Volume 11, Number 2 *2007*

Allied Academies
International Conference

Reno, NV
October 3-5, 2007

Academy of Legal, Ethical and Regulatory Issues

PROCEEDINGS

Volume 11, Number 2 *2007*

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SAME SEX MARRIAGE, CIVIL UNIONS, AND EMPLOYEE BENEFITS: UNEQUAL PROTECTION UNDER THE LAW - WHEN WILL SOCIETY CATCH UP WITH THE BUSINESS COMMUNITY?

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ABSTRACT

After the 2004 Presidential election, America was proclaimed to be a nation of red and blue states, with red states purportedly disfavoring same sex marriage and civil unions, and blue states seemingly more tolerant. Election day polling convinced most of America that the feelings on same sex relationships run deep, given that one in every five voters cited "moral values" as their top priority in determining their vote. But what was left out of the polls and post-election hype was this: American businesses, including most of the Fortune 500, have been providing increasing benefits to same sex couples for years, even in the red states.

Will the attitude of society catch up to the business community? And will new laws, including those banning civil unions, become a factor in where businesses choose to locate, or perhaps even inspire the business community to promote more tolerance toward same sex relationships and encourage the broader society to follow its lead? This paper examines the history of same sex benefits, civil unions, and same sex marriage, comparing the attitudes of the business community with those of society at large.

THE TIME IS RIGHT – OR IS IT? THE SUPREME COURT SPEAKS IN LEDBETTER V. GOODYEAR TIRE & RUBBER CO.

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ABSTRACT

In a 5-4 decision, the U.S. Supreme Court recently ruled that an employee may not sue their employer under Title VII unless they have filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged unlawful employment practice occurred. The majority opinion, written by Justice Alito, will likely bar many of the 40,000 pay discrimination cases brought between 2001 and 2006. In her scathing dissent, read aloud from the bench, Justice Ginsburg invited Congress to overturn the decision, stating that "The court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination" (Ledbetter).

FACTS

The plaintiff, Lilly Ledbetter, began her career at Goodyear Tire and Rubber in 1979. For most of her twenty year career at Goodyear, Ledbetter was the only female manager. Initially, Ledbetter's salary was the same as that of the male managers. However, over time, Ledbetter's salary slipped relative to that of the male managers. By 1997, Ledbetter was not only the sole woman manager, she was also the lowest paid manager. Ledbetter's monthly salary at the time of her departure was approximately $3,700 per month. Similarly situated male managers at Goodyear made between $4,200 and $5,200 per month.

In 1998, Ledbetter filed an administrative claim of discrimination with the Equal Employment Opportunity Commission .She alleged that Goodyear violated Title VII of the Civil Rights Act of 1964 but paid her a lower salary because of her sex. Ledbetter's claim eventually went to a jury who found in her favor. The District Court (in Alabama) entered judgment for Ledbetter for back pay, damages, attorney fees, and costs.

APPEAL

Goodyear appealed to the Eleventh Circuit and the victory for Ledbetter was reversed. The Eleventh Circuit, quoting Title VII, held that her claim was time-barred.

> *Title VII provides that a charge of discrimination shall be filed within [180] days after the alleged unlawful employment practice occurred . . . Ledbetter charged, and proved at trial, that within the 180-day period, her pay was substantially less than the pay of men doing the same work. Further, she introduced evidence sufficient to establish that discrimination against female managers at the Gadsden plant, not performance inadequacies on her part, accounted for the pay differential (Ledbetter).*

Nevertheless, the Eleventh Circuit found the evidence unavailing, holding that Ledbetter should have filed charges year-by-year, each time Goodyear failed to increase her salary commensurate with the salaries of male peers. "Any annual pay decision not contested immediately (within 180 days)… [is] a fait accompli beyond the province of Title VII ever to repair" (Ledbetter). The U.S. Supreme Court agreed.

THE FUTURE OF THE SUPREME COURT AND EMPLOYEE RIGHTS

According to an expert on the Supreme Court, "[C]onservatives finally got their Court." Out of 68 cases decided this term, 24 were resolved by a 5-4 margin, and Justice Kennedy was the majority in all 24, including Ledbetter. According to Erwin Chemerinsky, the Ledbetter case was in important victory for business.

