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Widely Used Psychological Test Found To Violate ADA

A large number of private sector employers administer psychological or personality tests to applicants and/or employees. However, the single most popular test, the Minnesota Multiphastic Personality Inventory Test (MMPI), a 507-question paper and pencil test, was just invalidated by a unanimous Seventh Circuit panel, *Karraker v. Rent-A-Center, Inc.,* 2005 U.S. App. LEXIS 11142 (June 14, 2005).

The appeals court held MMPI "is a psychological test . . . designed, at least in part, to reveal mental illness." And, of course, the Americans with Disabilities Act restricts "medical examinations," including those for mental illness. Rent-A-Center (RAC) administered MMPI and eight other tests to employees or outside applicants seeking management positions. RAC argued, in vain, that it used MMPI scores solely for the purpose of discerning personality traits, and indeed, the EEOC guidelines permit psychological tests "that measure personality traits such as honesty, preferences and habits."

The EEOC guidelines list seven factors to consider in determining whether a particular test is a "medical examination." Only one factor (number three, "whether the test is designed to reveal an impairment of physical or mental health") was arguably present in the RAC case. Yet, the Seventh Circuit panel concluded that, "no matter how the [MMPI] test is used or scored," using MPPI "has the effect of hurting the employment prospects of one with a mental disability" and violates the ADA.

It should be noted that RAC was using an earlier version of MMPI. The current version, MMPI-2, has been significantly revised eliminating many true-false statements found objectionable by earlier applicants and employees. Ten million MMPI-2 tests are now given annually. However, RAC itself no longer uses MMPI. In July 2000, prior to this Seventh Circuit decision, RAC paid $1,200,000 to settle a class action involving 1,200 employees who claimed MMPI violated the California constitution's privacy provision. RAC agreed to stop giving the test in California and to pay $2,000 to all class members who failed the test and $1,250 to those who passed.

Prior court rulings have been inconsistent on this issue. In *Karraker* itself, the Seventh Circuit reversed District Judge Michael McCusky (316 F. Supp. 2d 675, C.D. Ill. 2004), who upheld the MMPI test. A California federal court dismissed a similar ADA attack on another multiple-choice test, the PASS-ITT D.A.T.A. Survey, in *Thompson v. Borg-Warner Protective*

Service Corporation, 1996 U.S. Dist. LEXIS 4781 (N.D. Calif. 1996). That court held that test was *not* designed to elicit information about applicants' physical or mental impairments. Another early case brought by a security guard applicant at a Target store resulted in Target being enjoined from using its test, the "Psychscreen" test, *Soroka v. Dayton Hudson,* 19 Cal. App. 4th 1200 (1991). Target then settled the case while it was on appeal to the California Supreme Court.

What Should Employers Do Now?

The Seventh Circuit's *Karraker* decision is the first federal appellate court to weigh in on this key ADA issue. The sweeping nature of this ruling and its potential impact on common and widely used psychological tests mandate employers' immediate attention, particularly employers within the Seventh Circuit (Illinois, Indiana and Wisconsin) and in states such as California with even broader anti-discrimination and privacy laws. Notably, *Karraker* began as a certified class action, which raises any employer's potential financial exposure significantly. In light of *Karraker,* prudent employers should now take several steps:

1. Survey the employer's own HR practices to determine exactly which, if any, psychological and/or personality tests are being utilized.
2. If such tests are being utilized, determine how they are designed, how they are being utilized and for what purpose and if they are job-related and measure ability to perform the jobs in question.
3. Similar inquiries should be made of any test providers, recruiters, staffing agencies, etc. that provide applicant or employee screening and/or testing services for the employer.
4. Re-evaluate whether these tests have actually been helpful in screening out problem applicants and effective in predicting employee performance. There is substantial debate about the effectiveness of such tests in the employment context.
5. If there are psychological or personality tests that the employer wishes to utilize, the tests should be discussed with counsel, and analyzed to determine whether they will pass muster under the ADA and other laws.

