The College of Labor & Employment Lawyers

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ANNUAL INDUCTION DINNER – "AN AFFAIR TO REMEMBER"

Since its inception, the College has conducted some impressive induction dinners, and this year's event, the eighth annual, was no different. President Bob Dohrmann can be rightfully proud of the wonderful function attended by 380 formally attired Fellows and their guests at the historic Palace Hotel in San Francisco. The atmosphere throughout the entire evening was one of pomp and circumstance – a fitting recognition for the sixty-one new inductees to our growing honorary (and honorable) organization. The activities began with a "mix and mingle" reception for inductees to meet with the College leadership and their mentors, who volunteered to guide the soon-to-be Fellows through the evening.

The social substance of the event began with a polite cocktail "tasting" in the majestic Garden Court; which, at one time, was the horse carriage entrance to the hotel. Inductee-to-be Wendy Kahn (Washington, D.C.) summed up the scene succinctly as "lovely." Throughout the crowd, lively conversation ensued and good cheer was evident as inductees from various parts of the country and with different practice backgrounds shared a few moments of rewarding professional fellowship. Lively conversations abounded throughout the party with groups like Joe McKittrick (North Hampton, NH), Jim Ferber (Columbus, OH), George Barford (Tampa, FL), Kevin McCarthy (Portage, MI), and Lonny Dolin (Rochester, NY) discussing the virtues of Napa wines versus those of Sonoma vintages.

Joel D'Alba

Robert Dorhmann

The glorious evening continued with the serving of a splendiferous four course gourmet dinner (dishes such as "Seared Sea Bass with Corn-Crab Confit in Garlic Lemon Sauce") accompanied by ample, and apropos, juice of the grape. The ballroom was ablaze with candlelight shining through the glistening crystal and off the fine china place settings. Emeril would be duly proud of the elegance and good taste exhibited by so many labor lawyers! Seated at a table in the back of the room were three happy Fellows (either because they liked the food or because they were enjoying a bachelor weekend on the Bay): Parker Denaco (Concord, NH), Larry Poltrock (Chicago, IL), celebrating formation of new firm with daughter, and Denny Maloney (Aberdeen, SD) recently honored for fifty years in the state bar association.

The highlight of the evening was the ceremony honoring College Fellows both old and new. President Dohrmann posthumously awarded the Membership Certificate to Dean W. Gary Vause. Accepting on his family's behalf was the Acting Dean of the Stetson University College of Law, Darby Dickerson, who was accompanied to the event by Fellow Pete Zinober (Tampa, FL). Conducting a very impressive induction ceremony were Vice-President Joe Garrison and Immediate Past President Stephen Pepe. All new Fellows were invited to the stage while the Installation Charge was administered. A standing ovation ended the evening.

When asked to sum up this historic moment in time, Fellow Carl VerBeek (Grand Rapids, MI) appropriately stated "sterling company."

Don Slesnick
Reporter-at-Large

LECTURE PLANS AND SPEAKER PROFILES

The College's fifth annual lecture event will take place Friday, November 7th, in Washington, DC at the Mayflower Hotel. This year's format will feature a panel discussion and will center around the impact of recent incidents of corporate wrongdoing, the Sarbanes-Oxley bill and the public's current view of large corporations on labor and employment law litigation. Veta Richardson of the Minority Corporate Counsel Association, a group that has commissioned a study on relevant issues with regards to this subject, will serve as moderator. Members of the panel include Dr. Galina Davidoff from DecisionQuest, one of the lead researchers in the study, and Dr. Valerie Hans, Professor of Criminal Justice at the University of Delaware, who teaches and writes about business trials and who is a nationally-recognized expert on jury behavior. In addition, Julia Sutherland of Public Strategies, will discuss the approaches that lawyers and their clients may take to avoid the fallout from recent, well-publicized corporate scandals.

This year's lecture event is somewhat of a departure from recent years, but is sure to provide a stimulating afternoon with a strong exchange of ideas and thoughts. The College's first lecture was held in 1999 in Washington, DC with the Honorable Abner Mikva, former council to the President, Congressman and Court of Appeals Judge, and included a panel of three Fellows who followed his remarks with questions. The Honorable Richard Posner, Chief Judge of the Seventh Circuit Court of Appeals, presented the College's next speech at the University Chicago Law School, an event that was held in conjunction with a dedication to Fellow Emeritus Professor Bernard Meltzer. Other speakers include Fellow Emeritus Theodore St. Antoine, Professor Emeritus at the University of Michigan and renowned labor arbitrator and Arnold Weber, President Emeritus of Northwestern University.

