

LABOR & EMPLOYMENT

Disclosures Amid Group Terminations

BY GREGORY I. RASIN AND ELISE M. BLOOM

THE BUREAU of Labor Statistics reports that in the 15 months since Jan. 1, 2006, there have been over 17,000 mass layoffs—defined as each involving the reduction of at least 50 employees from a single establishment.<sup>1</sup> When conducting group terminations employers generally want to obtain valid and enforceable releases, including waiver of claims under the Age Discrimination in Employment Act (ADEA), in exchange for severance.<sup>2</sup> Understanding the intricacies of the Older Workers Benefits Protection Act (OWBPA),<sup>3</sup> a 1990 amendment to the ADEA—including the OWBPA's information disclosure requirements—can be the difference between obtaining valid waivers or unenforceable releases and potential litigation.

One element of the disclosure requirements is properly identifying the decisional unit—defined by Equal Employment Opportunity Commission (EEOC) regulations as “that portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver.”<sup>4</sup> This article examines the OWBPA, the controlling regulations and recent case law, and provides practical guidance on how to properly identify the decisional unit.

Requirements of the OWBPA

An individual may not waive any right or claim under the ADEA unless the waiver is “knowing and voluntary.”<sup>5</sup> The OWBPA established eight minimum requirements that must be

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Properly identifying the decisional unit is integral to validity of releases.



satisfied in order to meet the knowing and voluntary standard:

- the release must be written in a manner calculated to be understood by the employee signing the release, or by the average individual eligible to participate;
- the release must specifically refer to claims arising under the ADEA;
- the release must not purport to encompass claims that may arise after the date of execution;
- the employer must provide consideration for the waiver or release of ADEA claims above and

- beyond that to which the employee would otherwise already be entitled;
- the employee must be advised in writing to consult with an attorney prior to executing the agreement;
- the employee must be given at least 45 days to consider signing the release if the incentive is offered to a group;
- the release must allow the employee to revoke the agreement up to seven days after signing; and
- if the release is offered in con

nection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages of those eligible for the program, and the corresponding information relating to employees in the same job titles who were not eligible or not selected for the program.<sup>6</sup> The purpose of the disclosure requirements is to provide employees with sufficient information regarding a group termination program so that they can evaluate any potential ADEA claims they may have and make an informed choice whether or not to

sign a release.<sup>7</sup> Integral to this decision is the proper identification of the decisional unit. The decisional unit includes all classes, units, groups, job classifications or organizational units of employees that the employer considered in effectuating the termination program.<sup>8</sup>

The EEOC regulations provide non-exclusive examples of possible ways to structure decisional units: (1) on a facility-wide basis; (2) by division, department, group or subgroup; (3) based on a reporting structure; and (4) by job category or function.<sup>9</sup> Even if an employer ultimately decides to focus its work force reduction on a narrower grouping of employees, the proper decisional unit for purposes of the OWBPA is the groupings of employees that the employer considered for termination, not just those it ultimately selected for the reductions.<sup>10</sup>

The regulations address other “special situations” that employers and their counsel must keep in mind when describing the decisional unit. If the employees to be terminated are selected from a subgroup of a decisional unit, the employer must nonetheless disclose information for the entire population of the decisional unit. For example, if the employer decides to reduce headcount in a department by 25 percent, yet opts to select employees, based on performance, from the bottom one-third of the department, the decisional unit would still be the entire department—not just the subset of poor-performing department members.<sup>11</sup> Employers engaged in group termination programs that occur over time also should be aware that the information supplied with respect to such a program must be cumulative, i.e., employees terminated pursuant to a later installment of the same program must be provided with age and job title information for all employees in the decisional unit from the start of the program.<sup>12</sup>

Recent Case Law: Lessons

Recent circuit and district court decisions address the criteria for determining the decisional unit and highlight the lack of clarity that exists in the practical application of §7(f)(1)(H)'s informational requirements.

Continued on page 12

Tech-Tock



Are employees who check devices off hours entitled to overtime pay?

BY JEFFREY M. SCHLOSSBERG AND KIMBERLY B. MALERBA

IN THE TIME it takes you to read today's New York Law Journal, how often will you check your BlackBerry? Answer your cell phone? Perhaps you will not know the answer because the use of those devices has become so commonplace that it is second nature. But, for employers, the failure to account for employees' time using BlackBerry devices, cell phones and laptops could lead to significant overtime pay claims.

Overtime pay, at its core, is based on “time worked.” Regular use for work of laptops, cell phones, or personal digital assistants, also known as PDAs, such as BlackBerry devices and Palm handhelds, would undoubtedly be classified as time worked under applicable regulations governing overtime. In addition, federal and state laws require that an employer keep records of all time worked for those employees who are entitled to overtime. This article will address the legal issues implicated by the pervasive use of these technological advancements that keep us all more connected. For employers, the key to avoiding claims for overtime resulting from the use of BlackBerry devices, cell phones, etc., is developing an understanding of the issues involved and establishing appropriate policies and procedures.

Despite the ubiquitous BlackBerry and cell phone, most employers have not considered whether their

employees' use of those devices constitute time worked under federal and state wage-and-hour laws. Most companies distribute devices such as BlackBerry devices and cell phones simply because they hope that employees will stay connected, resulting in improved productivity or customer service.

Although often not expressly stated, the employee's assumption is that his or her employer wants the employee to use those tools after normal work hours to remain in touch with co-workers, customers, or clients. Thus, many employees independently check their BlackBerry devices when they are away from the office even if there is no formal requirement that they do so. And, many employees have their own cell phones and independently offer customers and co-workers their number—without specifically telling their employer—so they can be accessed during off-hours. Indeed, many employees will say that being available after hours is a demonstration of dedication that likely would be rewarded by the employer. Similarly, many employers appreciate the commitment shown by such employees for taking the initiative in “going the extra mile” for the company.

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Continued on page 13

INSIDE

10



When the Subordinate's Bias Matters

By Loren Gesinsky and Douglas B. Lipsky

11



Biodata: The Measure Of an Applicant?

By Robert Ottinger and Carrie Kurzon



BY LOREN GESINSKY  
AND DOUGLAS B. LIPSKY

THE U.S. Supreme Court recently recognized a split amongst the Circuit Courts of Appeals on the proper application of the subordinate-bias theory to employment-discrimination claims; and this split is seemingly replicated amongst the decisions of federal district courts in New York.

Under the theory, the bias of an individual who had no authority to take action adverse to the employee is imputed to the decision maker for purposes of establishing a prima facie case of discrimination under the *McDonnell Douglas* burden-shifting framework and to possibly establish pretext through rebuttal of an employer's legitimate, nondiscriminatory reason for the adverse action.<sup>1</sup> Such bias is imputed through a variety of actions taken by the non-decision-maker such as influencing the decision or reporting biased facts to the decision maker.

The Supreme Court recognized the split amongst circuit courts on this theory when it granted certiorari on Jan. 5, 2007, to review the Tenth Circuit's decision in *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles* and to resolve proper application of this theory.<sup>2</sup> Although *BCI* settled recently, the ultimate resolution of this split may alter significantly the burden plaintiffs face in New York and elsewhere when seeking to avoid summary judgment in employment-discrimination cases involving claims of subordinate bias.