Ordinary Workplace Incidents Can Easily Result In Million-Dollar Verdicts Against Employers

As employers know all too well, the answer to the question "can I be sued?" is always "yes, you can." Indeed, the case may even end up before a jury. Reality and hard facts are often ignored when a jury gets an opportunity to assess damages against an employer who, in the jury's view, acted "unfairly" towards an employee.

Haggar Clothing, the well-know marketer of men's casual and dress apparel and women's sportswear, operated a plant at Weslaco, Texas, at the mouth of the Rio Grande on the Mexican border. Altagracia Hernandez was a seamstress at that plant. On February 19, 1991, a simple, garden-variety workplace incident occurred involving Ms. Hernandez that, to date, has resulted in eleven years' litigation.

Ms. Hernandez was at work that fateful day when another worker carrying a table accidentally hit her on the chin with the table knocking her down and causing neck, knee and back pain as well as a brief loss of consciousness. Ms. Hernandez was placed on workers' compensation leave on February 25. She received medical treatment and workers' compensation benefits under Haggar's policy. When Ms. Hernandez did not return to work in February 1992, Haggar terminated her pursuant to its leave-of-absence policy limiting such leaves to a maximum of one year regardless of the reason for the leave.

Does this sound like a workplace dispute that can give rise to more than a decade of costly litigation? Ms. Hernandez found a lawyer willing to take her case and, in 1994, sued Haggar. She claimed she had been fired in retaliation for filing a workers' compensation claim after she was injured on the job.

Juries are bad enough. A retaliation claim presented to a jury is exponentially worse. Haggar's proud workplace safety accomplishments were turned against it. Ms. Hernandez argued Haggar's safety-incentive policies *actually encouraged* retaliation against employees sustaining workplace injuries. Employee units received bonuses by accumulating hours without a lost-time accident. Ms. Hernandez argued that safety program "pressured" employees not to report workplace injuries for fear of upsetting co-workers. She also claimed Haggar's hard-driving managers and supervisors were similarly "pressured" to avoid or minimize workers' compensation claims by forcing injured employees to stay on the job despite injuries.

Having painted this general picture of an employer anxious to avoid lost-time accidents at all costs, Ms. Hernandez told the jury her version of how Haggar responded to her particular injury. First, her supervisor refused to release her to go home, telling her to stay at work and put up with the pain. Her co-workers, Ms. Hernandez testified, urged her to see a doctor but her supervisor again refused, saying she should continue working to see if her condition improved. Ms. Hernandez stayed at work and even reported to work the following day. However, she then left work to see a chiropractor. She testified both her supervisor and the plant manager were extremely angry she left work and threatened not to pay for her visit to the chiropractor.

The jury found unlawful retaliation. It awarded Ms. Hernandez $210,000 in damages ($70,000 for back pay until the plant closed in May 1997, $70,000 for past pain and suffering and $70,000 for future pain and suffering) *and,* to top it off, $1,400,000 in punitive damages. Amazingly, the Texas Court of Appeal upheld this massive verdict including the jury's finding that Haggar acted with "actual malice" towards Ms. Hernandez.

Haggar set aside a $2,600,000 reserve for this verdict and appealed. The Texas Supreme Court unanimously reversed and directed the trial court to render a take-nothing judgment in Haggar's favor. *Haggar Clothing Company v. Altagracia Hernandez,* 2005 Tex. LEXIS 390 (May 13, 2005). Haggar cancelled the $2,600,000 accrual thereby boosting its earnings by approximately twenty percent.

The Texas Supreme Court found "no evidence" to support the jury's unlawful retaliation finding. The court reaffirmed the key principle that employers who terminate employees "pursuant to the uniform enforcement of a reasonable absence control provision will not be liable for retaliatory discharge." The *only* evidence of non-uniformity that Ms. Hernandez could muster was another employee who went out on leave in September 1994, two years *after* Ms. Hernandez was fired, and who was only officially terminated when the plant closed in 1997 not when that employee's LOA exceeded the one-year maximum in 1995. That evidence, the Texas Supreme Court held, proved neither discriminatory application of Haggar's absence-control policy nor retaliatory conduct.