Please watch for a mailing with information about this event or visit the College's website at www.laborandemploymentcollege.org.

Panelists Profiles:

Galina Davidoff, Ph.D. is a research and trial consultant with DecisionQuest. Her particular research interest is the way in which jurors process complex information. Having consulted on over 200 civil and criminal cases across the country, Dr. Davidoff's practice includes insurance and environmental litigation,intellectual property cases, contract disputes, personal injury matters and other areas of business litigation. She also has experience with criminal matters including murder and rape trials, conspiracy charges and white collar crime cases. She received her BA and MA (Clinical Psychology) from Moscow State University and her MA and Ph.D. (Psychology) from Clark University. She has been published extensively and speaks frequently.

Valerie Hans, Ph.D. is a Professor of Criminal Justice at the University of Delaware, whose writing and researched have centered on the relationship between the public and the courts. Her prime specialty is the institution of the jury, which is evident in her most recent book, *Business on Trial* (co-authored with Neil Vidmar). The book is a compilation of a decade of research on how juries decide cases with business and corporate parties. In addition, she has written many articles and lectured widely on different aspects of the jury system, is a member of the Law and Society Association and has testified as an expert witness in numerous criminal cases. She has also consulted with lawyers and government agencies on law and social science issues. Dr. Hans received her BA from the University of California, San Diego and her MA and Ph.D. from University of Toronto.

Valerie Hans

Veta Richardson serves as Executive Director of the Minority Corporate Counsel Association in Washington, DC, as well as serving as the Director of Publications for MCCA's magazine, *Diversity & the Bar.* Prior to joining MCCA, Ms. Richardson was vice president and deputy general counsel of the American Corporate Counsel Association where she was a member of the senior management team, responsible for the development of its Education and Legal Resources functions. She received her BS and JD from the University of Maryland. Since its founding in 1997, MCCA has emerged as a

Veta Richardson

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US SUPREME COURT DECIDES THE QUANTUM OF PROOF NECESSARY TO OBTAIN A MIXED MOTIVE INSTRUCTION IN TITLE VII CASES

By Edwin S. Hopson

Mr. Hopson is a management lawyer at Wyatt Tarrant & Combs, LLP in Louisville, Kentucky. He was inducted into the College as a Fellow in 1996.

The District Court gave the usual instruction that the plaintiff must prove by a preponderance of the evidence that she suffered adverse working conditions and that her sex was a motivating factor in such adverse working conditions imposed on her.

On June 9 2003, the U.S. Supreme Court in *Desert Palace Inc. v. Costa*, 539 U.S. ___ (2003), authored by Justice Thomas, decided the question of whether a plaintiff in a Title VII case must present direct evidence of discrimination in order to obtain a mixed-motive instruction to the jury at trial. The Court decided unanimously, with Justice O'Connor concurring, that direct evidence is not required.

Plaintiff, Catharine Costa, was the only female warehouse worker and heavy equipment operator employed in her classification and in her bargaining unit represented by the Team-sters Union. She suffered a number of adverse employment actions, in-cluding various discipline, and was eventually discharged after a physical altercation with another employee. The other employee, a male, had had no previous discipline and, therefore, had received only a five day suspension for the altercation in the workplace. Costa filed a Title VII action in the U.S. District Court for the District of Nevada asserting claims for discrimination based on sex and for sexual harassment. After dismissing the claim for sex harassment, the District Court allowed the sex discrimination claim to be tried. Costa presented evidence at trial that she was intensely stalked by one of her supervisors, that she received harsher discipline than male employees for the same alleged misconduct, that she was treated less favorably than males when overtime was assigned, and that supervisors "stacked" her disciplinary record against her and used/tolerated sex-based slurs.

Edwin Hopson

The District Court gave the usual instruction that the plaintiff must prove by a preponderance of the evidence that she suffered adverse working conditions and that her sex was a motivating factor in such adverse working conditions imposed on her. The District Court also instructed the jury on the mixed motive issue as follows:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

[Pages 5-6 of Slip Opinion.] The employer defendant objected to the mixed motive instruction on the ground that Costa had failed to adduce direct evidence that sex was a motivating factor in her dismissal or in any of the other claimed adverse employment actions. The District Court nevertheless gave the instruction. The jury returned a verdict in favor of Costa, awarding her back pay, and compensatory and punitive damages. After denial of judgment as a matter of law by the District Court, the employer took its appeal to the U.S. Court of Appeals for the Ninth Circuit. Initially, a panel of the Ninth Circuit vacated and remanded the case holding that the District Court had erred in giving the mixed motive instruction since Costa had not presented "substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus" [Page 6 of Slip Opinion]. The Ninth Circuit, sitting en banc, vacated the panel decision and affirmed the District Court. The High Court granted certiorari.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court had before it a mixed

