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Employer Update

Bite Added to Big Apple Human Rights Law

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In This Issue

A recent decision by New York State's highest court provides a reminder to New York City employers of the robust provisions of the New York City Human Rights Law ("NYCHRL") that make this legislation more rigorous than its federal counterpart, Title VII. *Albunio v. City of New York*, 947 N.E.2d 135 (N.Y. 2011), does not, in and of itself, establish any new standards for civil rights enforcement in New York City, but it provides a striking example of how employers should expect courts to interpret the broad scope of the NYCHRL's protections against retaliatory conduct.

The Restoration Act

The NYCHRL is the local law in New York City that, *inter alia*, protects employees from discrimination in the workplace. It includes an anti-retaliation provision. In 2005, the City Council enacted the Local Civil Rights Restoration Act (the "Restoration Act") in order "'to clarify the scope of the [NYCHRL],' which, the Council found '[had] been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.'" *Albunio* at 137, quoting 2005 N.Y.C. Local Law. No. 85, §1. Most notably, the Restoration Act amended part of the NYCHRL, Administrative Code §8-130, to read, "The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those with provisions comparably worded to provisions of this title, have been so construed." *Albunio* at 137.

Four years later, the First Department of the Appellate Division was presented for the first time with the opportunity to construe the Restoration Act in the case of *Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27 (N.Y. App. Div. 2009) leave to appeal denied, 13 N.Y.3d 702 (2009). *Williams* interpreted the Restoration Act's revisions to §8-130 as an explicit requirement that courts give the NYCHRL "an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language." *Williams*, 872 N.Y.S.2d at 31. Further, the court explained that such an analysis "must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights laws." *Id.*

To understand the "uniquely broad and remedial" purposes of the NYCHRL, the *Williams* court looked to the law's text and legislative history, and determined that the law's purposes "meld the broadest vision of social justice with the strongest law enforcement deterrent." *Id.* at 32 (citation omitted). After reviewing prior amendments to the NYCHRL, the court concluded that "[i]n case after case, the balance struck by the Amendments favored victims and the interests of enforcement over the claimed needs of covered entities in ways materially different from those

incorporated into state and federal law." *Id.* The court added, "Whether or not that desire is wise as a matter of legislative policy, our judicial function is to give force to legislative decisions."

Finally, the court provided a framework for interpreting the NYCHRL in the wake of the Restoration Act, declaring that courts should "first identify the provision of the City HRL [that the court is] interpreting and then ask, as required by the City Council: what interpretation 'would fulfill the broad and remedial purposes of the City's Human Rights Law?'" *Id.* at 37 (citation omitted).

The *Albunio* Case

When *Albunio v. City of New York* reached the New York Court of Appeals, the state's highest court was provided with an opportunity to provide practical guidance as to how this liberal interpretation of the NYCHRL should be applied.

The pertinent facts of the case are as follows. Captain Lori Albunio was the commanding officer of the New York City Police Department's Youth Services section. In April 2002, a position opened up in DARE, a Youth Services program in which officers educate students about the dangers of drugs. Albunio wanted Sergeant Robert Sorrenti to fill this open position, so she submitted her request to her immediate supervisor, Inspector James Hall. Hall then interviewed Sorrenti himself, with Albunio present as well.

The facts thereafter were disputed, but the jury could have found as follows. At the interview, Hall asked Sorrenti whether he was married and whether he had children, and aggressively questioned Sorrenti about his relationship with another male police officer, for example by saying, "You were more than just friends." Subsequently, Hall chose someone else for the open job, and told Albunio that he "wouldn't want [Sorrenti] around children." *Albunio* at 136.

Later that year, Albunio heard a rumor that she was going to be replaced. At a meeting with Hall, Deputy Commissioner Frederick Patrick, and Albunio,

In case after case, the balance struck by the Amendments favored victims and the interests of enforcement over the claimed needs of covered entities.

Patrick confirmed that they were "contemplating" replacing Albunio. When Albunio asked why, Hall said that it was because she had "'utilized poor judgment when requesting personnel,' citing Sorrenti as the primary example." *Id.* Albunio responded, "Sorrenti was the better candidate . . . [and] [i]f I had to do it all again, I would have recommended Sorrenti again." *Id.* Albunio was advised to find another assignment, which she did, albeit a much less desirable one than her previous post. This series of events led Albunio to bring an action against the City, Hall and Patrick, alleging violations of the NYCHRL's anti-retaliation provision. A jury found for Albunio, and the City appealed all the way up the ladder.

Section §8-107(7) of the New York City Administrative Code makes it an "unlawful discriminatory practice . . . to retaliate or discriminate in any manner against any person because such person has opposed any practice forbidden under this chapter." The question before the Court of Appeals in *Albunio* was "whether the record [supported] the jury's finding that *Albunio* . . . 'opposed' discrimination against Sorrenti on the basis of Sorrenti's perceived sexual orientation (a practice forbidden [under the NYCHRL])." *Id.* at 137.

Despite the relatively scant evidence that Albunio had "opposed" discrimination against Sorrenti on the basis of his perceived sexual orientation, the Court of Appeals affirmed the jury's finding in favor of Albunio. Noting first that, pursuant to the Restoration Act, §8-107(7) must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible," the court found that there was sufficient evidence to conclude that Albunio had "opposed" discrimination against Sorrenti despite the fact that "she had neither filed a discrimination complaint nor explicitly accused anyone of discrimination." *Id.* at 137-38.