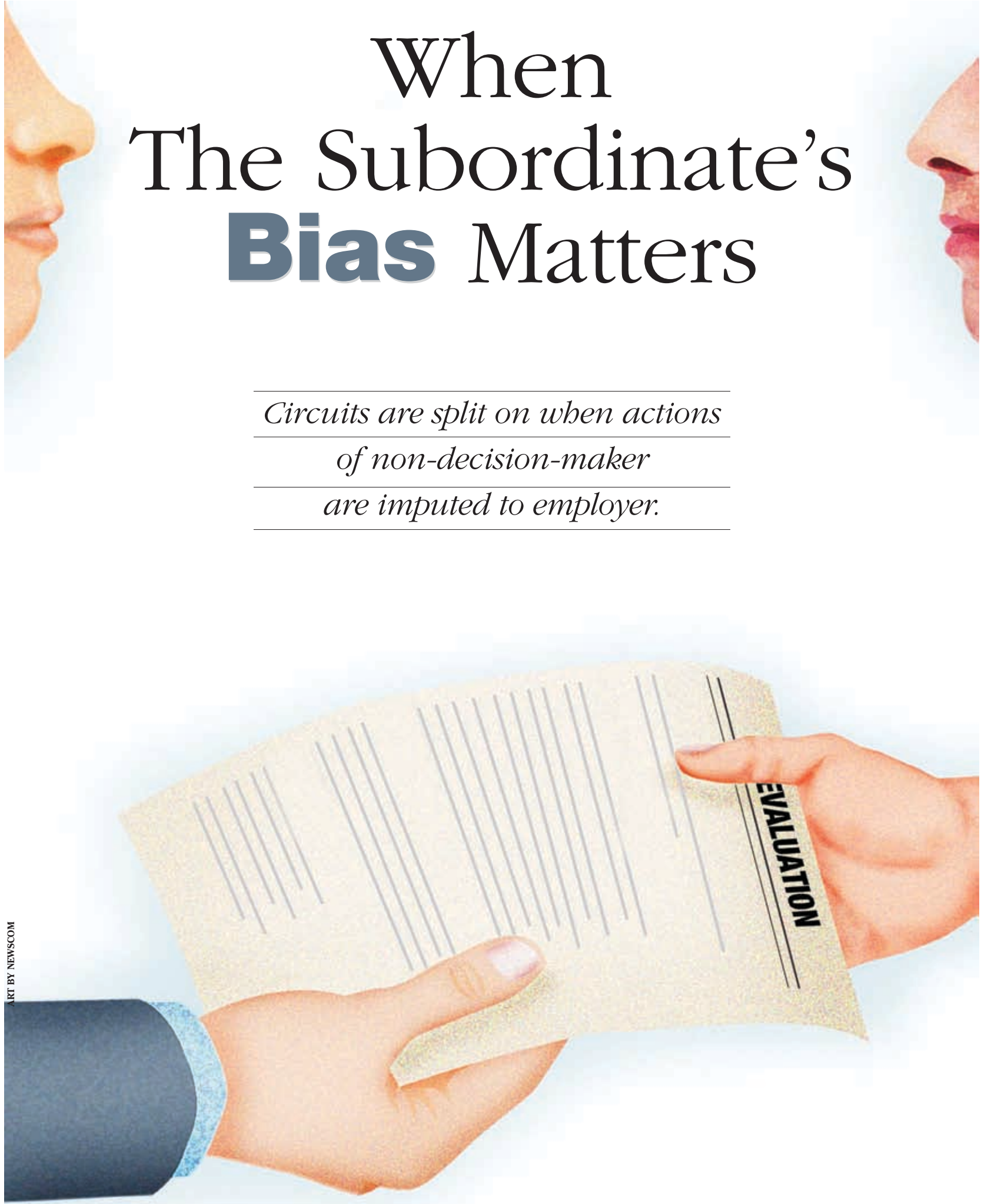
As the Tenth Circuit explained in *BCI*, claims involving the subordinate-bias theory are often referred to colorfully as "Cat's Paw" or "Rubber Stamp" claims. The etymology of "Cat's Paw" is rooted in a La Fontaine fable in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. In the employment-discrimination context, "Cat's Paw" refers to a situation "where a biased subordinate, who lacks decisionmaking authority, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action" such as an employee's termination.<sup>3</sup> "Rubber Stamp" has a more obvious etymology. It refers to the situation when the decision maker "gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate."<sup>4</sup>

Just as different names apply to the theory, courts have applied different standards regarding the level of control a biased subordinate must exert over the employment decision to impose liability on the employer. This variation might in part be explained by the unique bundle of facts in each case that must be sifted and weighed in order to determine whether an employer's complained of action occurred under circumstances giving rise to an inference of discrimination. Ultimately, the subordinate-bias theory is nothing more than an attempt to apply some form of a normative standard to assist in this requisite determination.

#### Different Standards

The U.S. Court of Appeals for the Fifth Circuit seemingly espoused in *Russell v. McKinney Hosp. Venture* the most pro-plaintiff standard that an employer is liable if the biased subordinate's factual information or other input "may have affected" the adverse employment decision.<sup>5</sup> Under this standard, a plaintiff is only required to demonstrate that the biased subordinate exercised some "influence" over the decision maker to avoid summary judgment for the employer. To meet this burden, Sandra Russell established that the biased subordinate gave an ultimatum that he would quit if Ms. Russell was not fired, and that the decision maker's budget was controlled by the subordinate's father. Based on this evidence, the Fifth Circuit held that Ms. Russell had established that the biased subordinate effectively became the decision maker, thus warranting the denial of the employer's summary-judgment motion.

Near the other end of the spectrum is the more pro-management standard articulated by the U.S. Court of Appeals for the Fourth Circuit in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*<sup>6</sup> According to *Hill*, evidence that the biased subor-



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ordinate exercised "substantial influence" or played a "significant role" in the employment decision is not enough for a plaintiff to establish the requisite inference of discrimination. Instead, the plaintiff must establish that the decision maker was completely beholden to the subordinate such that the subordinate is the actual decision maker.

*Hill* involved a biased subordinate who held no formal disciplinary or supervisory authority over Ethel Louise Hill but was involved in the reporting of Ms. Hill's violations of company policy that led to her termination. A potential factual distinction of interest to those interested in minimizing the pro-management value of *Hill* is that the decision maker personally investigated and verified the accuracy of Ms. Hill's violations before terminating her. In analyzing whether there was a sufficient link between the biased subordinate's actions and Ms. Hill's termination, the Fourth Circuit relied on these facts to hold that Ms. Hill failed to demonstrate the reason proffered by her employer was a pretext for discrimination.

The U.S. Court of Appeals for the Seventh Circuit seems to have the most cogently articulated position in the middle of the subordinate-bias spectrum. In *Lust v. Sealy, Inc.*, the Seventh Circuit explained: "[T]o prevail on a subordinate bias claim, the plaintiff must establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action."<sup>7</sup>

The Seventh Circuit's position on the subordinate-bias theory was explicitly accepted and followed by the Tenth Circuit in *BCI*. While adopting the Seventh Circuit's position, the

Tenth Circuit added that an employer may "avoid liability by conducting an independent investigation of the allegations against an employee."<sup>8</sup> *BCI* involved Stephen Peters, an African-American, whose employment was terminated for insubordination by a human-resources official who worked in a different city than Mr. Peters and did not know that Mr. Peters was African-American. In making the termination decision, the human-resources official relied exclusively on information of Mr. Peters' alleged insubordination provided by his immediate supervisor, who obviously knew Mr. Peters' race and had a history of treating African-American employees unfavorably and making disparaging racial remarks in the workplace.