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motive and decided that under 42 U.S.C. §2000e-2(a)(1) an employer could avoid liability by demonstrating that it would have taken the same action even if it had not made a gender based decision. The *Price Waterhouse* Court was divided on the question of when the employer's burden shifted to prove what amounted to an affirmative defense. Justice O'Connor, in concurring in the judgment, stated her view that "'the burden on the issue of causation' would shift to the employer only where 'a disparate treatment plaintiff [could] show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision.'" [Citation omitted] [Page 2 of Slip Opinion]. Based on this concurrence, some courts had since taken the view that in order to be entitled to a mixed motive instruction, the plaintiff must have established direct evidence of discriminatory conduct.

In response to the *Price Waterhouse* case and others, the Congress passed the Civil Rights Act of 1991, setting forth, *inter alia*, standards applicable to mixed motive cases. First, 42 U.S.C. §2000e-2(m) provides that "… an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Second, the 1991 Act provided that "with respect to 'a claim in which an individual proves a violation under section 2000e-2(m),' the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff" to declaratory relief, injunctive relief of certain types, attorney fees and costs [Page 3 of Slip Opinion.] Even after the passage of the 1991 Act, some Courts of Appeal had held, based on Justice O'Connor's *Price Waterhouse* concurrence, that direct evidence was required to establish liability under 42 U.S.C. §2000e-2(m).

In response to the Price Waterhouse case and others, the Congress passed the Civil Rights Act of 1991, setting forth, inter alia, standards applicable to mixed motive cases.

Justice Thomas, writing for the unanimous Court, squarely addressed the question of "… whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under 42 U.S.C. §2000e-2(m)" [Page 7 of Slip Opinion]. While deciding not to decide whether Justice O'Connor's concurrence in *Price Waterhouse* constituted the holding in that case, Justice Thomas focused on the impact of the 1991 Act on the issue at hand. The Court found that the 1991 Act, on its face, did not contain any "heightened showing through direct evidence" as a requirement for a plaintiff to demonstrate that the employer utilized a forbidden consideration with respect to an employment action or practice. It pointed out that the 1991 Act, in fact, defines an operative word, "demonstrates", which definition includes no reference to "direct evidence." The Court also pointed to the use of the term "demonstrates" at other places in Title VII and noted that the lack of any reference to "direct evidence" further supported the 1991 Act's definition. Additionally, Justice Thomas, citing *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), stated that in Title VII cases, courts should not depart from the rule that plaintiffs need only prove their cases, like any other civil case, by a preponderance of the evidence using direct or circumstantial evidence. He went on to state, that treating direct and circumstantial evidence alike was clearly and deeply rooted in the law: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." [citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n. 17 (1957)] [Page 9 of Slip Opinion]. Thus, the Court affirmed the Ninth Circuit.

Justice O'Connor, while joining in the Court's opinion, took the opportunity to comment about her concurrence in *Price Waterhouse*, which had consumed much of Justice Thomas' analysis in writing for the unanimous court. She reiterated her view that prior to the 1991 Act, the applicable "evidentiary rule we developed to shift the burden of persuasion in mixed-motive cases was appropriately applied only where a disparate treatment plaintiff" established direct evidence of discrimination [Page 1 of Concurring Opinion]. Justice O'Connor then went on to agree with the Court that the 1991 Act had "codified a new evidentiary rule for mixed-motive cases arising under Title VII" [Id.].

There can be no question that *Desert Palace Inc. v. Costa* is a holding which benefits plaintiffs and their counsel in Title VII cases. Like *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), which made it easier for plaintiffs to survive summary judgment motions filed by employers, *Desert Palace* may signal a trend towards allowing more juries rather than courts to decide discrimination cases.

THE IMPACT OF THE MICHIGAN CASES IN THE EMPLOYMENT CONTEXT

By Arthur G. Telegen

Mr. Telegen is a management lawyer at Foley Hoag in Boston, Massachusetts. He was inducted into the College as a Fellow in 2001.

The Supreme Court's *"Michigan"* affirmative action decisions last term[1] set out rules for when the Constitution permits race to play a role in admissions decisions at public universities. Although not employment cases, and primarily constitutional cases, the decisions are of special interest to practitioners in employment law. It seems inevitable that the Michigan decisions will adjust, if not chart, the course for future litigation over affirmative action in the workplace for both public and private employers.