Albunio's sole act that could have been deemed "opposition to discrimination" was her statement at the meeting with Hall and Patrick that if she "had to do it all again, [she] would recommend Sorrenti again." This statement was hardly clear evidence that she opposed discrimination against Sorrenti because of his perceived sexual orientation. But

in construing the word "opposed" according to the NYCHRL's "uniquely broad and remedial" purposes, the court concluded, "While [Albunio] did not say in so many words that Sorrenti was a discrimination victim, a jury could find that both Hall and Albunio knew that he was, and that Albunio made clear her disapproval of that discrimination by communicating to Hall, in substance, that she thought Hall's treatment of Sorrenti was wrong." Thus, "[b]earing in mind the broad reading" that must be given to the NYCHRL, the court held that sufficient evidence existed to find that *Albunio* opposed discrimination. *Id.* at 138.

Comparison to Title VII

Would a lone statement of "if I had to do it again, I would" constitute "opposition to discrimination" under Title VII of the Civil Rights Act of 1964? It very well may not.

The most noteworthy recent decision in the context of Title VII's "opposition clause" came in *Crawford v. Metro. Gov't of Nashville & Davidson County*, Tenn., 129 S. Ct. 846 (2009). While this decision did expand the clause's protective powers, it in no way indicated that the clause could reach as far as the NYCHRL's opposition clause reached in *Albunio*.

Crawford involved an employee who spoke out about discrimination "not on her own initiative, but in answering questions during an employer's internal investigation." *Crawford*, 129 S. Ct. at 849. The Supreme Court addressed the circuit split on whether such conduct was protected by Title VII's anti-retaliation provisions, or whether the "opposition clause" demands more active and consistent opposition (*i.e.* instigating a complaint) in order to fall under its umbrella of protection. The court held that "a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in [Title VII] requires a freakish rule [otherwise]." *Id.* at 851.

While the *Crawford* decision discussed a more expansive anti-retaliation protection, just as the *Albunio* decision did, the relative points on the "opposition to discrimination" spectrum at which these decisions were made demonstrates how the employee-protective measures of the NYCHRL, as strengthened by the Restoration Act, have surpassed those of Title VII. To start, consider the facts in the federal case: an employee responded to a question about whether she had witnessed any "inappropriate behavior" by describing in great detail several instances of sexually harassing behavior that had been directed towards her. The Sixth Circuit found that Title VII did not protect her from retaliation because she was merely answering questions instead of instigating a complaint herself, and it took the Supreme Court to resolve the open question of whether the reach of Title VII's opposition clause protects this individual from retaliation.

The NYCHRL's anti-retaliation provisions have surpassed those of Title VII.

Compare that scenario to the one that came before the New York Court of Appeals: Captain *Albunio* didn't just fail to instigate a complaint on her own; she failed to complain at all. She merely said at a meeting with two superiors that she believed Sergeant Sorrenti was the right man for the job and that she would recommend him again. There was never any acknowledgement of Sorrenti's perceived sexual orientation by anyone at that meeting, much less a clear statement from Albunio that she believed Sorrenti had been passed over for the job because of this perception and that she opposed such a decision. But in construing the NYCHRL "broadly in favor of discrimination plaintiffs," the court held that this comment constituted sufficient opposition to discrimination, even as indirect and ambiguous as it was.

Both *Albunio* and *Crawford* presented "close calls" under the opposition clauses of their respective statutes, as evidenced by the fact that they reached the highest courts in New York State and the United States, respectively. But while the "close call" Title VII case involved clear statements of opposition that were simply not made on the employee's own initiative, the "close call" NYCHRL case involved a far less active or direct statement of opposition. This contrast tells us that these two statutory schemes are no longer operating at the same point on the spectrum; rather, the NYCHRL's anti-retaliation protections have surpassed those of Title VII.

Employer Takeaways

Although the Restoration Act has been on the books since 2005, its effects have been felt only more recently, as *Williams* (in

2009) laid the groundwork for decisions like *Albunio* from earlier this year. Given that *Albunio* was decided by New York's highest court, courts may continue to interpret the NYCHRL liberally in favor of employees. Plaintiffs are likely to be more aggressive in pursuing discrimination and retaliation claims because of the favorable treatment that they may believe they will receive under the NYCHRL.

Plaintiffs are likely to argue that the Restoration Act does not apply solely to the "opposition clause," or even merely to the anti-retaliation provision. Rather, they likely will contend that all provisions of the NYCHRL are to be construed in as employee-friendly a way as is reasonably possible. Granted, federal and state laws have long provided strong protections for employees against discrimination and retaliation, so the Restoration Act should not require any sea changes in how employers conduct their businesses. Furthermore, retaliation cases traditionally have been very fact-specific, so the case-by-case nature of courts' analyses of these claims is unlikely to change. However, employers in New York City should be aware that plaintiffs and courts may argue that their grounds for asserting claims of retaliation by employees in New York City have been strengthened by the Restoration Act.

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The EEOC's Adoption of Regulations Implementing the ADAAA and the Implications for Employers

By Courtney Fain

In March, the Equal Employment Opportunity Commission ("EEOC") issued its long-awaited final rule (the "Final Rule") implementing the Americans with Disabilities Act, Amendments Act ("ADAAA"). The Final Rule adheres closely to the text of the ADAAA, providing instructive guidance as to its broad application. In light of the Congressional intent that people should not face a high bar in claiming a disability, the focus of the Final Rule is on rules of construction to be used in determining whether a person may be disabled under the ADAAA.