In describing the EEOC's burden of establishing that BCI's proffered explanation for Mr. Peters' termination was a pretext for race discrimination, the Tenth Circuit explained: "For the EEOC to prevail, it must make not only a factual showing that [Mr. Peters' supervisor] harbored racial animus toward black employees, but also a convincing legal claim that his racial animus should be imputed to BCI despite the fact that [Mr. Peters' supervisor] had no power to terminate anyone."<sup>9</sup>

In applying the Seventh Circuit's middle ground position, the Tenth Circuit held that the EEOC had produced sufficient evidence to create a jury question concerning the supervisor's racial animus, and whether this animus may have motivated the supervisor's actions. In addition, the court noted that BCI failed to conduct an independent inquiry of the allegations against Mr. Peters, instead simply accepting the supervisor's version of events. In light of the evidence regarding the supervisor's racial animus and absent a sufficient independent inves-

tigation, the Tenth Circuit reversed the district court's decision granting summary judgment to the employer.

#### New York Cases

Unlike in the Tenth Circuit in *BCI* and the other circuit courts discussed above, the subordinate-bias theory has not received significant attention from the U.S. Court of Appeals for the Second Circuit. Indeed, the actual term "subordinate bias" does not seem to appear in a Second Circuit decision that analyzes an employment-discrimination claim. However, the issue of when a subordinate's bias may be imputed to the decision maker to support an employment-discrimination claim has been analyzed to a limited extent in two Second Circuit decisions.

The Second Circuit first addressed this issue in 1997. As it was a side issue in *McLee v. Chrysler Corp.*, the Second Circuit, without much analysis, explained in dicta that allegations of bias against a supervisor who was not consulted about a termination decision "provide no basis for imputing to [the decision maker] an invidious motivation for the discharge."<sup>10</sup>

The next decision by the Second Circuit to provide meaningful analysis on this issue was in 2001. In *Rose v. N.Y. City Bd. of Educ.*, Shirley Rose's comments as direct evidence of discriminatory animus to warrant a *Price Waterhouse* burden-shifting-jury charge. Under the *Price Waterhouse*

framework, a plaintiff who establishes direct evidence of discriminatory animus satisfies her prima facie case and obviates her need to prove that the employer's alleged reason for the adverse-employment decision was pretextual.<sup>12</sup> In analyzing whether the supervisor's comments were indeed direct evidence of discrimination, the Second Circuit explained that comments made by an immediate supervisor who did not have termination authority, but who exerted "enormous influence in the decision-making process," constituted direct evidence of discriminatory animus. Although the Second Circuit appeared to set a relatively high burden for Ms. Rose to meet, it held—in keeping with the fact-determinative nature of this theory—that she had proved her biased supervisor exerted the requisite "enormous influence."

Both of these cases suggest that the Second Circuit's position on the subordinate-bias theory is most aligned with the Seventh Circuit's middle-ground position. Specifically, both circuits required the subordinate to do more than just influence the adverse-employment decision, but do not require the subordinate to be, in effect, the actual decision maker. Considering that the Second and Seventh Circuits are similarly aligned and that the Tenth Circuit followed the Seventh Circuit on this issue, it would appear that the Second Circuit would have concurred with the Tenth Circuit's holding in *BCI*.

However, this cannot be said of recent decisions by federal district courts in New York. (Notably, the subordinate-bias theory does not appear to have received significant attention by New York state courts.) Perhaps this variation is because of the many years between *Rose* and the present, or the absence of a Second Circuit decision specifi-

cally and fully addressing the subordinate-bias theory. Perhaps this variation also relates to the way in which the inherent fact-sensitivity of the inquiry resists a neat framework—a tendency illustrated by recent decisions of federal district courts in New York that favor employers despite setting forth a seemingly pro-plaintiff framework for the subordinate-bias theory.

In *Sadkis v. SUNY Coll. at Brockport*, the Western District court cited to the Second Circuit in *Rose* and then articulated a relatively pro-plaintiff standard.<sup>13</sup> The *Sadkis* court explained: "The element of causation...can be satisfied by showing that a person with discriminatory animus toward the plaintiff influenced the 'actual' decisionmaker, even if the latter did not consciously discriminate against the plaintiff." In that case, the court denied summary judgment to the employer because there was evidence that the biased subordinate expressed his opinion to the decisionmaker that the plaintiff should not be promoted, and that his opinion may have been a motivating factor in the decision not to promote plaintiff.

Recently, in *Brown v. Astrazeneca Pharm, L.P.*, an Eastern District court has appeared to further relax the required nexus between the subordinate and the adverse employment decision.<sup>14</sup> The *Brown* court stated: "Because the alleged comments were not directly linked to anyone involved in plaintiff's termination, plaintiff must show that the offending employees exerted discriminatory influence over the decisionmakers or in some way affected the termination decision." *Brown* does not go on to define what is meant by "in some way affected the termination decision." The expansive *Brown* standard was most recently applied in *Johnson v. Paragon Recycling & Transfer Corp.*, which nevertheless held that there was an insufficient nexus between the subordinate's comments and the plaintiff's termination to support an inference of discrimination.<sup>15</sup>

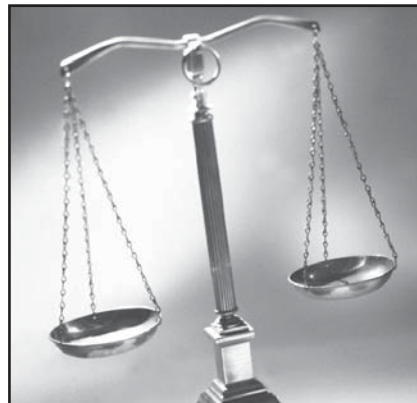
Although the *Sadkis*, *Brown*, and *Johnson* decisions have arguably relaxed the burden for plaintiffs, the most recent New York court to address this theory has, reflecting the split amongst the circuit courts, seemingly heightened the burden for plaintiffs. In *Knight v. New York City Hous. Auth.*, the Southern District court set forth the standard as: "The discriminatory animus of intermediate supervisors who have input in the decision making process will not give rise to liability if the supervisor with final authority bases an adverse employment action exclusively on an independent evaluation. But the employer will be liable where the decision maker 'rubber stamps' the recommendation of the subordinates; in such cases...the decision maker acts as a conduit of the subordinates' improper motive."<sup>16</sup>

In applying this standard, the *Knight* court found that discriminatory intent was absent and granted summary judgment to the employer because the biased subordinate provided his input to the decision maker nearly one year before the adverse employment decision occurred and there was no evidence that the decision maker consulted with the subordinate about what action to take.

#### Conclusion

The Supreme Court's holding in *BCI* may have provided a definitive ruling on the proper application of the subordinate-bias theory and thereby resolved the split amongst the circuit courts on the theory. Given the recent settlement of *BCI*, circuit courts will likely continue to differ in their approach to the theory. Indeed, there appears to be even less predictability in New York than in many other jurisdictions because the Second Circuit has yet to clearly articulate its position on the theory and no New York state court seems to have articulated any position on the theory. However, considering the Supreme Court's rare decision to grant certiorari in *BCI*, the Supreme Court appears poised to resolve the conflict amongst the circuit courts and New York courts on this issue at the first opportunity.