The plant manager could not possibly have anticipated that his simple tickler letter terminating Ms. Hernandez when her LOA exceeded one year under the company's written policy could generate such a legal firestorm. The jury and the trial and appellate courts that upheld the jury's $1,610,000 verdict against Haggar were all wrong as a matter of law. They totally accepted Ms. Hernandez searing depictment of Haggar as an unfair, uncaring and indeed malicious employer for whom corporate profits were more important then employee health and safety. Juries and retaliation claims are indeed a dangerous and volatile mixture for any employer.

Personnel Law

SOX Of Many Colors — Sarbanes-Oxley Cases Reach the Courts

The Sarbanes-Oxley Act (SOX) reached its third anniversary on July 30, 2005. Although there have been relatively few SOX court cases to date, the cases decided so far offer tantalizing clues as to SOX's future.

SOX claims must be filed first with the Department of Labor. However, whistleblowers can then run to district court for de novo review if no final administrative decision has issued within 180 days after their claim was filed and there is no delay due to their bad faith, 29 C.F.R. Sec 1980.114.

Judy Collins took this "escape route" when no OSHA final order had issued nearly eight months after she filed a whistleblower complaint against her former employer, Beazer Homes. Two days *after* Judy's court complaint was filed, OSHA issued its preliminary determination finding no reasonable cause to believe she had been discriminated against. Possibly encouraged by this OSHA determination, Beazer Homes moved for summary judgment. It lost, largely because of SOX's higher evidentiary standard. The district judge held Beazer could not establish "by clear and convincing evidence" that it would have fired Judy absent her alleged protected activity, *Collins v. Beazer Homes,* 334 F. Supp. 2d 1365 (N.D. Ga., September 2, 2004).

The *Collins* decision warned employers that summary dismissals of SOX claims, even following a pro-employer administrative ruling, would likely be rare indeed. A second court case, *Bechtel v. Competitive Technologies, Inc.,* 2005 U.S. Dist LEXIS 8857 (D.Ct., May 13, 2005), revealed the futility of resisting an OSHA preliminary reinstatement order. OSHA ordered the two whistleblowers, Bechtel and Jacques, reinstated on February 2, 2005. When Competitive did not reinstate them, they went to court supported by DOL as intervenor and, a mere one hundred days later, obtained a district court order mandating their reinstatement.

Federal District Court Judge Jorge A. Solis' June 7, 2005 SOX decision in *Murray v. TXU Corp.,* 2005 U.S. Dist. LEXIS 10945 (N.D. Tex.), pleased employers much more than the *Collins* and *Bechtel* decisions. TXU, an energy trading company, fired senior vice president William Murray on August 1, 2002, only two days after SOX went into effect. It paid Murray $386,250 in severance for his "without cause" termination only to discover he was a whistleblower attempting to emulate Enron's Sherrod Watkins, a fellow Texan.

Murray claimed TXU officials knew about massive losses in the company's European operations but failed to tell investors until three months later. TXU stock then dropped 75%. TXU, for its part, contended Murray's job was eliminated as part of a company-wide restructuring plan.

Murray went to court with his SOX claim using the same 180-day escape route Judy Collins had. He was poised to become the first SOX claimant to go to trial when a June 13, 2005 trial date was set. However, TXU moved to strike Murray's jury trial demand and his request for punitive damages. Judge Solis, as will be discussed below, granted both motions on June 7, less than a week before trial was scheduled to start. Judge Solis also ordered mediation. The parties settled two days later, canceling the trial. TXU executives were spared testifying at the trial.