Background of the ADAAA

The express purpose of the ADAAA, which became effective on January 1, 2009, was to "reinstat[e] a broad scope of protection to be available under the ADA."[1] The ADAAA was a direct response to the Supreme Court's holdings in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), and companion cases in the lower courts, which "narrowed the broad scope of protection intended to be afforded by the ADA."[2]

In *Sutton*, the court held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment. . . ."[3] In *Toyota*, the court held that an impairment substantially limits a major life activity, and therefore is a disability, only where it "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[4]

While retaining the basic three-part structure defining a person as "disabled" if he or she (1) has an impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment, the ADAAA also broadened the definition of "disability" in four significant ways. First, it overturned the holdings in *Sutton* and *Toyota* by expressly providing that (1) whether an impairment is a disability is determined without regard to mitigating measures[5] and (2) "substantially limits" should be broadly construed.[6] Second, it provided a non-exhaustive list of "major life activities" and stated that an impairment need only impact one major life activity to be considered a disability.[7] Third, the ADAAA strengthened the "regarded as" prong by providing that the perceived impairment need not be perceived as limiting a major life activity.[8] Finally, it explained that an impairment that is episodic or in remission may qualify as a disability if it would substantially limit a major life activity when active.[9]

The Final Rule

Pursuant to the ADAAA, the EEOC issued a Notice of Proposed Rulemaking in September 2009. The Final Rule was issued in March 2011, and became effective on May 24, 2011, nearly two and a half years following the ADAAA's effective date. Consistent with the intent of the ADAAA, the Final Rule makes clear that the definition of "disability" should be broadly construed, and "the question of whether an individual meets the definition of disability . . . should not demand extensive analysis."[10] Importantly, the Final Rule notes that the determination as to whether a person is disabled under the ADAAA still requires an individualized assessment, yet the practical impact of that statement is limited given that the Final Rule also contains a list of 16 types of impairments that will "virtually always" substantially limit a major life activity, including, among others, autism, cancer, diabetes, HIV, major depressive disorder, and post-traumatic stress disorder.[11]

The Final Rule . . . sets forth more expansive rules of construction for determining whether an impairment "substantially limits" a major life activity such that it qualifies as a disability.

To give effect to the mandate for broad construction, the Final Rule provides an expanded definition of "major life activity." Sitting, reaching, and "interacting with others" have been added to the list of major life activities set forth in the text of the ADAAA.[12] The Final Rule also expands the list of major bodily functions under major life activities, and provides that "[t]he operation of a major bodily function includes the operation of an individual organ within a body system."[13] Importantly, "[w]hether an activity is a 'major life activity' is not determined by reference to whether it is of 'central importance to daily life,'" and "major" should not be interpreted as creating "a demanding standard for disability."[14]

The Final Rule also sets forth more expansive rules of construction for determining whether an impairment "substantially limits" a major life activity such that it qualifies as a disability, and provides that:

- "Substantially limits" is not meant to be a demanding standard;
- the focus of claims under the ADA should be on whether there has been discrimination and not on whether the person qualifies as disabled (that is, whether he or she has an impairment that substantially limits a major life activity);
- whether an individual has a disability still requires an individualized assessment, although, as noted above, certain impairments will "virtually always" substantially limit a major life activity;
- scientific, medical, or statistical evidence is usually not required for comparison of an individual's performance of a major life activity to that of the general population;
- as noted above, the ameliorative effects of mitigating measures, except for ordinary eyeglasses or contact lenses, should be ignored for purposes of determining whether an impairment substantially limits a major life activity. However, the negative effects of any mitigating measures, such as the side effects of medicine to treat a disability, should be considered;
- an impairment that is episodic or in remission can be a disability;
- an impairment need only limit one major life activity; and
- in determining whether a person has an actual disability or a record of disability, impairments that last or are expected to last less than six months may be substantially limiting.[15]

Further, consistent with the ADAAA's strengthening of the "regarded as" prong, the Final Rule makes clear that whether the perceived impairment substantially limits a major life activity is not relevant in evaluating coverage under the "regarded as" prong.[16] It is sufficient that the individual is regarded as having *any* impairment that led to an adverse employment action. Also, an employee need show only that there was an adverse action, and the motivation or basis for the employer's belief as to the perceived impairment is irrelevant. Importantly, the exception for transitory (less than six months) and minor impairments under the "regarded as" prong is treated as an affirmative defense under the Final Rule, and therefore the burden of proof is on the employer to show that the impairment is *objectively* transitory and minor.[17]

Remaining Questions

The Final Rule is also notable for what it does not address and the guidance that it fails to provide. For example, while instructing that impairments that last or are expected to last less than six months may be substantially limiting for determining whether a person has an actual disability or a record of disability, the interpretive guidance to the Final Rule offers little insight into how employers should treat workers with temporary impairments. While noting that an employee with a 20-lb lifting restriction that lasts for several months is substantially limited in the major life activity of lifting, and is therefore disabled, the guidance also cites the legislative history for the statement that "[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe." The Final Rule does provide that it is still appropriate to consider the "condition, manner, or duration" of the impairment, but in light of the emphasis on extensive application of the ADA and expansive list of major life activities, even seemingly minor temporary impairments, such as a broken leg, which may substantially impair the major life activity of walking for a short period of time, or seasonal affective disorder, which by definition is depression that is temporally limited, may trigger coverage under the ADA.