.....●●●.....  
1. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 804 (1973).  
2. 450 F.3d 476 (10th Cir. 2006).  
3. 450 F.3d at 484.  
4. 450 F.3d at 484.  
5. 235 F.3d 219, 227 (5th Cir. 2000).  
6. 354 F.3d 277, 291 (4th Cir. 2004).  
7. 383 F.3d 580, 584 (7th Cir. 2004).  
8. 450 F.3d at 484.  
9. 450 F.3d at 484.  
10. 109 F.3d 130, 137 (2d Cir. 1997).  
11. 257 F.3d 156, 162 (2d Cir. 2001).  
12. *Id.* at 161 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989)).  
13. 310 F.Supp.2d 506 (W.D.N.Y. 2004).  
14. 2006 WL 2376380, \*8 (E.D.N.Y. Aug. 16, 2006).  
15. 2006 WL 3207869 (E.D.N.Y. Oct. 31, 2006).  
16. 2007 WL 313435, \*10 (S.D.N.Y. Feb. 2, 2007).



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# Biodata: The Measure Of an Applicant?

*Innovative trend will trigger  
litigation and test the law’s limits.*

BY ROBERT OTTINGER  
AND CARRIE KURZON

CORPORATE America is changing its hiring practices, and Google is at the forefront. In the rush to hire talent, innovative companies like Google are abandoning traditional employment practices. With research showing that grades and interviews are not reliable predictors of success, the use of “biodata” is becoming more prevalent. This new trend has serious implications for human resource departments and employment law attorneys as there will inevitably be a surge of discrimination claims arising from the use of biodata as these innovative practices potentially test the limits of established law.

Biodata is the term used in industrial and organizational psychology for biographical data. Biodata probes deep into an individual’s background and consists of a person’s life and work experiences, as well as beliefs, values, opinions and attitudes. This information is then presumed to be related to personality structure, personal adjustment or success in social, educational or occupational pursuits. Employers are now using biodata as a means of obtaining a more scientific approach to the interview process.

Google’s Use of Biodata

Google’s prior method for selecting its own employees consisted of the traditional model: hiring candidates from top schools with outstanding grades. That model is now considered outdated. Today, instead of reviewing transcripts, Google developed an algorithm that selects employees who are

better fits for the company and it accomplishes this selection faster.<sup>1</sup> Google reportedly hires over 100 people per week and with that figure expected to double next year, Google has determined that biodata is the most efficient way to predict performance. While no one can say with certainty whether the use of biodata is better than the traditional interview process, it does seem to work for Google, which purports to have less than 4 percent employee turnover. Google’s system, as the leading model of this new wave, deserves closer examination. Google created an automated system that collects biodata from the 100,000 job applications it receives each month. The system asks job applicants to fill out an elaborate online survey that examines their personality, behavior, attitudes and other personal details going back to high school. The survey covers a massive range of topics including whether the applicants like to work alone or in groups, if they like dogs, if they ever published a book, started a club in school or set a world record. Google’s army of mathematicians created a set of formulas that computes the applicant’s responses and scores each applicant on a scale of 0 to 100. The score is designed to predict how well the person will fit into

Google’s corporate culture. Although Google is an innovator, it is not the only company jumping into the biodata arena.

Use Is on the Rise

Although biodata surveys have been around for decades, mainly in government agencies, during the 1960s, the tests spread to the private sector, but fell out of favor after passage of the Civil Rights Act, as companies feared they could have a disparate impact, and therefore be discriminatory.<sup>2</sup> A survey<sup>3</sup> of 348 companies conducted in 1988 found that only 6 percent of companies had used biodata. A similar study of human resource specialists by the Bureau of National Affairs reported that only 4 percent used biodata. Notably, 40 percent of respondents said that privacy concerns prevented them from using biodata and some cited fear of litigation. Currently, the use of biographical surveys similar to Google’s new system is on the rise. In the past few years companies have realized that increased competition makes efficient hiring of productive employees imperative. In 2002, Proctor & Gamble contracted with the Performance Assessment Network, Inc., to provide a biodata-based hiring system for the company’s prospec-

tive employees. The biodata system was integrated throughout Proctor & Gamble’s offices in Asia, Europe, North America, and Latin America. Other large companies have followed suit, including SER Solutions, Inc., a communications company in Dulles, Va., which also utilizes the personal assessment tests as a more effective means to finding the right employees. There is no doubt that corporate America is using biodata-based surveys. The question for employment lawyers is whether our laws can balance a company’s need to quickly and accurately select suitable employees and also prevent discrimination.

Potential Implications

On one hand, the use of biodata may reduce discrimination claims by removing the inevitable subjectivity that comes with a traditional interview. On the other hand, certain algorithms that analyze a person’s biodata can also adversely impact protected categories such as race, gender, age and national origin. Courts have repeatedly held that a selection device should measure the person for the job, not the person in the abstract. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

If a job applicant’s past is examined, the use of biodata can arguably measure a person in the abstract, or subconsciously favor a protected class, thereby subjecting the company to liability. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, prohibits “procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups.” *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). In analyzing hiring procedures and mechanisms similar to biodata models, courts focus on the procedure itself to determine if any discriminatory barriers exist within both the process and the results of the process to determine if the process has an adverse impact on minority groups. Employee selection systems such as Google’s biodata algorithm may find itself under close scrutiny. Employment discrimination claims are traditionally based on either disparate impact or disparate treatment. Legal challenges to employment decisions based on biodata would invoke the disparate impact theory. The disparate impact approach invalidates employment policies that appear on their face to be unbiased, but impact one group more

Continued on page 13



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Continued from page 9

In *Burlison v. McDonald's Corp.*,<sup>13</sup> the U.S. Court of Appeals for the Eleventh Circuit reversed a district court's decision which invalidated a release of claims offered to employees under a national restructuring program; the district court had found that the employer-required disclosure information was insufficient. The dispute centered on the fact that, while the reduction in force (RIF) was nationwide, the employees were selected for termination based on an individualized assessment process performed by regional managers.<sup>14</sup>

McDonald's provided each terminated employee with the ages and job titles of the employees selected and not selected for layoff, but limited the disclosure information to the region in which each particular employee worked.<sup>15</sup> The *Burlison* plaintiffs alleged that the releases they signed were void because they disclosed information only for the Atlanta region, not the nation.