Murray had argued he was entitled to a jury trial because he was seeking legal damages for injury to his reputation. SOX's remedy section, 18 U.S.C. Sec. 1514A(c), states prevailing parties "shall be entitled to all relief necessary to make the employee whole" and then specifically mentions "compensatory damages." Normally, the term "compensatory damages" would cover Murray's claimed reputational injury as well as mental anguish and pain and suffering. However, SOX also specifies that compensatory damages "shall include," in addition to reinstatement and back pay, compensation for any "special damages sustained." SOX then gives three interesting examples of "special damages": litigation costs, expert witness fees and reasonable attorneys' fees.

Judge Solis pointed to these three "special damages" examples, noting none were non-pecuniary damages similar to reputational injury, pain and suffering and mental anguish. He concluded SOX did *not* allow "normal" compensatory damages due to its limited definitions and examples. Murray would not have his SOX claims tried to a jury. Judge Solis drew an analogy to Title VII *prior* to the 1991 amendments adding jury trials and compensatory and punitive damages. The Supreme Court interpreted the 1964 Title VII law as not allowing "any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation or other consequential damages," *U.S. v. Burke,* 504 U.S. 229 (1992). Thus SOX, like the original Title VII, did not provide for jury trials.

Murray's punitive damages claim was also stricken. That was an easier issue. SOX's original draft expressly allowed for punitive damages in limited cases (where the protected conduct involved a substantial risk to health, safety and welfare of the employer or the public) but this limited provision was deleted from the final law. Murray quickly settled his case when his jury trial demand, his punitive damages claim and, in passing, even his compensatory damages claim for injury to his reputation were all stricken.

Whistleblowers will certainly disagree with Judge Solis. They will argue the limited remedial scheme under the original Title VII is the wrong analogy. Under other whistleblower laws, such as the Energy Reorganization Act, compensatory damages for injury to reputation, humiliation and mental anguish may be awarded. OSHA itself apparently disagrees with Judge Solis as well. In the *Bechtel* case, OSHA's February 2, 2005 preliminary determination awarded Messrs. Bechtel and Jacques "normal" compensatory damages. Bechtel was awarded \$7,198 "for counseling charges due to stress of termination." Jacques was awarded \$90,000 for "damage to reputation and career, severely compromised ability to find work and mental suffering."

Judge Solis' square ruling that punitive (and normal compensatory damages) are not available to SOX whistleblowers produced not only a quick settlement in the *Murray* case but also apparently led, one week later, to a June 14 settlement of Jacques' claims against Competitive Technologies. John Scott Bechtel's separate claims against Competitive, including the \$7,198 OSHA awarded him for counseling expenses following his termination, are likely to be settled too.

These out-of-court settlements leave conflicting precedents in their wake. A federal district judge has squarely held SOX whistleblowers are not entitled to jury trials or compensatory or punitive damages. In contrast, OSHA itself has awarded compensatory damages in preliminary and unreviewed administrative SOX determinations. These starkly different views of the remedies available to SOX whistleblowers may actually encourage more out-of-court settlements. Finally, William Murray's eve-of-trial judicial defeat could discourage other SOX whistleblowers from running to court to escape the OSHA administrative process as he and Judy Collins did.

Targeting Disloyal Employees Under The Computer Fraud And Abuse Act

Confidentiality agreements and non-compete clauses are not always enough to keep a disloyal employee from revealing trade secrets to a new or potentially new employer. Now, employers are equipped with another option for protecting their confidential information — the Fraud and Related Activity in Connection with

Computers Act, commonly known as the Computer Fraud and Abuse Act, 18 U.S.C. Sec. 1030 (CFAA). Traditionally, trade secret cases are brought in state court. However, this Act gives employers access to federal court.

Employers are often faced with current or ex-employees who reveal confidential information to competitors either before they leave or after they have moved on to other employment. These problems have multiplied with the increase in computer technology and the ease by which information is transmitted over the Internet. Activities such as e-mailing confidential information or downloading such information onto laptops or other portable devices taken to a new employer are violations if the company's computer usage policy forbids these actions.

CFAA has governed the area of computer crimes since the mid-nineteen eighties. However, there have been new amendments making it applicable to a much broader spectrum of computers and employee activities.

