt the process of legislative abortion reform that was already well on its way to producing in the United States, as it did all over Europe, compromise statutes that gave very substantial protection to women's interests without completely denying protection to developing life."

Her disfavor of judicial activism is further articulated in her analysis of the Canadian Supreme Court's 1988 landmark case on abortion and judicial review. That decision determined that a criminal abortion statute violated the Canadian Charter of Rights and Freedoms. She lauds four of the majority justices for their careful review of case decisions from other countries (a subject she develops very well using additional examples), and for deciding "the case in such a way as to leave maximum leeway to legislative decision-making..." The Chief Justice had emphasized that "courts are not the appropriate forum for articulating complex and controversial programmes of public policy." *Regina v. Morgantaler* [1988] 1 S.C.R. 30, at 46. She chides the fifth majority justice as "the only judge on the Court who seemed impatient to begin instructing the legislature on the limits of its authority."

In keeping with her theme of judicial circumspection and nuanced analysis Professor Glendon does not condemn judicial activism. She approves of examples of Canadian and European rulings striking down statutes. However, that approval seems, except in the case of *Brown*, to be somewhat regretful. Of course it *is* regrettable when judicial activism reveals a failure of the legislative process. However, while she invokes Dr. Martin Luther King, Jr. elsewhere in the book for his example of the efficacy of communicating human rights issues at a grass roots level, thereby supporting the legislative process, she might have mentioned that in his famous "Letter From Birmingham City Jail" Dr. King pointed out that generations can suffer waiting for society through legislatures to rectify injustices.

The very readable book ends with the chapter "Refining the Rhetoric of Rights". Professor Glendon is eloquent in describing the indispensability of broad-based, informed debate and deliberation to the continued existence of our liberal democracy. Drawing from the examples of Abraham Lincoln and Dr.

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Martin Luther King, Jr., she finds a basis for hope that, in the words of Czechoslovak President Vaclav Havel, "politics can also be the art of the impossible, that is, the art of making both ourselves and the world better."

David W. Lynch

(Mr. Lynch, a member of the Delaware Bar, is a Deputy Attorney General)

Tales of Delaware

It is a pleasure to write once again about the work of Roger Martin, an historian-educator-legislator, justly honored by the Delaware State Bar Association a few years ago with its Distinguished Legislative Service Award.

It's hard to believe that seven years have passed since we reviewed Senator Martin's fine historical study, "A History of Delaware Through Its Governors, 1776-1984". This magazine had the good fortune to print one of the chapters from Senator Martin's earlier book in our Fall 1984 number. We are pleased to return the compliment and find included, with our delighted permission, the Senator's entertaining account of a crime of passion in Lewes, Delaware back in the very early 19th century. See "Thou Shalt Not Covet" at page 15.

The Senator's new book is less a serious historical study than a superior entertainment (which his previous book also managed to be). It contains a lot of entertaining oddities about our State, including a bang-up description of the Franklin D. Roosevelt, Jr. -Ethel duPont wedding, and a fascinating study of the last of the German U-boats in World War II, including a chat with the Commander. There is a charming account of the career of Dr. Margaret Handy ("the children's doctor"). And as usual Senator Martin has come up with the telling detail. We learn that at the end of the flu epidemic of 1918, Dr. Handy opened a pediatric clinic at Delaware Hospital under truly abominable conditions. "One hairbrush and one toothbrush were shared by all the children."

"Tales of Delaware" is essential Delawareana, written by a wise and entertaining raconteur.

($15-available at local book stores)

WEW

Intelligent Laughter: The Serious Business of Comedy

"A Backhanded View of the Law" by Mordecai Rosenfeld, $24.95, Ox Bow Press, Woodbridge, CT.

In 1927 the then Lord Chief Justice of England, Lord Hewart, wrote a highly complimentary introduction to A. P. Herbert's legal-comic masterpiece, "Misleading Cases in the Common Law". Herbert, a non-practicing barrister, a member of Parliament, and a frequent contributor to Punch, used comedy to illuminate legal issues normally shrouded in solemn absurdity.