The law, as it existed before *Michigan*, answered some questions, but not others. No question Title VII forbids discrimination against majority as well as minority races, see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and a cause of action for reverse discrimination exists. Nonetheless, the Supreme Court has long held that affirmative action plans which favor minorities are permissible under some circumstances, even if they discriminate in these circumstances against non-minorities. The apparent linguistic inconsistency between affirmative action and the statutory prohibition against discrimination was vigorously debated by the Court a quarter century ago, and those Justices who found the statute's language sufficiently elastic to permit the favoring of minorities in some circumstances prevailed. *Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616 (1986).

Arthur Telegen

What circumstances have permitted race-based affirmative action under Title VII have been less than clear.

What circumstances have permitted race-based affirmative action under Title VII have been less than clear. After review of the many opinions in *Weber, Johnson* and *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986) (holding that affirmative action based on historic societal discrimination violates the equal protection clause), it is probably fair to say that in hiring and promotional opportunities, minorities could be favored where the targeted jobs were ones in which they were "underrepresented" by some definition, but that providing preference for the sake of diversity unrelated to historical underrepresentation, was not permitted. Moreover, an affirmative action plan could not unduly disadvantage the presumably over-represented majority, which reduces to the proposition that layoff decisions were thought not to be an appropriate subject matter for affirmative action. This was so even where the layoffs of underrepresented minorities might undo the results of a permissible affirmative action hiring program. *See Taxman v. Board of Education of Piscataway*, 91 F.3d 1547 (3d Cir. 1995), cert. dismissed, 527 U.S. 1010 (1997).

Perhaps in response to the limited guidance provided by the courts, few employer-created AAPs explicitly give preference to underrepresented minorities. Instead, most large employers -- and virtually all government contractors in response to the requirements of the OFCCP – have created plans or programs designed to increase the hiring and promotion of underrepresented minorities through targeted search, mentoring, rewarding managers who attain minority hiring goals, etc., without ever saying explicitly that race counts when comparing minority and non-minority candidates for jobs or promotions. It is worth saying the obvious: these plans are designed to increase minority representation in the workplace, and it seems likely that in their application there are actual preferences given to underrepresented minorities from time to time, even if such preference is not explicitly sanctioned by the plans.

It is in this context where many employers' AAPs by their terms do not fully exploit the reach permitted by *Weber* and *Johnson*, but in their application may exceed it, that the *Michigan* cases should be examined. The *Michigan* cases' rule appears to be as follows: achieving diversity in the student bodies of state universities represents a "compelling state interest" which if pursued in an appropriately tailored fashion, will pass Constitutional muster. The Court's majorities rejected the Michigan undergraduate admission program because it awarded virtually automatic admission to underrepresented minorities similarly situated to non-minorities, but endorsed the law school's admissions pro

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gram which examined applicants individually, giving weight to race along with all other relevant data about applicants. While the real differences between the programs was questioned by the dissenters, and will likely give rise to litigation as schools attempt to stay in the right part of *Michigan*, the rule is pretty clear.

The question before the house is whether *Michigan* will influence the law as it applies to affirmative action plans. An argument could be made that it will not. Surely the *Michigan* cases focus on the unique place of higher education in our society, and even indulge the proposition that "academic freedom" provides a basis for a more flexible view of admissions policies. Nonetheless, it seems inevitable that the *Michigan* reasoning will find its way into the employment context. First, and most concretely, the *Michigan* cases' rulings are under Title VI as well as the Constitution. While there are historical jurisprudential differences between Title VI and Title VII, the operative concept of equal opportunity is the core of both, and it would be unfortunate if equality were so malleable a concept as to have a different meaning in two titles of the same statute. Moreover, to the extent that the *Michigan* cases are thought to be university-bound, this, too, is unlikely to limit them in the long run. Academic freedom and societal centrality would hardly distinguish the hiring of university faculty. And persuasive cases could be made that, for example, police officers, who patrol the cities' streets, and other public servants should be "diverse." In the end, the *Michigan* cases' generous view of equality will not be readily contained.

Hiring processes which pursue admirable social aims will not have to euphemize their methods.

Indeed, an argument can be made that AAPs scrutinized under Title VII should be viewed more flexibly than state sponsored affirmative action scrutinized under the Equal Protection Clause. *Weber* and *Johnson* both suggest that Title VII gives private employers more flexibility than the Constitution, and suggest that it is Title VI, not Title VII, that aims the full force of the Equal Protection Clause at private entities. *Board of Regents v. Bakke*, 438 U.S. 265, 287 (12978).