Additionally, while the Final Rule provides that scientific, medical, or statistical evidence usually is not required to prove that an impairment qualifies as a disability, the EEOC declined in the Final Rule to provide guidance as to what documentation employers can seek as to the existence of a disability.

The Final Rule is significant for its repeated guidance that whether a person is disabled under the ADAAA should not require extensive analysis.

Implications for Employers

The Final Rule hues very closely to the text of the ADAAA, and so it is unlikely that employers who modified their policies and procedures in light of the ADAAA will need to undertake any additional reforms. However, the Final Rule is significant for its repeated guidance that whether a person is disabled under the ADAAA should not require extensive analysis. Under such a framework, it will be increasingly difficult for an employer to defend against ADAAA claims, or move to dismiss such claims, on grounds that an employee is not disabled, and an employer will need to demonstrate instead that it engaged the disabled employee in an interactive process in a good faith effort to provide a reasonable accommodation.

1 42 U.S.C. § 12101(2)(b)(1).

2 *Id.* at § 12101(2)(a)(4).

3 527 U.S. 471, 475-76 (1999).

4 524 U.S. 184, 198 (2002).

5 42 U.S.C. § 12101(4)(a)(4)(E)(i) & (ii).

6 *See id.* at § 12101(4)(a)(4)(B).

7 *Id.* at § 12101(4)(a)(2) & (4)(a)(4)(C).

8 *Id.* at § 12101(4)(a)(2)(A).

9 *Id.* at § 12101(4)(a)(4)(C).

10 29 C.F.R. § 1630.1(c)(4).

11 *Id.* at § 1630.2(j)(3).

12 *Id.* at § 1630.2(i)(1).

13 *Id.*

14 *Id.* at § 1630.2(i)(2).

15 *Id.* at § 1630.2(j)(1).

16 *Id.* at § 1630.2(j)(2).

17 *Id.* at § 1630.15(f).

Social Framework Analysis After *Dukes v. Wal-Mart*

By Patricia Wencelblat

In *Dukes v. Wal-Mart*, 131 S. Ct. 2541 (2011), a majority of the Supreme Court emphatically rejected the expert testimony of Dr. William Bielby, a sociologist who conducted a "social framework analysis" of Wal-Mart's culture and personnel practices, and concluded that Wal-Mart was vulnerable to gender discrimination, and that these policies contributed to gender disparities at Wal-Mart. Similar expert testimony by Dr. Bielby and other social scientists had been used by plaintiffs' counsel in numerous discrimination class actions to support their motions for class certification. The *Dukes* opinion leaves little doubt that the use of social framework analysis in support of class certification motions should be dead. However, plaintiffs' counsel may seek to continue the use of such testimony in individual cases, and they may find support for the use of social framework analysis in an individual discrimination case from the Supreme Court's plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Origins of the Social Framework Analysis

The original conception of social framework analysis arose outside of the discrimination and class certification contexts. The term "social frameworks" was coined by two social scientists who used it to describe the use of general social science research during trials to help juries decide specific factual issues being litigated. *See* John Monahan et. al, *Contextual Evidence of Gender Discrimination: the Ascendance of "Social Frameworks*," 94 Va. L. Rev. 1715, 1726 (Nov. 2008). The key characteristic of these social frameworks were the use of general, "off the rack" research that would provide jurors with contextual information that the jurors could apply to the specific facts in the case, if they believed that such application was warranted. *Id.* Social frameworks that address flawed intuitions or inaccurate beliefs can be the most helpful to juries. *Id.* at 1741.

Notable examples of the original social frameworks include: eyewitness identification, risk assessments of violence, battered woman syndrome, and rape trauma syndrome. *Id* at 1726. For example, in a case involving the use of eyewitness testimony, a social science expert might present general research on the reliability of cross-racial eyewitness identification, but would not testify as to the specific eyewitness in the case at hand. In the case of battered woman syndrome, the testimony might address typical actions and reactions by a battered woman, which could be very different from the expectations of jurors.

Social Framework Analysis in Pattern or Practice Class Certification Motions

In typical pattern or practice of discrimination claims, of which *Dukes* is the prime example, plaintiffs' motions for class certification tended to follow a familiar pattern. Plaintiffs usually claimed that (1) a company discriminated against them by granting managers excessive discretion or subjectivity, which permitted pervasive stereotypes and prejudices towards minorities to surface; (2) the company's culture encouraged bias in decision-making and discouraged minorities from advancing; and (3) equal opportunity measures were cosmetic and not effective. *See* Gregory Mitchell, *Good Causes and Bad Science*, 63 Vanderbilt L. Rev. En Banc 134 (2010).

To support their motions for class certification, plaintiffs would introduce expert testimony from statisticians who would testify as to company-wide statistical disparities, and social scientists who seek to put a discriminatory gloss on the statistics by presenting information to the fact-finder about how stereotypes operate, and the circumstances under which decision-makers are more likely to rely on stereotypes.

However, in many of these cases, social scientists would not limit themselves to simply describing social science research regarding stereotyping, but instead, would go one or two steps further and link that general research to the specific working conditions at issue. These experts would review discovery materials produced in the case, such as documents and deposition transcripts, and testify that, because of these policies, the company was vulnerable to bias in the form of stereotyping. Additionally, some experts would take their testimony one step further, and testify that not only was the company vulnerable to bias, but that these policies had

contributed to disparities within the company. Monahan at 1743-48.