Well, now, sixty-five years later the present Lord Chief Justice of England, Lord Lane, has written a highly complimentary introduction to Mordecai Rosenfeld's new book, "A Backhanded View of the Law". And quite properly so! Rosenfeld is the American peer Herbert's, who also uses comedy to illu-

minate the law. Herbert specialized in the examination of jurisprudential absurdity; Rosenfeld concerns himself with outrages against justice. The fact that he can discuss the tragic without losing the comic vision is a tribute to his wisdom and intellectual balance. (Laughter is the great, the intelligent, and the necessary enemy of stupidity and wickedness.) As Voltaire observed, life is a tragedy to those who feel, and a comedy to those who *think.*

The new Rosenfeld book, a welcome companion to his "Lament of the Single Practitioner" is a collection of essays, literary parodies, and speeches. Like his first volume, the new book is both instructive and richly entertaining because Rosenfeld brings to its composition a wide general culture to which he has been not merely exposed, but which he has absorbed and then applied to the task of comprehending the legal world around us.

Don't get me wrong: I am not discussing the work of an inaccessible highbrow. In fact at times he is positively down home comfy. Consider his splendid Ring Lardner parody (pp. 143-146), in which he ventilates a goofy constitutional squabble between the Rastafarians and the New York State Department of Correctional Services.

His discussion of the iniquities of military "justice" (disguised as a critique of Melville's *Billy Budd*) is at once literate, lowbrow, and hilarious:

> "I first read *Billy Budd* in high school, because it was the shortest book on the list. Those who chose *Moby Dick* were considered to be show-offs or teacher's pets or masochists."

Delaware lawyers will find of particular interest his speech to the Delaware Bar at the Law Day luncheon held in May, 1989. He says some funny, iconoclastic things about corporate practice (how dare he do that in Delaware!) and his good natured kidding invites us to reflect upon our role as lawyers and guardians of justice.

Rosenfeld's book is a tonic at a time when too many people are prepared to trash the intellect and to exalt that ultimate antidemocratic obscenity, the "politically correct". In his moving speech delivered when he received an award from the Touro Law School (See pp. 213-217), he observes, "a book, on any subject, is our civilization's most worthy object." I agree, and I hope you do.

WEW

LINDA LUCAS FAYERWEATHER

And You Thought You Were Obeying the Law

Work Place Regulations - A Problem For Small Business

The innocent (and lawless) negotiate the mine-strewn field of employment law.

What is a small business? By the U.S. Small Business Administration standards it can be

- a service firm with average annual receipts under $14.5 million
- a manufacturer with no more than 1,500 employees
- a retail enterprise with average annual receipts under $13.5 million.

There are various qualifications within each category and other categories including construction, wholesale, agriculture, and financial businesses. In Delaware, 76% of all jobs are with firms of 100 or less employees. Small businesses often find work place regulations a dark tunnel of unintelligible rhetoric designed to limit profit and hopelessly tangle the wheels of business. Too often a well intentioned small business finds out about regulations after a violation is discovered. Although ignorance of the law is no excuse, typically information about applicable regulations is hard to find in one place.

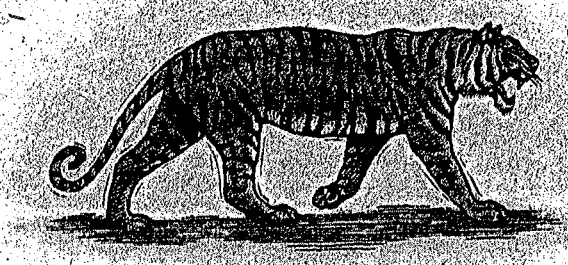
The business owner who has only *one* employee must comply with all tax regulations. He must pay unemployment insurance, worker's compensation, and federal, state, and local income and other taxes. Furthermore he must comply with immigration rules. The small business owner is usually aware of these rules and obeys them. But there are other regulations applicable to smaller firms whose management often don't realize that they must comply or be in violation of the law.