What is suggested here is that over time private employers will be able to make explicit what may have been implicit for some time: race counts. AAPs which provide some form of "credit" for minorities underrepresented in the job at issue will pass muster under Title VII, with cognate state statutes likely to follow. This is probably good news, at least in the integrity department. Hiring processes which pursue admirable social aims will not have to euphemize their methods.

Unfortunately, this is probably also good news for those of us who earn a living litigating discrimination cases. The prediction of a general loosening of the rules hardly gives certainty in outcome of litigation. What is "underrepresented" has been the subject of controversy in almost every case challenging an AAP. And efforts to stay on the lawful side of the Michigan line will undoubtedly be challenged by skilled lawyers who want to prove to a jury that purportedly individualized assessment was in fact automatic hiring.

Moreover, while the foregoing speaks to hiring, and likely promotions, layoffs have presented greater concerns for the courts. In fact, if there is a rule, it appears to be that race-conscious layoffs always lose. The courts worry about AAPs that "trammel" the rights of majority employees violate the *Weber* rule for that reason. The full impact and ultimate logic of the "trammel" rule remain to be tested. One fears that workforces diversified by effective AAPs can easily be dediversified by seniority-based layoffs. And closer to home, it seems race-conscious law firm partnership decisions may have more career impact ("tramelling"?) than race-based layoffs.

Which raises a final point: all things considered, there has not been a lot of reverse discrimination litigation. In a field where the plaintiffs' bar seems enormously creative, attacks on AAPs under pre-*Michigan* rules have been infrequent. This may be partly explainable by the dissonance between the plaintiffs' goals in attacking AAPs and the political views of many in the plaintiffs' bar. However, as the class action specialists run out of wage/hour cases to bring, and with the publicity given the *Michigan* cases, we may see a significant upswing in litigation attacking AAPs. The *Michigan* cases call for a reexamination of those programs.

[1] *Grover v Bollinger,* 123 S. Ct. 2325 2003); *Gratz v. Bollinger,* 123 S. Ct. 2411 (2003).

ONE MORE VIEW– MANDATORY ARBITRATION AGREEMENTS: THE COAST IS CLEAR, BUT IS IT RIGHT FOR YOUR CLIENT?

By Joseph E. Tilson

A management lawyer, Mr. Tilson is a partner in the law firm of Meckler, Bulger & Tilson in Chicago, Illinois and was inducted as a Fellow of the College in 2001. The author wishes to acknowledge the assistance of Jennifer McMahon, an associate at Meckler, Bulger & Tilson, in preparing this article.

The current climate also affords a variety of other practical options for resolving employee disputes, and each employer should carefully consider those options as well.

Much attention has been devoted over the last decade to whether employers can and should require their employees to enter into mandatory arbitration agreements – promising to arbitrate rather than litigate all employment disputes. In some of the early mandatory arbitration programs, efforts were made to limit the remedies available to complaining employees or otherwise restrict the rights they would possess in court litigation. Not surprisingly, the EEOC and private litigants aggressively challenged the viability of plans containing such features, with great success. It is now settled that, to be enforceable, a pre-dispute mandatory arbitration program must assure claimants the full panoply of rights protected and remedies available in court litigation, and a full and fair hearing procedure that is at least as accessible, in cost and otherwise, as the local courts. Where these conditions are met, it now appears that requiring such agreements of employees is permissible, and that the agreements are enforceable so long as they simply shift the forum of the dispute without altering substantive rights and they meet certain contract formation requirements (although those requirements may be particularly exacting in some states).

Joseph Tilson

There remains, however, a sharp divergence of thought on the advisability of mandatory arbitration even among attorneys representing management, as is illustrated by two recent articles on the topic in this publication. (Stephen W. Jones, *Some Second Thoughts on the Use of Arbitration to Resolve Employment Discrimination Claims,* in the Fall 2002 issue, and James K. L. Lawrence, *Commentary – Arbitration of Employment Claims Has Its Benefits*, in the Spring 2003 issue.) James Lawrence accurately points out that the average cost of defending employment-related court cases continues to proliferate, and alarming jury verdicts continue to be reported, making arbitration continue to look attractive by comparison. On the other hand, Stephen Jones correctly notes that most courts are showing a willingness to weed out baseless and insubstantial claims before trial, and that what it takes to form an enforceable contract to arbitrate continues to be less than clear in at least some jurisdictions.