CFAA currently states: "Whoever … intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains … information from any protected computer if the conduct involved an interstate or foreign communication … shall be punished." Punishment ranges from fines to terms of imprisonment depending upon the Section of the Act implicated. Damage is defined as "any impairment to the integrity or availability of data, a program, a system, or information that causes a loss aggregating at least $5,000 in value during any one-year period to one or more individuals…."

The most common scenario involves an employee who initially has authorized access to the employer's confidential information but then abuses that authority by sharing that confidential information with a competitor. In *Shurgard Storage Centers v. Safeguard Self-Storage,* 2000 U.S. Dist. LEXIS 16196 (W.D. Wash., 2000), storage facility employees with authorized access to computer information accepted jobs with a direct competitor. Before leaving Shurgard, they e-mailed trade secrets and other proprietary information to the competitor. Shurgard sued that competitor, alleging Computer Fraud and Abuse Act violations. The District Court held the employees' authorized access to the facility's computers ended when they "acquired adverse interests" and "committed a serious breach of loyalty" by acting on their new employer's behalf. The disloyal employees were treated as hackers from and after the time they started acting as agents for the competitor.

Sometimes employee access to information will not be a violation. This is the case when the employee accesses the employer's confidential information while unauthorized to do so but does not produce anything of value. In *United States v. Czubinski,* 106 F.3d 1069 (1st Cir. 1997), Richard Czubinski worked for the IRS as a Contact Representative. To perform his official duties (which mainly involved answering questions from taxpayers regarding their returns), Czubinski routinely accessed information on the IRS's computer systems, known as the Integrated Data Retrieval System. He used a valid password given to him by the Service. He then knowingly disregarded IRS confidential information rules by performing searches outside the scope of his Contact Representative duties to satisfy his own personal curiosity about the tax information of friends, acquaintances and political rivals. He was convicted of computer fraud and wire fraud. The First Circuit reversed his conviction. The court held that nothing in the record indicated that Czubinski did anything more than knowingly disregard IRS rules by reading the confidential information he accessed. Since there was no evidence he printed out, recorded or used the information he read, the court reasoned he did not obtain "anything of value."

Another CFAA decision held allowable damages do not include international business trips or expensive dinners with a company's top executives even when they are discussing how to deal with disloyal employees. In *NEXANS Wires v. SARK-USA, Inc.,* 319 F. Supp. 2d 468 (S.D.N.Y. 2004), two former employees, prior to leaving their jobs, allegedly unlawfully removed confidential business information maintained on NEXANS computers at the behest of its competitors. NEXANS alleged it suffered a "loss" of at least $5,000 in "value." It pointed to two NEXANS directors' international business trips costing over $8,000 and meetings held to discuss the transfer of confidential information that had already occurred.

District Judge Miriam Cedarbaum found these meetings were held simply to discuss preventing the confidential information from getting into competitors' hands. There was no evidence that preventive measures were added to the NEXANS computers or that the system itself was augmented to tighten security. These travel and meeting expenses did not satisfy the $5,000 "loss" requirement under CFAA.

As more CFAA lawsuits are filed, courts will clarify and extend its protections. Although no one can guarantee that trade secrets will never be revealed, an employer can take steps to make that less likely. Monitoring computer equipment and establishing effective communications policies unequivocally puts employees on notice that the employer intends to protect its proprietary information at all costs. Those policies also will help the employer vindicate its rights if an unauthorized disclosure occurs. Employers still need to take traditional precautions such as non-compete agreements, confidentiality policies and classifying and protecting trade secrets. These steps and the developing law under the CFAA should warn departing employees they should never transfer confidential information via e-mail or portable device to further their aspirations for other jobs.