The Fair Labor Standards Act ("FLSA") covers 85% of all employees nationally. The FLSA establishes a minimum wage and a 40 hour work week. It defines hourly rate, piece rate, overtime, fixed salary, fixed salary for fluctuating hours, and commission payments. There are exceptions for farm workers, domestic workers, government employees, executives, administrators, professionals, and fishermen and fish processors. FLSA also says who are outside or independent contractors. Because of the very aggressive interpretation of this definition by the Internal Revenue Service, most challenged claims of independent contractor status fail. A small business must proceed very carefully through this regulatory mine field. (See twenty questions below.)

There are other laws and regulations governing pay and hiring, such as the Equal Pay Act, Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act. The Equal Pay Act requires equal wages for women and men who work in the same establishment on jobs that require equal skill, effort, and responsibility. It covers most employees, including executive, administrative and professional personnel. The Civil Rights Act of 1974 included the Equal Employment Opportunity Act, which was designed to provide access to employment regardless of race, color, religion, sex or national origin. It applies to all employers with 15 or more employees in each of twenty or more calendar weeks. A later amendment limits dis-

Illustration by Paulette Bogan

If you think this is how we're attacking rising costs, think again.



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crimination in the case of pregnancy, child birth, and related medical conditions. Further amendments have limited height and weight requirements if they screen out a disproportionate number of a particular minority. And it is unlawful to ask a prospective employee about marital status, pregnancy, future children, and the number and age of their children. The Age Discrimination Act, which applies to employers with 20 or more employees, protects those between the ages of 40 and 70.

The Occupational Safety and Health Act requires *all* employers to "furnish a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees/" *All* businesses are covered by this act except the self employed, farms where only the immediate family works, and work places such as mines already protected by other federal agencies.

A New Thunderhead on The Horizon

The recent Americans With Disabilities Act will require employers to make reasonable efforts to hire qualified individuals with disabilities and make the work place accessible to them. By July 1992, employers with 25 or more workers are covered by the Act and by July 1994, those with as few as 15 workers will be covered. This law also requires the business owner whose business is public to make the place of business accessible to disabled patrons, where this does not cause "undue hardship".

Even a brief review of these laws makes it apparent that small business owners are directly affected by most work place regulations and that they must ever be alert to complying fully with both the letter and the intent of the law.

A SERIOUS GAME OF 20 QUESTIONS

The IRS will ask these questions to determine if workers are in fact company empoyees or true independent contractors. The IRS considers *any* "yes" answer to constitute an employer/ employee relationship.

1. Do you provide the worker with instructions as to when, where, and how work is performed?
2. Did you train the worker in order to have the job performed correctly?
3. Are the services provided by this worker vital to your company's operations?
4. Is the worker prevented from delegating work to others?

5. Is the worker prohibited from hiring, supervising, and paying assistants?

6. Does the worker perform services for you on a regular basis?

7. Do you designate the worker's hours of service?

8. Is the worker in your employ full-time?

9. Does the worker perform duties on your company's premises?

10. Do you control the order and sequence of work performed?

11. Do you require employees to submit oral reports, written reports, or both?

12. Do you pay the worker by the hour, week, or month?

13. Do you pay for the worker's business and travel expenses?

14. Do you furnish tools or equipment for the worker?

15. Does the worker lack a "significant investment" in tools, equipment, and facilities?

16. Is the worker insulated from suffering a loss as a result of the activities executed by your company?

17. Does the worker perform services exclusively for your firm?

18. Does the worker not make services available to the general public?

19. Do you have the right to discharge the worker at will?

20. Can the worker terminate the business relationship without incurring any liability charges?

Mrs. Fayerweather is the Director of the Delaware Small Business Development Center. She received the " Woman's Business Advocate" award for the State of Delaware by SBA in 1991. She holds a Baccalaureate degree from Eastern Michigan University and an MBA from Augusta College, Georgia.