What all this means, as a practical matter, is that arbitration agreements may be a perfect fit for some employers, but a potential disaster for others. Accordingly, an employer considering a mandatory arbitration arrangement today must make a highly individualized assessment of the company's past experience with employment litigation, its vulnerability to future claims, the kinds of claims that have been most troublesome and costly for it, the state of the law regarding mandatory arbitration in the various jurisdictions where the company operates, and whether a mandatory arbitration program can be tailored and implemented so as not to unduly disrupt employee morale and the company's culture. The current climate also affords a variety of other practical options for resolving employee disputes, and each employer should carefully consider those options as well.

The first question to evaluate is whether there is even a need for the company or any of its facilities to change the way employment claims are handled. An employer should evaluate whether employment claims have resulted in costly and time-consuming litigation in the past or are likely to do so in the future. If not, the best course may be to leave well enough alone. Although employers who have implemented arbitration agreements widely report that they have not experienced an increase in the number of employment claims, common sense dictates that if arbitration agreements make employment claims cheaper and easier to pursue, there is always that potential. However, an enterprise that already confronts a large volume of costly or disruptive employment claims obviously has reason to seriously explore whether a mandatory arbitration plan might help control the problem. Similarly, mandatory arbitration may be advisable even for an employer whose employment claims have been tolerable until now but which regards itself as a likely target for future claims, or for which even one large and costly court case could be crippling. Also, mandatory arbitration

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may be adopted just for certain categories of employees or certain divisions or locations of the company.

Second, as mentioned above, implementing a mandatory arbitration program may adversely affect the morale of employees covered by the program. Such programs may raise emotionally charged issues for certain employees, who feel unfairly deprived of their rights to pursue violations of their civil rights in court. In a workforce characterized by frequent employee turnover and dominated by relatively short-term employees, the morale effect of implementing such a program may not be a significant concern. On the other hand, an employer with a large contingent of long-term employees should carefully weigh the possibility of a strong negative reaction to the inauguration of mandatory arbitration, if it is perceived as a sudden and unjustified diminishment of faithful employees' rights. An employer enjoying a history of good relations and communications with its employees may be more confident of successfully gaining employee acceptance of mandatory arbitration, but such an employer also may decide that the need for such a program is insufficient to risk the consequences that could flow from a botched implementation. In any event, incorporating an internal appeals process or a mediation program at the same time may make the mandatory arbitration program more palatable.

Another factor that may favor the serious consideration of mandatory arbitration is if an employer faces a heightened risk of class action claims by employees.

Another factor that may favor the serious consideration of mandatory arbitration is if an employer faces a heightened risk of class action claims by employees. Employees continue to attempt to pursue various discrimination claims on a class-wide basis. In addition, the recent proliferation of FLSA litigation, including FLSA collective actions, has been extensively commented upon. Although the U.S. Supreme Court's recent decision in *Green Tree Financial Corp. v. Bazzle*, No. 02-634 (June 23, 2003), a commercial arbitration case, reinforces the need to draft arbitration agreements carefully to preclude class-based arbitration, at least some courts have approved mandatory arbitration agreements that limit employees' ability to arbitrate employment claims on a class-wide basis. *See Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (citing *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3rd Cir. 2000), and *Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814 (11th Cir. 2001).

As was observed in Stephen Jones' article, the enforceability of a mandatory arbitration program depends at least in part on principles of contract law that vary from state to state. As a result, a program implemented simultaneously company-wide may be enforceable in one state but unenforceable in another. In some states, it may be enough simply to announce and distribute a mandatory arbitration policy at an employee meeting; employees who continue to work after learning of it will be bound solely by virtue of their continued employment--without signing anything. However, an employer cannot be confident that such a program will be legally binding everywhere it operates.

Obviously, state-to-state variances in what it takes to make a mandatory arbitration program enforceable pose a disincentive to a large employer that operates in many states. Any mandatory arbitration agreement it devises may face protracted litigation in some jurisdictions, thus frustrating the primary objective which, after all, is *avoiding* costly litigation. Alternatively, to maximize its prospects of being found acceptable everywhere, a program may end up with features that seem to make it little better than traditional court litigation. Of course, there is another alternative: a company may adopt mandatory arbitration only in the jurisdictions where the program it favors appears to meet the local criteria. A multi-state employer should consider all the alternatives before rejecting mandatory arbitration completely.