The district court in the Northern District of Georgia held that the OWBPA required McDonald's to provide information national in scope, despite the fact that the layoff decisions were made by region.<sup>16</sup> On appeal, the Eleventh Circuit reversed the district court, finding that McDonald's limitation of disclosure information to the decisional unit that applied to the discharged employees was appropriate. The court determined that, since the selection decisions for the reduction in force were made at the regional level, statistics regarding the employer's national restructuring efforts were not relevant or required for purposes of the OWBPA's disclosure requirements.<sup>17</sup>

Further evidence of the care required in defining the decisional unit is underscored by the U.S. Court of Appeals for the Tenth Circuit's revised decision in *Kruchowski v. Weyerhaeuser Co.*<sup>18</sup> The court held that the employer's releases were invalid because the employer identified the wrong decisional unit in its disclosure to employees.<sup>19</sup> The plaintiffs, part of a group termination program at a specific facility, were provided with disclosure information identifying those employees selected and not selected for termination.<sup>20</sup> In its initial disclosure information, the employer notified plaintiffs that the decisional unit was made up of all salaried employees employed at the facility.<sup>21</sup> The plaintiffs filed suit alleging age discrimination. The district court in the Eastern District of Oklahoma granted the employer's motion for summary judgment, concluding that the employer's releases complied with the OWBPA.<sup>22</sup>

On appeal, the Tenth Circuit found flaws in, among other things, the employer's information disclosures of the decisional unit. Specifically, in responding to interrogatories, the employer stated that the decisional unit consisted of those salaried

employees who reported to the facility manager.<sup>23</sup> Fifteen support staff employees who worked at the facility did not report to the facility manager and thus were not part of the actual decisional unit, even though they were so identified in the employer's disclosure materials distributed at the time of the group terminations.<sup>24</sup> Because the employer disclosed a decisional unit to the employees that was not the actual decisional unit, the court concluded that the employer's information disclosures were inaccurate, rendering its releases invalid.<sup>25</sup>

Three other recent district court decisions provide guidance on the "dos and don'ts" of defining the decisional unit. In *Ricciardi v. Electronic Data Systems Corp.*,<sup>26</sup> the court granted the employer's motion for summary judgment on plaintiff's challenge to the validity of a release executed pursuant to a reduction in force. The plaintiff claimed, inter alia, that he was terminated as part of a national rolling RIF and that the employer was thus required to disclose information on a national basis.<sup>27</sup> The employer produced evidence, however, that the plaintiff was terminated as part of a RIF by a specific division of the company.<sup>28</sup>

The court, in the Eastern District of Pennsylvania, concluded that plaintiff's termination was confined in scope and time, and that the employer was not obligated to provide additional information about other earlier, separately terminated employees when disclosing information to the plaintiff.<sup>29</sup> *Ricciardi* illustrates the importance of careful record-keeping and documentation of decisional unit determinations, including both those employees considered and those ultimately selected for termination programs and whether the terminations are part of a rolling program or constitute a distinct transaction.

*Wells v. Xpedx, a Div. of International Paper Co.*,<sup>30</sup> illustrates how a lack of attention to detail in implementing a RIF may ultimately result in releases being invalidated. Xpedx implemented a RIF in 2001 after acquiring three companies. While plaintiff was not terminated at that time, in December 2002 plaintiff was dismissed based on performance and later claimed that the release he signed was invalid under the ADEA.<sup>31</sup> Xpedx contended that plaintiff was terminated on an individual basis, or in the alternative, as part of a "reduction in force," but one unrelated to the prior, larger RIFs.<sup>32</sup>

Despite its contention that the plaintiff's termination was on an individual basis, Xpedx "inadvertently" provided plaintiff with the same paperwork used in the 2001 RIF, except that it noted a different decisional unit.<sup>33</sup> Identifying a decisional unit, however, gave rise to the inference that plaintiff's termination was not on an individual basis but was part of a group termination pro-

## Disclosures in Terminations

gram.<sup>34</sup> Section 626(f)(1)(H) mandates information disclosure to employees terminated as part of a group termination program—but not to employees terminated on an individual basis.

Xpedx alternatively argued that even if plaintiff was terminated as part of a larger RIF, it properly fulfilled the OWBPA's requirements, including the decisional unit disclosures.<sup>35</sup> The court, however, questioned Xpedx's decisional unit determination, which included only the plaintiff (i.e., the company provided plaintiff with only his own age and job title information).<sup>36</sup> Xpedx maintained that the plaintiff was the only employee in his level of management, there were no other comparable positions in the group, and he was the only individual terminated in his group.<sup>37</sup>

The court, in the Middle District of Florida, however, found a genuine issue of fact regarding the scope of the decisional unit because plaintiff's supervisor was located in a different office than plaintiff, from which

one could conclude that the entire division, and not just the plaintiff's subgroup, was the appropriate decisional unit.<sup>38</sup> Employers must resist the temptation to use the paperwork from a prior RIF when faced with a new circumstance that has its own set of facts.

Finally, an April 2007 decision presents some new and potentially disturbing challenges for employers considering large-scale RIFs involving multiple business units. In *Pagliolo v. Guidant Corp.*, the employer simultaneously conducted RIFs at six of its subsidiaries.<sup>39</sup> A centralized senior management committee oversaw Guidant's business units and ordered the RIFs as part of a cost-cutting measure after it determined that the company would not meet its year-end goals.<sup>40</sup> Although not every department in every business unit ultimately reduced staff, each was required to examine how to reorganize and reduce staff.<sup>41</sup> Guidant considered more than 8,000 employees for the RIF and ultimately informed over 700 employees that it intended to terminate their employment.<sup>42</sup> Guidant asked these employees to sign releases in exchange for receiving severance benefits, and at the time of termination, provided them with a nationwide disclosure statement.<sup>43</sup>

Plaintiffs filed an age discrimination suit claiming, inter alia, that: (1) Guidant failed to properly disclose

the decisional unit for the RIF by not describing the proper decisional unit in its disclosure materials; and (2) the decisional unit was not legitimate under the OWBPA because Guidant improperly aggregated parts of separate corporations and numerous facilities into a single decisional unit.<sup>44</sup> The court in Minnesota agreed and entered summary judgment for plaintiffs.

First, the court found that Guidant failed to disclose the decisional unit in a manner calculated to be understood by the average individual eligible for the program by listing nearly all of its U.S.-based employees in its disclosure materials.<sup>45</sup> This holding is troubling in light of the company's position that all of these employees were, in fact, considered for termination and determinations were made on a nationwide basis.<sup>46</sup> Second, the court concluded that it was improper for Guidant to combine the employees of the six subsidiary corporations into one decisional unit.<sup>47</sup> While concluding

that each of the six separate employers should have been a separate decisional unit because "[n]othing in the statute suggests that multiple corporations can be combined to constitute one decisional unit,"<sup>48</sup> the court ignored the fact that the EEOC's guidance also does not prohibit such a decisional unit determination, and in fact contemplates the use of broad decisional units where operations at several facilities were considered for reduction.<sup>49</sup>

The court also held that Guidant should have limited decisional units by facility because the terminated employees could not reasonably have been expected to draw conclusions from the disclosure materials absent any information regarding employees' locations.<sup>50</sup> The fallacy in the reasoning here lies in the fact that if the scope of the employer's decision-making process included multiple facilities, as did Guidant's, disclosing information on an individual-facility basis would have been inappropriate. While arguably inconsistent with the EEOC's regulations, *Pagliolo*, until reversed or modified, should be considered in any group termination.<sup>51</sup>

### Key Questions

In order to avoid the potential pitfalls in determining the decisional unit employers should be asked the following questions:

- What is the reason for this program? Cost-cutting? Consolidation? Merger? Reorganization? Identifying the purpose behind a RIF may reveal who the employer considered for termination.
  - Which jobs were looked at for possible consolidation? Was the program confined to one position or department? Was more than one department evaluated? Were employees at other locations considered? Were employees transferred as part of the program?
  - Which employees will assume responsibility for the work that the individuals to be terminated are currently performing?
  - Who was involved in the employer's decision-making process? Did management solicit recommendations from lower-level managers? Who approved these decisions? Is a central committee or review process involved in deciding which employees to include/not include in the program? What criteria were used in selecting the employees ultimately designated for separation?
  - Are there records, notes or memoranda that speak to the decisions on which departments, divisions, facilities, etc. were and were not considered?
  - Did RIFs occur in the recent past? What was the purpose behind those RIFs? Which business units were impacted? Distinguishing prior, separate RIFs is critical in preparing disclosure information, as courts will evaluate whether the current RIF may in fact be a continuation of an ongoing termination program.
  - Is the employer relying on an earlier model for a subsequent RIF? Reliance on an earlier RIF template may fail to recognize new strategies or initiatives involved in the subsequent program.
- Prior to implementing a RIF, inquiries of this nature should be answered with the intensity that accompanies responding to interrogatories. Doing so should elicit answers that reveal not just the employer's selection process, but which employees it considered for the program, and thus enable counsel to advise the employer regarding the proper scope of the informational disclosures. Taking care before the RIF will go a long way in avoiding subsequent litigation.

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1. See Press Release, Bureau of Labor Statistics, "Mass Layoffs in March 2007" (April 20, 2007), available at <http://stats.bls.gov/news.release/pdf/mnls.pdf>. Statistics are seasonally adjusted.

2. 29 U.S.C. §626 et seq.

3. 29 U.S.C. §626(f).

4. 29 C.F.R. §1625.22(f)(3)(i)(B).

5. 29 U.S.C. §626(f)(1).

6. *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1093 (10th Cir. 2006) (citing 29 U.S.C. §§626(f)(1)(A)-(H)). The statutory factors are not exclusive and other facts and circumstances may impact whether a waiver is knowing and voluntary, such as if there is a material mistake, omission, or misstatement in the information furnished by the employer to the employees. 29 C.F.R. §1625.22(a)(3).

7. 29 C.F.R. §1625.22(f)(1)(iv); *Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1247 (11th Cir.

2006).

8. 29 C.F.R. §1625.22(f)(3)(i)(A).

9. 29 C.F.R. §1625.22(f)(3)(iii).

10. 29 C.F.R. §1625.22(f)(3)(ii)(E).

11. 29 C.F.R. §1625.22(f)(4)(v).

12. 29 C.F.R. §1625.22(f)(4)(vi).

13. *Burlison v. McDonald's Corp.*, 455 F.3d 1242 (11th Cir. 2006).

14. Id. at 1244.

15. Id.

16. *Burlison v. McDonald's Corp.*, 401 F.Supp.2d 1365 (N.D. Ga. 2005), reversed by summary judgment granted by, 455 F.3d 1242 (11th Cir. 2006).

17. 455 F.3d at 1247.

18. 446 F.3d 1090 (10th Cir. 2006).

19. *Weyerhaeuser* is perhaps most significant for the Tenth Circuit's omission, in its revised decision, of its earlier, controversial holding that employers seeking to obtain a release in conjunction with a group termination program must fully describe the program's "eligibility factors," i.e., specific factors used in analyzing whether each employee considered would be selected for termination. See *Kruchowski v. Weyerhaeuser Co.*, 423 F.3d 1139 (10th Cir. 2005), opinion withdrawn, superseded on rehearing in part by 446 F.3d 1090 (10th Cir. 2006).

20. 446 F.3d at 1092.

21. Id. at 1094.

22. Id. at 1092.

23. Id.

24. Id.

25. Id. at 1094-95.

26. No. 03-5285, 2007 WL 576323 (E.D. Pa. Feb. 20, 2007).

27. Id. at \*4.

28. Id.

29. Id.

30. No. 8:05-CV-2193, 2006 WL 3133984 (M.D. Fla. Oct. 31, 2006).

31. Id. at \*1.

32. Id. at \*8-9.

33. Id. at \*2.

34. Id. at \*9. The court found that identifying a decisional unit for an individual termination was not Xpedx's only mistake. The company also stated in both the termination letter and termination agreement it provided to the plaintiff that he had 45 days to review the agreement before executing it. Id. at \*8. Under §626(f)(1)(F), employers are only required to provide an employee with 21 days to review the agreement if the employee is being terminated on an individual basis and not as part of a group termination program. See id. The company also provided plaintiff with a referral letter explaining that plaintiff's position with Xpedx was impacted by "major restructuring efforts," and included the designation "xpedx-RIF" on his pay stubs—actions which the court found supported the inference that plaintiff was terminated as part of a larger RIF. Id. at \*9.

35. *Wells*, 2006 WL 3133984, at \*9.

36. Id.

37. Id.

38. Id. at 11.

39. No. 06-943, 2007 WL 1040869, at \*1 (D. Minn. April 4, 2007).

40. Id.

41. Id.

42. Id. at \*2.

43. Id. at \*3.

44. Id. at \*7-8.

45. Id. at \*8.

46. Id. at \*7.

47. Id. at \*8.

48. Id.

49. See 29 C.F.R. §1625.22(f)(3)(ii)(E); see also 29 C.F.R. §1625.22(f)(3)(iii) (describing examples of involuntary RIF structures as "not all-inclusive").

50. *Pagliolo*, 2007 WL 1040869, at \*8.

51. The *Pagliolo* court also granted summary judgment to plaintiffs on claims that Guidant: (1) materially misrepresented the decisional unit by including approximately 200 employees who were initially notified that they had been selected for termination but ultimately transferred to other positions within the company and were never eligible for severance benefits; (2) failed to disclose the eligibility factors the employer used to determine which employees were subject to the termination program; and (3) failed to comply with the regulations by disclosing employees' dates of birth, rather than age, and failing to disclose employees' grade level within job titles. On April 30, 2007, Guidant moved the district court to amend its order to include a statement concluding that the order involves controlling issues of law, including the decisional unit issue, so that Guidant may pursue an immediate interlocutory appeal with the U.S. Court of Appeals for the Eighth Circuit. That motion is pending before the district court.



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Continued from page 11

than another and cannot be justified by business necessity. *Griggs v. Duke Power Co.*, supra, 401 U.S. at 431. The individual components of a biodata-based hiring process may constitute separate and independent employment practices. The separate components will be subject to Title VII even if the overall result of the process does not have an adverse impact on a protected group. *Smith v. Xerox*, 196 F.3d 358, 370 (2d Cir. 1999). When a ranking mechanism dictates what candidates can be considered for employment, the components of that mechanism will be scrutinized to determine if it acts as a barrier to potential protected employees. Such a barrier can mean the system has a disparate impact on minority hiring. *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1378 (2d Cir. 1991). As such, even if a biodata-based selection system does not ultimately favor one group over



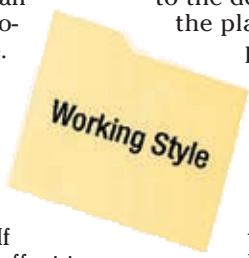
another, the system would still be subject to legal dissection so that each part of the process can be tested for discrimination.