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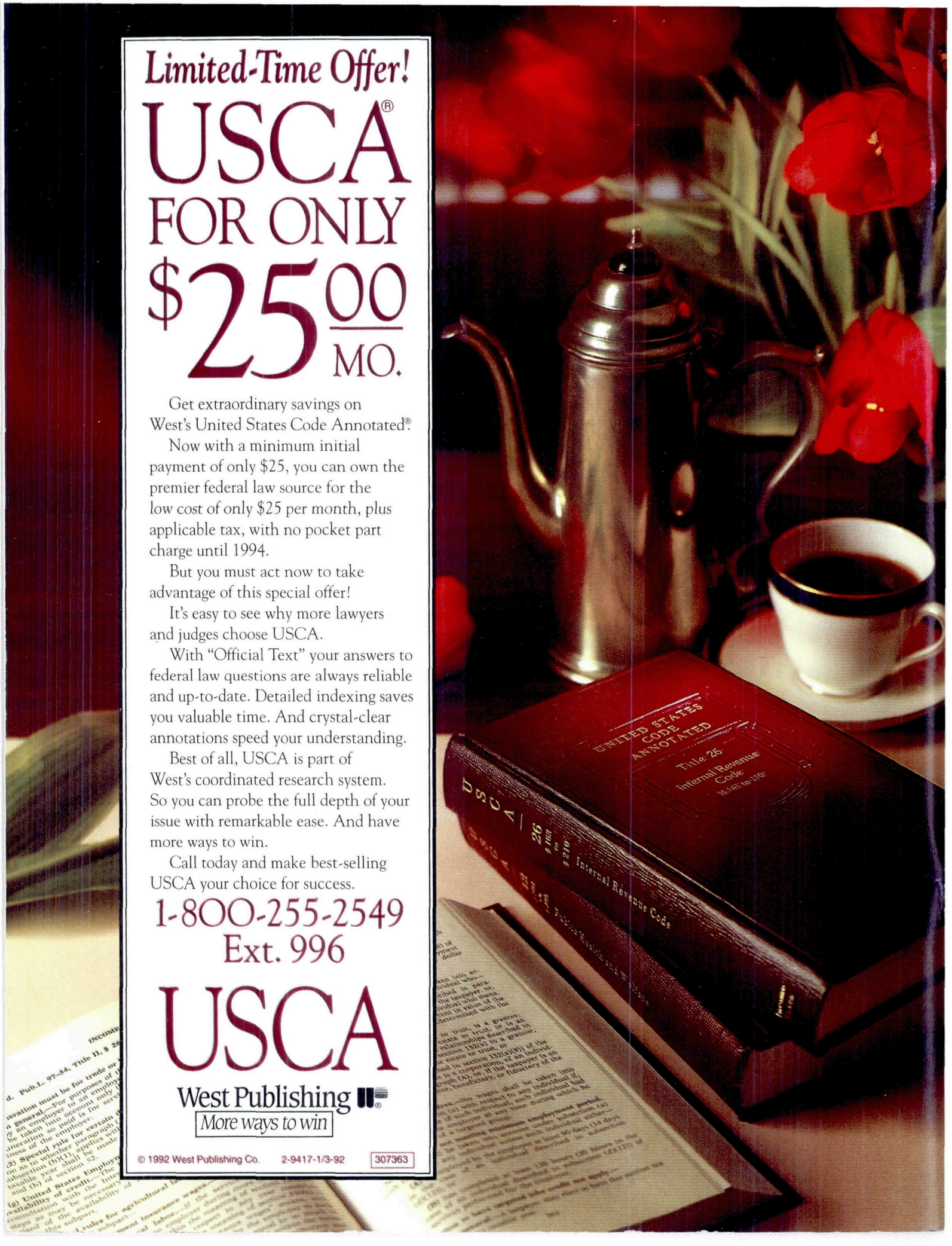

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