The Supreme Court's Rejection of Dr. Bielby's Testimony

The *Dukes* case followed this typical pattern. The plaintiffs in *Dukes* introduced the expert testimony of Dr. Bielby to tie together the claims of the putative class, who worked in over 3,400 stores around the country. Dr. Bielby conducted a typical "social framework analysis," and testified that Wal-Mart had policies and a strong corporate culture that made it vulnerable to gender bias, and concluded that these policies had contributed to gender-based disparities. The Supreme Court noted that "[t]he only evidence of a 'general policy of discrimination' respondents produced was the testimony of Dr. William Bielby, their sociological expert." *Dukes*, 131 S. Ct. at 2553.

The Supreme Court rejected the use of this testimony as a means of demonstrating commonality for class certification purposes, because "[Dr. Bielby] could not . . . 'determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart." *Id.* The Supreme Court particularly noted that "Dr. Bielby conceded that he could not calculate whether .5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Id.*

The Supreme Court concluded that Dr. Bielby's testimony did "nothing to advance respondents' case," because the question of "whether .5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking is the essential question on which respondents' theory of commonality depends." *Id.* at 2554. Therefore, the Supreme Court held that it could "safely disregard" Dr. Bielby's testimony. *Id.*

The Use of Social Framework Analysis in Individual Claims of Discrimination

Social framework analysis may never be able to determine causation at the level of certainty required by the Supreme Court to support commonality in class certification determinations. However, there may be other areas in which plaintiffs may be still able to rely on social frameworks in discrimination cases, albeit for a different purpose, as demonstrated by the use of such testimony in *Price Waterhouse v. Hopkins*.

The *Dukes* opinion leaves little doubt that the use of social framework analysis in support of class certification motions should be dead.

In *Price Waterhouse v. Hopkins*, the Supreme Court addressed Hopkins's claim that she was denied partnership at Price Waterhouse at least in part because of her gender. During the partnership selection process, all partners at Price Waterhouse were invited to submit written comments on each candidate. *Id.* at 233. Dr. Susan Fiske, a social psychologist, reviewed each of the comments submitted with regard to Hopkins, and testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping, and that Hopkins was the victim of sex stereotyping. Dr. Fiske explained that it was a commonly accepted practice for social psychologists to reach this kind of conclusion without having met any of the people involved in the decision-making process. *Id.* at 236.

According to Dr. Fiske, Hopkins' uniqueness as the only woman in the candidate pool and the subjectivity of the evaluations made it likely that the comments submitted on her candidacy were the result of sex stereotyping. Dr. Fiske's testimony focused both on overtly sex-based comments, as well as intensely critical comments from partners who knew Hopkins only slightly. Dr. Fiske came to the general conclusion that the partnership process at Price Waterhouse was vulnerable to sex stereotyping, as well as the specific conclusion that Hopkins was the victim of sex stereotyping. However, Dr. Fiske admitted that she could not say with certainty whether any particular comment was the result of sex stereotyping.

The plurality opinion in Price Waterhouse did not directly address Dr. Fiske's credentials as an expert witness, as this had not been raised by Price Waterhouse at trial, but the opinion included statements that seemed to indicate at least some support for her testimony. The opinion did not accept the characterization by Price Waterhouse of Dr. Fiske's testimony as "gossamer evidence" nor her conclusions as "intuitively divined," nor did it "adopt the dissent's dismissive attitude toward Dr. Fiske's field of

study" and toward her professional integrity. *Id.* at 255.

Dr. Fiske's testimony in *Price Waterhouse* was fundamentally different than Dr. Bielby's testimony in *Dukes*, and there may still be an opportunity for plaintiffs' counsel to continue to use social framework analysis in individual cases like *Price Waterhouse*. However, given the strong language used in *Dukes*, Dr. Fiske's specific conclusion that Hopkins was the victim of sex stereotyping may not be acceptable.

Dr. Bielby's testimony was introduced in connection with plaintiffs' motion for class certification, and purported to support the argument that Wal-Mart engaged in a general policy of discrimination. As such, Dr. Bielby's admission that he could not testify as to how many decisions were the result of stereotyping proved to be a fatal flaw, because without such evidence, there could be no common policy of discrimination. Moreover, Dr. Bielby's methodology was questionable and had been criticized by numerous other social scientists, as he reviewed only discovery material produced in the litigation, such as depositions and personnel policies, did not analyze any decisions that occurred pursuant to those policies, and yet came to the conclusion that stereotyping was a cause of gender disparities at Wal-Mart.

The Supreme Court concluded that Dr. Bielby's testimony did "nothing to advance respondents' case.

Unlike *Dukes, Price Waterhouse* was a single plaintiff discrimination case. In contrast to Dr. Bielby, Dr. Fiske reviewed all comments submitted on Hopkins' candidacy for partnership, and based her opinion about the partnership process at least in part on the actual comments generated by the process, rather than materials that simply described the process.

Dr. Fiske's first conclusion that the system itself was vulnerable to sex stereotyping is more likely to be accepted as it is similar to traditional social frameworks. However, Dr. Fiske's other conclusion that Hopkins was the victim of sex stereotyping comes closer to the line drawn by *Dukes* and by other social scientists. After *Dukes*, Dr. Fiske's conclusion on the ultimate issue might not be based on sufficient scientific certainty because Dr. Fiske could not identify which comments were conclusively the result of such stereotyping.