An employer's overall biodata-based employee selection system is subject to invalidation if it adversely impacts a protected group and the selection criteria are not closely linked to predicting job performance. In order to challenge a biodata system, a plaintiff must identify the challenged employment practice such as a biodata survey or testing program. Next, the plaintiff must demonstrate that this survey or testing program is the cause of an adverse impact on a protected group such as race or sex as defined by Title VII. If the plaintiff can make this showing, the burden then shifts to the company. *Bradley v. City of Lynn*, 443 F.Supp.2d 145, 156 (D. Mass. 2006).

Once the burden shifts to the company, the company has several

options. First, it can challenge the plaintiff's proof directly by arguing that no survey or testing policy exists or that the policy does exist but it does not produce an adverse impact on the protected category at issue. Or in the alternative, the company may admit that its policy does have a disparate impact, but argue that it is job-related and consistent with business necessity. If the company fails in its effort to rebut the claimant's argument, then the company may be found liable.

Although the risk of liability is very real for a defendant using a biodata-based employee selection process, thus far, courts have failed to really address this issue substantively. For example, in *United States of America v. City of Garland*, 2004 WL 741295 (N.D. Tex. 2004), the plaintiff alleged that the city's use of its written examination for entry-level police officers and firefighters had



a disparate impact against African-Americans and Hispanics, was not job-related and, thus, violated Title VII. The court, in granting judgment to the defendant, merely held that the plaintiff failed to prove by a preponderance of the evidence that the employment practices violated Title VII. Id. Some courts have implied that the use of biodata would have helped the defendant's case in a disparate impact case. In *Bradley*, supra, the plaintiffs in a class action in the District of Massachusetts argued that the written exam used to fill firefighter vacancies had a disparate impact on African-Americans and Hispanics, in violation of Title VII of the 1964 Civil Rights Act.

In agreeing with the plaintiffs, Judge Patti B. Saris concluded that the "statistical evidence showed clear differences in scores as a function of race for both the 2002 and 2004 examinations." She determined that the exam was not properly validated or job-related. Judge Saris, however, stated that the defendant could have used a biodata test in combination with the written cognitive examination to reduce the disparate impact of the examination. Id. at \*174.

The use of biodata has also been alleged to be a violation of the Equal Protection Clause of the 14th Amendment. In *Antonelli v. State of New Jersey*, 419 F.3d 267, 96 FEP 491 (3d Cir. 2005), the plaintiffs brought a civil rights action, alleging, inter alia, that the method used by New Jersey to administer and score the biodata component of a firefighters' exam, violated their rights under the Equal Protection Clause. Id. The Court of Appeals, in affirming the lower court's decision granting summary judgment to the defendant, held that the biodata component of an examination for entry-level firefighters had no disparate impact on non-Hispanic whites. Since the exam was found to be facially neutral, the plaintiffs needed to show that the defendants acted with discriminatory intent and the exam had a discriminatory impact. According to this finding, plaintiffs failed to meet this burden. Id.



Causation and Statistics

There are particular issues that will arise when trying to prove disparate impact in a case involving biodata selection. The first major

issue that is likely to arise in biodata cases will concern causation, namely, how can a plaintiff prove that a testing program is causing an adverse impact on a protected group? The courts have explained that a plaintiff must demonstrate a substantial statistical disparity that raises an inference of causation. This means that the disparity cannot be accounted for by chance. *EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus.*, 186 F.3d 110, 117 (2d Cir. 1999). In evaluating statistical evidence, the Supreme Court has held that no single test controls how disparate impact claims must be established. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994-95, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). The U.S. Equal Employment Opportunity Commission (EEOC), however, has a formula for this.

The EEOC's Uniform Guidelines on Employee Selection Procedures (1978) requires the use of the "four-fifths rule." The rule provides that a "selection rate for any race...which is less than four-fifths (or 80 percent) of the rate for the group with the highest rate will generally be regarded by the [EEOC] as evidence of adverse impact..." 29 C.F.R. §1607.4(D). For example, if a company hires white applicants 40 percent of the time and African-American applicants 20 percent of the time, the selection



rate for African-Americans would be half that of white employees. This 50 percent selection ratio is less than 80 percent and therefore it would violate the four-fifths rule. This would establish an adverse impact on African-Americans under the EEOC Guidelines.

Even if a plaintiff can prove an adverse impact, the company can avoid liability by proving that the selection criteria (biodata) is job-related and consistent with business necessity. The selection criteria are valid if they are "predictive of or significantly correlated with important elements of job performance." 29 C.F.R. §1607.5(B). The strength of the relationship between the selection criteria and job requirements is determined by calculating a correlation coefficient. Id. §1607.14(B)(6). A correlation coefficient of 1.0 means that the criteria are highly predictive of job performance and valid. *Williams v. Ford Motor Co.*, 187 F.3d 533, 540 (6th Cir. 1999). A correla-

tion coefficient of 0.0 indicates that there is no connection between the criteria and job performance. A coefficient of 0.3 is the minimum needed to establish a satisfactory relationship between the selection criteria and job performance. *Bradley*, 443 F.Supp.2d at 161.

Once companies begin using biodata systems to hire employees, we can expect legal challenges to follow. The law, as described above, provides employment lawyers with the tools needed to thoroughly analyze these systems and keep them fair. Companies, however, are likely to argue that litigation over biodata will hinder their ability to compete globally. In fact, it may be extremely difficult for companies to determine how their biodata systems will impact protected groups. Even if the biodata systems do adversely impact certain protected groups, employers will argue that it is not logical to punish them when the impact is unforeseen, unintentional, and simply the result of our culture.

When evaluating the use and potential implications of biodata, the "management side" is likely to push for a law that only considers job relatedness and does not consider adverse impact. Minority groups, on the other hand, would oppose any attempt to minimize the adverse impact theory for biodata or similar employee selection mechanisms. The law is clear, the argument goes, that discrimination is illegal—even if it is not intentional, and the burden of adverse impact discrimination should not fall on the victims.

Conclusion

There is no easy answer to the conflicts that are coming. Discrimination exists and our employment laws are designed to prevent it. These new challenges will force us to question these laws. Are there better ways to prevent employment discrimination? Are the current laws equipped to deal with modern challenges created by a global economy? Only time will tell whether the benefits of using biodata will be outweighed by the potential legal implications.

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1. Saul Hansell, "Google Answer to Filling Jobs Is an Algorithm," The New York Times, Jan. 3, 2007, available at <http://www.nytimes.com/2007/01/03/technology/03google.html?ex=117876960&en=chf81081e486da4&ei=5070>.
  2. Amy Joyce, "Before Scoring That Job You'd Better Ace That Test," Wash. Post, June 8, 2006, A1, available at <http://www.washingtonpost.com/wpdyn/content/article/2006/06/07/AR2006060702052.html>.
  3. Hammer, E.G., & Kleiman, L.A. (1988). "Getting to know you," Personnel Administrator, 34, 86-92.

Tech-Tock: Work in a Connected World

Continued from page 9

Nevertheless, whether the directive comes from the employer to stay in touch or the initiative comes from the employee, if sufficient time is devoted to use of BlackBerry devices and cell phones, that time will be time worked under applicable wage-and-hour regulations. It is not a defense to a claim for overtime that the employer did not require the employee to do the extra work. Indeed, the Fair Labor Standards Act (FLSA) defines "employ" to include where an employer "suffers" or "permits" an employee to work.<sup>1</sup> Time worked also includes "work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked."<sup>2</sup> Accordingly, if, in fact, the employee worked, the employer must compensate the employee for that time.