Labor Relations

Non-Union Employees' Privacy Act Lawsuit Forces Union To Abandon Common Organizing Campaign Strategy

The Drivers Privacy Protection Act (DPPA) is not well-known. It was passed in 1994 after an actress was murdered by a stalker who obtained her home address from California Department of Motor Vehicle records. State DMV Offices, with some exceptions (i.e., recalls, safety, thefts), are prohibited from disclosing without the person's express consent "personal information" obtained in connection with a motor vehicle record, 18 U.S.C. Sec. 2721(a). Personal information includes photographs, driver identification numbers, medical or disability information, social security numbers, telephone numbers, names and, most important, addresses except for the five digit zip code, 18 U.S.C. Sec. 2725 (3).

Unions seeking to organize employees strongly emphasize visits by organizers to employee homes. A common union organizing campaign strategy is to write down license plate numbers of vehicles in company parking lots and then match those plate numbers with each vehicle owner's home address. UNITE used this approach extensively in 2002 when seeking to organize 28,000 employees of Cintas, the industrial uniform supplier, spread out over nine states. For some states, UNITE accessed home addresses from Westlaw. For other states, however, the union hired a private investigator to get names and addresses indirectly from state DMV offices.

UNITE had no idea the impending legal storm it would generate when it jotted down license plate numbers in Cintas' Allentown, Pennsylvania parking lot. Two separate "spottings" were required to eliminate visitors. After the union's private investigator obtained home addresses from Pennsylvania DMV, UNITE organizers began home visits in February 2004. Angry plant employees asked Cintas how the union could have obtained their home addresses. The company put them in touch with a local attorney and agreed to advance that lawyer's fee provided it was reimbursed from any eventual recovery.

UNITE was totally caught off guard when the local attorney filed a DPPA lawsuit. The union had not considered the law at all. That lawsuit and a quick review of DPPA convinced UNITE to abandon totally its traditional practice of obtaining home addresses from state DMV license plate records.

The employees' lawsuit was an outstanding success. District Judge Stewart Dalzell certified a nationwide class of all persons whose license plate numbers were obtained from DMV records and used during a two-year period. He certified this class under Federal Rule 23(b)(3) to allow pro-union employees to opt out. Most importantly, Judge Dalzell, in disagreement with two earlier Florida DPPA decisions (*Kehoe v. Fidelity Federal Bank & Trust,* 2004 U.S. Dist. LEXIS 11464, S.D. Fla. 2004 and *Schmidt v. Multimedia Holdings Corp.,* 361 F. Supp. 2d 1346, M.D. Fla. 2004), held class members did *not* have to prove actual damages to qualify for the $2,500 liquidated damages provided in DPPA, 18 U.S.C. Sec. 2724(b).

Judge Dalzell's damages ruling basically guaranteed every class member $2,500 if they did not opt out. Considering that many of Cintas' 28,000 employees were targets of UNITE's nationwide organizing effort, UNITE faced damages as high as $70,000,000. To top it off, DPPA permits punitive damages and allows a prevailing plaintiff to recover reasonable attorneys' fees.

Judge Dalzell's opt-out decision was devilishly clever. Even pro-union plaintiffs may decide to stay in the case if they are guaranteed an automatic $2,500. That development may complicate matters for Cintas because the LMRDA prohibits employers from financing any action brought by union "members." If pro-union plaintiffs remain in the case, Cintas may have to reduce or eliminate its financing.

Cintas, as Judge Dalzell noted in his opinion, "remains unwaiverly committed to maintaining a union-free workplace," *Pilcher v. UNITE,* 2005 U.S. Dist. LEXIS 10334 (E.D. Pa. May 31, 2005). The company's creative lawsuit protecting its employees' privacy rights certainly caught UNITE unawares. Even apart from a possible multi-million dollar damage recovery flowing mainly to non-union employees, that lawsuit has already forced many unions to read DPPA and, like UNITE, abandon their traditional practice of using state DMV offices to identify the names and home addresses of employees they seek to organize.

Illinois Becomes the First State to Grant an Evidentiary Privilege to Union Representatives

On June 14, 2005, the Illinois legislature passed Public Act 94-0022 amending the Illinois Code of Civil Procedure to establish a new evidentiary privilege for communications between union representatives and bargaining unit members. The statute, the first of its kind in the country, becomes effective January 1, 2006.