Conclusion

In sum, while the *Dukes* decision likely marks the end of the use of expert testimony by social scientists purporting to conduct a "social framework analysis" in support of a motion for class certification, defendants in discrimination cases may still have to contend with social science experts conducting a "social framework analysis" to support individual claims of discrimination.

The New York State "Marriage Equality Act" and Its Effects on Employee Benefits

By Joshua Gelfand and Steven Margolis

On July 24, 2011, the Marriage Equality Act (the "Act") became effective, making New York State the sixth state to legalize same-sex marriage. Although New York has, for several years, recognized same-sex marriages performed outside the state, the Act now permits same-sex couples to legally marry in state. The Act, signed into law on June 24, 2011, also provides that, in New York, no distinction may be made between the treatment of same- and opposite-sex marriages. However, the Act includes an explicit exemption for benevolent organizations and religious institutions and makes clear that no member of the clergy acting in such capacity will be required to perform any marriage.

The broad sweeping language of the Act will have a significant effect on employee benefits arising out of or governed by New York State law. However, pursuant to the Federal 1996 Defense of Marriage Act ("DOMA"), which defines "marriage" as "only a legal

union between one man and one woman as husband and wife" and "spouse" as only "a person of the opposite sex who is a husband or a wife," many rights afforded under New York State law will not be mandated for certain employee benefits subject to DOMA. This could create new pitfalls for certain employees and employers attempting to navigate the Act as well as DOMA.

Health and Welfare Benefits

The Act's effect on a health or other welfare benefit plan provided by an employer depends on whether the plan is provided through an insurance policy purchased by the employer (an "insured" plan) or funded through the general assets of the employer (a "self-insured" plan).

Insured Plans

Insured plans funded through insurance policies governed by New York State insurance law will be required to comply with the Act, meaning that such plans cannot distinguish between the treatment of same-sex spouses and opposite-sex spouses. In practice, this is not a significant change from current law, since Governor Patterson issued a directive in 2008 that all New York State agencies recognize same-sex marriages performed in other jurisdictions. However, there continue to be adverse federal tax implications for coverage of same-sex spouses – the fair market value of any benefit for a same-sex spouse would be treated as imputed income to the employee for federal income tax purposes.

Self-Insured Plans

Self-insured plans are typically not subject to state insurance laws. The Employee Retirement Income Security Act of 1974 ("ERISA") generally preempts state laws with respect to self-insured plans, so that such plans are not subject to the Act. Because of DOMA's definition of "marriage" and "spouse," self-insured plans are not required to recognize otherwise valid same-sex marriages. Therefore, despite the provisions of the Act, employers are not required to treat same-sex spouses in the same manner as opposite-sex spouses under self-insured benefit plans. However, an employer can still elect to provide equal benefits to same-sex spouses if the employer so chooses, subject to the imputation of tax discussed above. Employers should give serious thought to whether or not they wish to extend self-insured benefits to same-sex spouses and should carefully review the definition of "spouse" in all plan documents to properly capture the employers' intended universe of beneficiaries. For example, employers should consider whether or not, in addition to same-sex spouses, they wish to extend benefit coverage to include opposite-sex non-married domestic partners or, alternatively, discontinue offering coverage to all unmarried domestic partners.

Post-Employment Benefit Continuation Coverage

COBRA Continuation Coverage

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") is a federal program requiring employers to provide continuation coverage under certain health and welfare benefits to "qualified beneficiaries" (such as employees and their spouses) following a "qualifying event" (such as a termination of employment). Because COBRA is a federal program, as with self-insured benefit plans, DOMA provides that an employer is not required to provide COBRA continuation coverage to same-sex spouses. However, as with self-insured benefit plans, an employer may still elect to extend such coverage to same-sex spouses. It should also be noted that a bill was introduced in the House of Representatives on June 23, 2011 that seeks to extend COBRA continuation coverage eligibility to domestic partners (as defined in the applicable group health plan) and their children.[1]

New York State "Mini-COBRA" Coverage

In addition to COBRA, New York State law requires certain employers to provide COBRA-like post-employment benefit continuation coverage ("mini-COBRA") with respect to insured plans funded through insurance policies governed by New York State law.[2] While the Act does not affect COBRA entitlements, it does affect continuation coverage under New York State's mini-COBRA laws and, therefore, to the extent opposite-sex spouses would be entitled to continuation coverage under New York State mini-COBRA, such benefits will now need to be extended to same-sex spouses.

Pension and Other Benefits Governed by Federal Law

401(k) and Defined Benefit Pension Plans

Employer-provided 401(k) and pension plans are governed by ERISA and are therefore outside the ambit of the Act. Because DOMA provides that the term "spouse" can only refer to people of opposite sexes that are married, same-sex spouses are not legally

entitled to many of the protections and rights provided under such plans to married persons of opposite sexes.