Who Is Entitled to Overtime?

In order to determine whether an employee may be entitled to overtime in the first place, the employer must establish whether the employee is exempt or non-exempt. Most employees are non-exempt, i.e., they are entitled to overtime for all hours worked over 40 in one week.<sup>3</sup> Unless an employee is exempt under one of the limited exemptions, he or she is entitled to overtime pay. The limited exemptions primarily are based on an employee's job duties as well as the fact that he or she is paid a fixed salary for all hours worked in one week. The FLSA provides for exemptions from overtime pay for employees who fall under certain classifications: executive, administrative, and professional, as well as certain computer employees and outside sales employees.<sup>4</sup>

For an employee to qualify for an exemption, she must be paid at least \$455 per week and must meet certain other criteria in connection with her job duties. Job titles alone are not determinative as to whether an exemption applies. Similarly, the executive exemption is not limited to vice presidents or chief executive officers and may include certain managers. However, the fact that an employee has the job title of "manager" and earns \$500 per week is not sufficient. One must look beyond the job title to the actual job duties to determine whether an exemption applies. In order for a manager to qualify under the executive exemption, the employee must: have a fixed salary of at least \$455 per week; have as the primary duty management of the enterprise or of a customarily recognized department; customarily and regularly direct the work of two or more other employees; and have the authority to hire or fire or make recommendations as to hiring and firing.<sup>5</sup>

Another common misconception is that paying an employee a "salary" is enough to exempt an employee from receiving overtime pay. However, being paid on a salary basis is only one factor in the exemption analysis. Although most non-exempt employees are paid on an hourly basis, an employee who performs clerical work, for example, and does not meet any of the job duty criteria of the exemptions cannot be exempted from overtime solely because he is paid on a salary basis.

Tracking Employee's Time

Once it is established which employees are non-exempt, and therefore eligible for overtime, the next step is calculating how many hours a non-exempt employee has worked.<sup>6</sup> Certainly, if an employer is not considering employees' use of BlackBerry devices and cell phones as time worked, that employer is potentially in violation of applicable laws and regulations by failing both to pay employees for time worked and to keep accurate records.

However, an employer is not responsible for paying employees for small amounts of time that are insubstantial or insignificant.<sup>7</sup> According to a federal regulation, "insubstantial or

insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis."<sup>8</sup>

Indeed, according to the U.S. Court of Appeals for the Second Circuit, "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved."<sup>9</sup> Factors that may be considered in determining whether work done by an employee should be compensable include the following: "(1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis."<sup>10</sup> It should be noted that according to a federal regulation, 10 minutes is not de minimis.<sup>11</sup>

For example, if an employee works a 40-hour workweek, from 9 a.m. to 5 p.m., Monday through Friday, but occasionally checks his e-mail on his BlackBerry over the weekend for a minute here or two minutes there, the employer would likely not have to pay overtime for these few minutes

*The most important point for employers to heed is that it is necessary to create a policy that is workable, capable of recording all time worked, and uniformly enforced.*

spent above the 40 hours worked during the week. The rationale is that it would be an administrative nightmare to have to record the time for every instance someone checked his or her BlackBerry for such short periods. Further, in the aggregate, the amount of overtime would be nominal. Conversely, if that same employee were checking and responding to client e-mails and returning phone calls over the weekend for extended periods of time, this time would certainly be compensable overtime.

On-Call Time

Another issue about which employers should be concerned is in connection with employees "on call" and whether such time is time worked under applicable law. "An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.'"<sup>12</sup> Where an employee is unable to use the time effectively for his own purposes, he is considered to be "engaged to wait" and is, thus, working.<sup>13</sup>

However, an employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is considered to be waiting to be engaged and is not working while on call.<sup>14</sup>

Caution on Exempt Employees

Another potential pitfall involves exempt employees. In order to main-

tain the exempt status of an employee, the employee must be paid his or her full salary for any week in which he or she performs any work. A problem may arise, however, where a company has an exempt employee who is on unpaid leave. If the employee checks his or her BlackBerry and makes work-related calls for more than a de minimis amount of time, the employee would be entitled to be paid for that entire week so that the exemption could be preserved. Notably, the loss of the exemption status may not necessarily be limited to that one week. The Department of Labor could determine that the exemption is lost for the entire statute of limitations period.<sup>15</sup> Accordingly, even for exempt employees, it is important to have a policy explaining the company's position on working while on unpaid leave, particularly in light of the potential economic consequences from inattention to this issue.

Uniform Policy


The key is that employers must be aware of these issues so as to not fall victim to a claim of overtime pay. In the absence of a proper policy governing employees' time and adoption of a sound methodology for recording that time, employees could assert claims for overtime leaving the employer without a way to defend itself. Indeed, regulations place the duty to control the amount of work performed by employees on management, which must ensure that employees are not working at times that the company does not wish work to be performed. Similarly, an employer "cannot sit back and accept the benefits [of employees' work] without compensating for them."<sup>16</sup> Importantly, a company's mere promulgation of a rule against employees working overtime is not sufficient. Indeed, to the extent an employee "breaks the rule" and works overtime without permission, the employer must still pay the employee. The employer's remedy is to enforce workplace discipline for violating the rule.

In sum, it is essential that employers consider these issues and decide whether they prefer to limit non-exempt employees to spending only a de minimis amount of time checking e-mails and making calls outside their normal work hours or whether they freely should be permitted to check e-mails and use their cell phones. If the latter, employers must also develop a mechanism by which employers will track all time worked, including that time devoted to use of PDAs, cell phones, and laptops.

The most important point for employers to heed is that it is necessary to create a policy that is workable, capable of recording all time worked, and uniformly enforced. If employers take note of this warning, employers can reap the benefits from the ever increasing high-tech world rather than the risk.

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1. Fair Labor Standards Act of 1938, 29 U.S.C. §203(g). See also, 29 C.F.R. §785.11 ("Work not requested but suffered or permitted is work time").
  2. 29 C.F.R. §785.12
  3. 29 U.S.C.A. §207 (a)(1).
  4. The general requirements for the major categories of exemptions are set forth in the U.S. Department of Labor Regulations. For the executive exemption, see 29 C.F.R. §541.100; for the administrative exemption, see 29 C.F.R. §541.200; for the professional exemption, see 29 C.F.R. §541.300; for computer employees, see 29 C.F.R. §541.400, and for outside sales employees, see 29 C.F.R. §541.500. It should be noted that the New York State Department of Labor relies upon the federal regulations when investigating an overtime claim.
  5. 29 C.F.R. §541.100(a).
  6. Regulations require that an employer keep accurate records of all time worked by non-exempt employees. 29 C.F.R. §516.2(a)(7).
  7. 29 C.F.R. §785.47.
  8. Id.
  9. *Reich v. New York City Transit Authority*, 45 F.3d 646, 652 (2d Cir. 1995).
  10. Id.
  11. 29 C.F.R. §785.47.
  12. 29 C.F.R. §785.17.
  13. 29 C.F.R. §785.15.
  14. 29 C.F.R. §785.17.
  15. The statute of limitations ranges from as low as two years under federal law to up to six years under New York law.
  16. 29 C.F.R. §785.13.

# STEP IT UP.



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