Similar to the attorney-client and doctor-patient privileges, this new law provides a union representative "shall not be compelled to disclose" any information obtained from a bargaining unit member "in attending to his or her professional duties or while acting in his or her representative capacity," 735 Ill. Comp. Stat. 5/8-803.5 (2005). Exceptions to the privilege exist when necessary to prevent crimes likely to result in a clear, imminent risk of serious physical injury or death of another person, civil or criminal actions against the union or union representative, court ordered disclosure and written or oral consent, after full disclosure, of the bargaining union member involved. The law expressly acknowledges that conflicting "federal or state labor laws shall control."

Illinois is the first state to actually enact such a privilege into law. However, courts and commentators have debated creating a union representative privilege for years. The general trend, however, has been for both federal and state courts to decline to proclaim such a new privilege and defer to Congress and state legislatures. In 2003, a California Court of Appeal explicitly refused to sanction such a privilege under the California Labor Code, the Railway Labor Act or under employees' constitutional right of privacy, *American Airlines v. Superior Court,* 8 Cal. Rptr. 3d 146 (Ct. App. 2003). In *American Airlines,* a union representative refused to disclose information obtained from union members in a wrongful termination suit, claiming the communications were privileged. The employee (who was a real party in interest) argued the court should borrow the privilege from the National Labor Relations Act, and relied on *Cook Paint and Varnish Co.,* 258 NLRB 1230 (1981). The court declined to find a union member-union representative evidentiary privilege under the NLRA based on *Cook's* "narrow" holding. (In *Cook* the Board found the employer committed an unfair labor practice by questioning a union steward, who had been involved in another employee's grievance arbitration, and by threatening to discipline the steward if he didn't turn over his notes.) The court noted that transforming an unfair labor practice under the NLRA into a new evidentiary privilege under California law should be left to the legislature. Likewise, the Arizona Supreme Court refused to extend the attorney-client privilege to encompass the relationship between a union representative and a union member, *Hunt v. Maricopa County Employees Merit Sys. Comm'n,* 619 P.2d 1036, 1041 (Ariz. 1980).

The only federal courts to examine this issue have likewise declined to establish a privilege shielding communications between union members and their official representatives from compulsory disclosure. In refusing to recognize such a new privilege, one district court pointed out that "all fifty states and the District of Columbia had enacted some form of psychotherapist privilege before the Supreme Court finally recognized that privilege," *In re: Grand Jury,* 995 F. Supp. 332, 336 (E.D.N.Y. 1998). Another district court found the union representative-union member relationship was not one society ought to encourage and protect as it does the attorney-client privilege or the spousal privilege, *Walker v. Huie,* 142 F.R.D. 497, 501 (D. Utah 1992).

The Illinois law breaks new ground. Two federal labor agencies, the National Labor Relations Board and the Federal Labor Relations Authority, have discussed a possible evidentiary privilege for union members and representatives. *See Cook Paint & Varnish Co., supra,* and *Customs Service,* 38 F.L.R.A. 1303 (1991). A New York appellate court also discussed a union representative privilege but unequivocally rejected the contention that "a common-law privilege on a par with that of attorney-client" should be established, *City of Newburgh v. Newman,* 70 A.D. 2d 362 (3d Dep't 1979). In fact, the 1996 New York legislature went so far as to pass legislation creating a new testimonial privilege for communications between police officers and police union officials, but that legislation was vetoed by Governor Pataki, *see In re: Grand Jury, supra,* at 335-36.

The new Illinois law will likely encourage union lobbyists to urge other state legislatures to follow suit. If other state legislatures follow Illinois' lead, the movement toward the establishment of a formally recognized union representative privilege will pick up speed. The more likely scenario, however, is that other states will wait to see the fallout from the enactment of the Illinois law and how that precedent-breaking law fares in the courts.

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