Examples:

- ***Beneficiary Designation*** – A participant may name anyone as beneficiary under a 401(k) plan. However, if no one is named, the default beneficiary under federal law is the participant's spouse. Since under DOMA a "spouse" does not include persons of the same-sex, the same-sex spouse would not be the default beneficiary.
- ***Hardship Withdrawals*** – Federal law allows for early withdrawal from a 401(k) plan due to financial hardship, including that of a spouse as part of a safe harbor. This benefit is not automatically available to married persons of the same sex, although employees may make withdrawals on account of hardship suffered by the primary beneficiary under the plan.
- ***Nonspousal Rollovers*** – Employers must offer a nonspousal rollover option to beneficiaries of an employee's 401(k) plan; however, several inequalities remain between spousal and nonspousal rollovers, most notably that spousal beneficiaries may delay withdrawal from their rollover account until reaching age 70½ while nonspousal beneficiaries must either (i) withdraw all funds within five years of the employee's death or (ii) immediately begin annual withdrawals for the duration of either the decedent or the nonspousal beneficiary's life expectancy (depending on the terms of the plan).[3]
- ***Pension Distributions*** – Pension plans must generally offer married participants payment in the form of a qualified joint and survivor annuity, along with pre-retirement spousal death benefit coverage. These benefits are not required for same-sex spouses and would be unavailable unless an employer specifically alters its plan and employees are made aware of their ability to elect such option.

While employers are not required to provide equal protections and rights under 401(k) plans and defined benefit pension plans to married persons of the same sex, to a large extent, employers are free to do so if they so choose.

Despite the provisions of the Act, employers are not required to treat same-sex spouses in the same manner as opposite-sex spouses under self-insured benefit plans.

Family and Medical Leave Act ("FMLA")

The FMLA is a federal law requiring certain employers to provide employees with job-protected unpaid leave due to a serious health condition or to care for a sick family member or new child. While the FMLA definition of "spouse" defers to the definition recognized under state law for purposes of marriage in the state in which the employee resides, it is likely that DOMA, which was enacted after the FMLA, restricts this definition solely to spouses of the opposite sex. This interpretation is supported by a 1998 Department of Labor opinion letter as well as at least one recent Federal District Court case in the First Circuit.[4] However, in 2010 the Department of Labor expanded same-sex domestic partners' rights to some extent, having issued interpretive guidance clarifying that non-biological parents are permitted unpaid FMLA leave for the birth of a child or to care for such child with a serious health condition.[5] In addition, several bills have been proposed in the House of Representatives which, if passed, would extend FMLA coverage to domestic partners.[6]

While not required under the FMLA, an employer could voluntarily provide leave benefits to same-sex spouses similar to those provided to spouses of the opposite sex. However, it should be noted that since such leave could not be designated as FMLA leave, the employee taking the leave could potentially "double up" where covered FMLA leave is later taken in the same 12-month period (*e.g.*, caring for a parent or child).

Social Security

Under the Social Security Act, the federal government provides numerous benefits, such as the spousal survivor benefit, for which same-sex married couples remain ineligible as a result of DOMA. Despite this, some expansions in entitlements have been effected, such as the extension of non-biological children's entitlements to disability benefits under the Social Security Act.[7]

State and Federal Income Tax Issues

New York. Since the Act requires there be no differentiation under New York State law between

opposite- and same-sex married couples, it is expected that same-sex spouses should be able to file a joint New York State tax return. In addition, we anticipate that there should not be imputed New York State income tax as a result of an employer's provision of health and welfare benefits to an employee's same-sex spouse. The New York State Department of Taxation and Finance is expected to issue further guidance on these issues in the near future.

Federal. As a result of DOMA, the Act does not affect how same-sex marriages in New York will be recognized for federal income tax purposes. That is, same-sex spouses cannot file joint federal tax returns and cannot receive any federal tax advantages associated with employee benefit plans by virtue of their marital status.[8] For example, the fair market value of any benefit coverage given to an employee's same-sex spouse, as discussed above, would be imputed into the employee's taxable income for federal income tax purposes. In addition, employees could not pay for their same-sex spouse's health benefits with pre-tax dollars (since "cafeteria plans" are governed by federal law) and would not be eligible for reimbursement of their same-sex spouse's medical expenses under the employee's flexible spending account.

The disparity in treatment of same-sex married couples for federal and New York State income tax purposes could likely result in complex tax filings in which same-sex spouses must file differently for purposes of federal and New York State income tax returns and treat certain benefits as taxable income for federal income tax purposes and non-taxable for purposes of New York State income tax. This will be administratively burdensome for both the employer and the employee.

As a result of DOMA, the Act does not affect how same-sex marriages in New York will be recognized for federal income tax purposes.

Same-Sex Divorce

Entitlement to same-sex marriage in New York brings with it the inevitable complications of same-sex divorce. One significant issue that arises in connection with divorce proceedings in the benefits context is the division of a couple's retirement assets. Tax qualified pension plans are generally prohibited under ERISA from permitting the assignment or alienation of plan benefits.[9] ERISA provides an express carve-out for alienation resulting from a qualified domestic relations order (a "QDRO") entitling a person to all or a portion of his or her ex-spouse's plan benefits.[10] As a result of DOMA, however, an order relating to same-sex spouses would not constitute a "domestic relations order" under ERISA.[11] As a result, such an order could not qualify as a QDRO and would therefore be unenforceable against a same-sex ex-spouse's qualified plan assets. Therefore, same-sex couples negotiating a divorce settlement should take care not to rely on QDROs as part of the settlement.[12]

Employer Action Items

As a result of the impact that the Act will have on employee benefits, employers should review their current benefit plans and policies to determine any necessary changes or clarifications as a result of the Act and to ensure that the structure of the plans and policies accurately reflects the benefit coverage the employer desires to provide. It is recommended that, among other things, employers take the following actions:

- Consider, to the extent not required by the Act, the degree to which the employer desires to extend employee health and welfare benefits to same-sex spouses, including, for example:
  - Provision of self-insured health and welfare benefits to same-sex spouses (including whether or not to provide a tax gross-up to the extent such benefits are deemed taxable to the employee);
  - Extension of COBRA continuation coverage to same-sex spouses and/or expansion of the definition of qualifying event (*e.g.*, to cover dissolution of a domestic partnership or same-sex marriage);
  - Treatment of same-sex marriages as spousal relationships for purposes of 401(k) and defined benefit pension plans (*e.g.*, entitlement to survivor annuity coverage, establishment of automatic beneficiary entitlement, and expansion of hardship withdrawal rights);
- Consider the degree to which the employer desires to extend benefit coverage to include opposite-sex and same-sex non-married domestic partners or, alternatively, discontinue benefit

coverage to all unmarried domestic partners.