Moreover, even for the company or location where the uncertainty or other disadvantages of mandatory arbitration appear to outweigh its potential advantages, other options are available that can help reduce litigation costs, avoid "runaway" juries, and simplify the resolution of employee complaints. They include:

> Internal complaint procedures for employees that allow employers to investigate and resolve employee claims before they hit the courts.
>
> Contractual jury waivers, under which employees remain free to sue but simply waive the right to a jury trial. See, *Brown v. Cushman & Wakefield, Inc.*, 2002 WL 1751269 (S.D.N.Y.).

The bottom line is that disputes between employers and employees will arise no matter what precautions employers take. There is no universally "best" method of preventing or resolving such disputes, and there is no single type of dispute-resolution program that works for everyone. Employers must consider their specific needs and their particular workforce characteristics to determine if and where mandatory arbitration may serve them well. They should be wary of off-the-shelf or cookie-cutter approaches to mandatory arbitration, and similarly, they should be careful not to rule out mandatory arbitration altogether if programs can be tailored to serve their needs effectively with respect to at least some employees.

The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other notable relative information.

SPOTLIGHT ON FELLOWS

First Subject of College's Video History Project Passes Away

Howard Jenkins, Jr. an Emeritus Fellow and the first African-American appointed as a Member of the National Labor Relations Board, passed away June 3, 2003. His service as a Board Member spanned two decades (1963-1983) and six Presidents. A Republican, Member Jenkins was first appointed by President Kennedy in 1963, reppointed by Presidents Johnson in 1968, Nixon in 1973 and Carter in 1978.

Howard Jenkins, Jr.

Born in Denver in 1915, Mr. Jenkins was a member of the bars in Colorado and the District of Columbia. He received his AB degree from the University of Denver in 1936 and his law degree from the same school in 1941. At the 1973 graduating exercises of his alma mater, he was awarded the Honorary Degree of Doctor of Laws in recognition of his distinguished public service.

From 1943-1944, Mr. Jenkins served as an Acting Regional Attorney for the War Labor Board in Denver. He was Chief Regional Enforcement Officer and then Counsel for the General Counsel of the National Wage Stabilization Board from 1945-1946. From 1946-1956, he was a Professor of Law at Howard University in Washington, DC, where he was active in the civil rights movement.

Mr. Jenkins returned to government service in 1956 as an attorney in the Solicitor's Office at the US Department of Labor. In 1957, Solicitor Stuart Rothman, who later served as NLRB General Counsel, named him Special Assistant. From 1958-1962, Mr. Jenkins was Director, Office of Regulations, followed by Assistant Commissioner in the Bureau of Labor-Management Reports at DOL. President Kennedy nominated him to the Board and the Senate confirmed him in 1963.

The University of Denver created a section about Mr. Jenkins' life and career at the link www.penlib.du.edu/specoll/jenkins that is part of the special collection in the Penrose Library at the University and he was also the first subject of the College's Video History Project. The tape of his interview can be obtained from Susan Wan.

▶ ***Earl V. Brown, Jr.*** Asia Counsel to the US labor movement's worker rights NGO, the Solidarity Center, has recently published articles on Thailand's labor and employment laws and on the Burmese military regime's forced labor practices (the latter with Phil Robertson). The articles appear in a new study of Asian employment laws, the *Asia Pacific Labour Law Review, Workers' Rights for the New Century*, published in Hong Kong by the Asia Monitor Resource Center. Mr. Brown works with worker rights advocates in South East Asia and China on programs to strengthen enforcement of labor and employment laws. He is one of the very few union-side practitioners currently working on labor law programs in the Peoples' Republic of China.

▶ ***Parker Denaco*** retired as Executive Director of the New Hampshire Public Employee Labor Relations Board in July after twelve years in service in that position. He was the former and first executive director of the Maine Labor Relations Board after it was established in 1972 and is a past president of the Association of Labor Relations Agencies. In addition to his governmental duties, Mr. Denaco has been the co-chair of the Maine Bar Association Labor Law Section and chair of the Labor and Employment Law Section of the New Hampshire Bar Association. He will return to his neutral practice as a mediator and arbitrator in New Hampshire.

▶ ***Allen Drachman*** was appointed Chair of the Massachusetts Labor Relations Commission this past July.

▶ ***William Harding*** was named in Chambers & Partners USA - America's Leading Business Lawyers (2003-2004). Along with his firm, Harding Schultz & Downs, Mr. Harding was ranked in the top three for the state of Nebraska as an employment-defense lawyer.

▶ ***Peter Hurtgen*** was a keynote speaker for the 5th Annual Regional Labor-Management Conference sponsored by the New England Consortium of Labor Relations Agencies of Waterville Valley, New Hampshire on July 17-18. Coincidentally, this conference commemorated the 25th anniversary of the Consortium. Other Fellows in attendance were ***Allen Drachman, Parker Denaco, James Allmendinger*** and ***Richard E. Molan***.

(cont'd. on pg. 10)

(cont'd. from pg. 9)

▶ ***George Nicolau*** was selected by the National Academy of Arbitrators as an "old hand" to be interviewed at this year's Annual Meeting in June. The purpose is both recognition of the individual's achievement and an expectation that those attending will gain insights and wisdom. Mr. Nicolau is past president of the Academy and a member of the College's Board of Governors. Commenting that at 78, Mr. Nicolau was the youngest "old hand" ever so honored, his interviewer, Fellow ***Arnold Zack***, suggested that Mr. Nicolau return ten years from now and do it again.

George Nicolau

▶ ***Jared Jossem*** passed away April 21, 2003 after a long battle with cancer. He was inducted a Fellow of the College in 2001. In 1970, Mr. Jossem left the NLRB in Chicago and moved to Hawaii. There he built a 26-year relationship with the Torkildson law firm, eventually becoming Chair of the Labor and Employment Law Department. In 1998 he co-founded Jossem & Toyofuku and in 2001 merged the firm with Dwyer, Schaff Meyer Jossem & Bushnell. Mr. Jossem was an active lecturer on labor and civil rights topics and was frequently published. He was the founding editor of the Hawaii Chamber of Commerce *Labor Law Desk Manual* and at the time of his death, he was an editor of the ABA Section of Labor and Employment Law's treatise *How to Take a Case Before the NLRB*, published by the Section with BNA books.

▶ ***Charles A. Powell, III,*** a partner at Johnston Barton Proctor & Powell in Birmingham, Alabama took office August 12th for a three-year term as a member of the Board of Governors of the American Bar Association. He will represent the ABA Section of Labor and Employment Law on the Board. Mr. Powell has established a lengthy record of service in a variety of capacities with ABA and has served in various capacities with the Alabama State Bar and its Labor and Employment Law Section. He is a past president (1998) of the College as well as a Founding Governor.

Charles Powell

▶ ***George T. Roumell,*** a labor arbitrator in Detroit, Michigan, was recently awarded the highest award of the State Bar of Michigan – the Robert P. Hudson Award. The award, which has only been given 26 times in the 69 year history of the State Bar, is "presented periodically to commend one or more lawyers for their unselfish rendering of outstanding and unique service to and on behalf of the State Bar of Michigan, the legal profession and public."

▶ ***William M. Saxton,*** Counsel, Director Emeritus and former Chairman and CEO of Butzel Long was honored at a reception on September 12, 2003 by the State Bar of Michigan. Mr. Saxton was presented with its Champion of Justice Award which is given for integrity and adherence to the highest principles and traditions of the legal profession and professional accomplishments that benefit national, state or local communities. He is one of three recipients to receive the prestigious award this year. Having practiced law for more than fifty years, Mr. Saxton was elected a Fellow Emeritus of the College in the inaugural class of 1996.

William Saxton

▶ ***Robert J. Truhlar*** became president of the 14,000 member Colorado Bar Association on July 1st. He is co-founder of the law firm Truhlar and Truhlar, LLP in Littleton, Colorado and has been in private practice for twenty-two years specializing in employment law, employment discrimination and litigation.

EIGHTH ANNUAL INDUCTION DINNER

Joel D'Alba

(cont'd. from pg. 2)

knowledge leader on diversity issues and includes many of the legal profession's most respected and widely sought leaders as members of its Board of Directors.

Julia Sutherland is a Managing Director at Public Strategies in Washington, DC. She is a respected counselor to corporate and association executives in the areas of public policy communications, crisis counseling, labor and employment issues and reputation management. Her Public Strategies' assignments include Bridgestone/Firestone Americas Holding Co. and work on behalf of financial services and healthcare clients. She has helped clients stake out their public position when faced with discrimination claims, contentious contract disputes and negotiations, safety issues and wage and hour matters. In addition to private litigation relating to the workplace matters, she has counseled clients facing litigation and regulatory action by the Department of Labor, OSHA, the EEOC and the NLRB.

Julia Sutherland

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Applications for admission are now being accepted.
Note new deadline of February 1st.
Please visit the website at www.laborandemploymentcollege.org
for nomination papers.

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The views expressed herein are not necessarily those of The College of Labor and Employment Lawyers, Inc.

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