- Review and analyze existing benefit plans, policies, and procedures (including enrollment forms, administrative procedures, employee handbooks, and current domestic partner policies) to (i) determine the rights to which same-sex spouses and domestic partners are currently entitled (including the definition of "spouse" in each plan), (ii) ensure current rights reflect the benefits the employer desires to provide, and (iii) revise such plans, policies, and procedures to the extent necessary or desired.
- Coordinate with the employer's payroll department to ensure payroll is prepared to address the taxation issues that may arise as a result of providing benefits with disparate federal and state income tax treatment.
- To the extent any benefits are provided solely to same-sex domestic partners (*e.g.*, tax gross-ups on taxable health benefits), review with legal counsel whether such benefits remain necessary in light of the Act and whether the legalization of same-sex marriage in New York enhances potential discrimination claims against the employer by non-married opposite-sex or same-sex domestic partners.
- Review any current eligibility requirements imposed on same-sex partners but not opposite-sex partners (*e.g.*, proof of domestic partnership, cohabitation requirements) and consider with legal counsel any potential employer liability arising out of such potential discrimination.
- Confer with legal counsel to prepare employer communications to employees and their families.

1 Equal Access to COBRA Act of 2011 (H.R. 2310).

2 *See* McKinney's Insurance Law § 3221(m)(6); *see also* NYS Insurance Department State Continuation Coverage Extension to 36 Months Frequently Asked Questions *at* http://www.ins.state.ny.us/cobra/cobra_ext_36.htm#faq, last updated Apr. 27, 2010 ("State continuation coverage does not apply to self-funded plans, dental-only plans, vision-only plans or prescription-only plans …").

3 The Pension Protection Act of 2006 created an entitlement for nonspousal rollovers, now codified under Section 401(a)(9)(B) of the Internal Revenue Code of 1986, as amended, and Treas. Reg. §§ 1.401(a)(9)-3 and 1.401(a)(9)-5. *See also* Notice 2007-7, 2007-5 IRB 395, 1/10/2007 as modified by Notice 2009-82, 2009-41 IRB 491, 9/24/2009.

4 *See* Department of Labor Wage and Hour Division Opinion Letter dated November 18, 1998 (FMLA-98); *Gill v. Office of Personnel Mgmnt.*, 699 F.Supp. 2d 374 (D. Mass. 2010).

5 *See* Department of Labor Wage and Hour Division Administrator's Interpretation No. 2010-3 (June 22, 2010) ("Employees who have no biological or legal relationship with a child [such as a same-sex spouse] may nonetheless stand in loco parentis to the child and be entitled to FMLA leave … to care for the child if the child had a serious health condition. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement.").

6 *See* Family Leave Insurance Act of 2009 (H.R. 1723); Family and Medical Leave Inclusion Act (H.R. 2132); Balancing Act of 2009 (H.R. 3047).

7 *See* Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Acting General Counsel Social Security Administration (Oct. 16, 2007)("Although DOMA limits the definition of 'marriage' and 'spouse' for purposes of federal law, the Social Security Act does not condition eligibility for [child's insurance benefits] ('CIB') on the existence of a marriage or on the federal rights of a spouse in the circumstances of this case … Accordingly, we conclude that nothing in DOMA would prevent the non-biological child of a partner in a Vermont civil union from receiving CIB under the Social Security Act.").

8 Note, however, that a same-sex spouse can still receive certain federal tax advantages to the extent the spouse qualifies as a "dependent" under the federal tax code. *See*, *e.g.*, PLR 200108010, 2/23/2001 (A "dependent" includes an individual who "(1) receives more than half of his or her support from the taxpayer for the year, and (2) who has the home of the taxpayer as his or her principal abode and is a member of the taxpayer's household during the entire taxable year of the taxpayer" provided that the individual and taxpayer's relationship is not in violation of local law.).

9 *See* 29 U.S.C. § 1056(d).

10 A "qualified domestic relations order" is defined under ERISA as a domestic relations order (i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and (ii) includes certain enumerated information (such as the name and last known mailing address of the participant and each payee covered by the order and the portion of benefits to be paid) and does not require the plan to provide certain other specifically enumerated information. *See* 29 U.S.C. § 1056(d)(3).

11 *See* 29 U.S.C. § 1056(d)(3)(B)(ii) ("the term 'domestic relations order' means any judgment, decree, or order (including approval of a property settlement agreement) that — (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a state domestic relations law (including a community property law).").

12 Note that a domestic relations order granted to an ex-spouse in a same-sex divorce proceeding could qualify as a QDRO to the extent the ex-spouse qualifies as a dependent of the plan participant. *See* 29 U.S.C. § 1056(d)(3)(B)(ii)(I) (providing domestic relations orders apply with respect to spouses, former spouses, children, or other dependents of a participant).

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