> *The Court made it much more difficult for employees to sue for pay discrimination under Title VII of the Civil Rights Act of 1964. The Court said that the statute of limitations for such pay discrimination claims . . . begins to run when the salary is set . . . the Court did not decide whether the statute of limitations is tolled until a plaintiff reasonably could know of the discriminatory salaries in the workplace or how that is to be determined. (Ledbetter).*

Given the current conservative majority on the Supreme Court, it is unlikely that any case dealing with tolling the statute of limitations would be decided in a pro-business fashion. As in the past when the Court has handed down unpopular decisions, the public will need to look to legislation to overturn the Court's decision. Within hours after the Ledbetter decision was made public, Senator Hillary Rodham Clinton of New York announced her intent to submit a bill to overturn the Court's decision. In the meantime, victims of pay disparity should look to other than Title VII for relief.

REFERENCES

Chemerinsky, Erwin*, August 2007. The Supreme Court: Sharp turn to the right*, California Bar Journal.

Greenhouse, Linda (May 30, 2007). *Justices' Ruling Limits Suites on Pay Disparity*, The New York Times, retrieved August 8, 2007, from (http://www.nytimes.com/2007/05/30/washington/30scotus.html?ei+5124&en=120ee0d6b).

Lilly M. Ledbetter v. The Goodyear Tire & Rubber Co., Inc., 2007 U.S. Lexis 6295 (2007).

CREATING POSITIVE FIRST WORK EXPERIENCES FOR YOUNG ADULTS

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ABSTRACT

The percentage of sexual harassment allegations filed by workers under the age of eighteen has increased dramatically since 2001. It is generally accepted that attitudes toward work and many basic work related behaviors are learned early in life. Because of that, the initial job experiences that young workers encounter are important in shaping their future behavior in the workplace. The purpose of this paper is to examine the Equal Employment Opportunity Commission's (EEOC) Youth@Work initiative and to present policy and practice suggestions that employers can utilize to reduce their exposure to litigation and create positive first work experiences for young adults.

INTRODUCTION

"Give today's kids a taste of work—and you'll get better employees tomorrow" (Personnel Journal, 1995). It is generally accepted that attitudes toward work and many basic work related behaviors are learned early in life. Because of that, the initial job experiences that young workers encounter are important in shaping their future behavior in the workplace. In recent years, sexual harassment and discrimination, aspects of workplace behavior that have plagued many organizations, have been identified as a serious problem for organizations that employ teenage workers (Flahardy, 2005). The percentage of sexual harassment allegations filed by workers under eighteen has increased dramatically since 2001 from 2 percent to 8 percent in 2004 (Flahardy, 2005). The number of lawsuits filed by the EEOC involving teen workers increased from eight cases in 2001 to 15 in fiscal year 2005 (Armour, 2006). One published source estimated that the EEOC "has filed at least 131 lawsuits across the country involving the harassment of teenage employees" (Phillips Jr., 2007).

In response to the increased complaints and litigation involving young workers, the Equal Employment Opportunity Commission initiated the Youth@Work initiative in September of 2004. This comprehensive outreach and education campaign is designed to inform teenagers about their employment rights and responsibilities and to help employers create positive first work experiences for young adults (EEOC, 2007). The primary objective of the program is to inform young workers as to their "real world rights and responsibilities as an employee"(EEOC, 2007). To that end, the

EEOC web site (www.youth.eeoc.gov) and more than 2,100 Youth@Work events held nationwide since the program was initiated have spear headed the EEOC's efforts to inform young people as to their rights and how the EEOC process works. Additionally, the EEOC's outreach efforts have also been directed at employers, with the objective of helping employers "create positive first work experiences for young adults"(EEOC, 2007). The purpose of this paper is to examine the increase in sexual harassment allegations associated with workers under the age of eighteen, the Equal Employment Opportunity Commission's (EEOC) Youth@Work initiative, and to present policy and practice suggestions that employers can utilize to reduce their exposure to litigation and create positive first work experiences for young adults.

NATURE OF THE PROBLEM

Employers have recognized for a number of years the importance of creating positive first work experiences for young people. Numerous programs like Kids and the Power of Work (KAPOW) and Developmental Partners, a project between Duke Power Co. and the Charlotte-Mecklenburg school system of North Carolina have been developed to give young people as early as their elementary school years a "taste of work" with the objective of getting "better employees tomorrow" (Personnel Journal, 1995). KAPOW, founded in 1991 by Grand Metropolitan PLC and the National Child Labor Committee was designed to "fill a gap in the nation's school-to-work initiatives" and connect younger kids to jobs they may hold in the future (Personnel Journal, 1995). Companies participating early on included Green Giant, Burger King and Alpo Pet Foods. The Developmental Partners project began in 1986 and was aimed at improving opportunities for minority and underprivileged students. In this program, high school juniors attended classes on study skills, test taking, time management and college-major planning. In their senior year, they discussed interviewing techniques, dressing for success, resume writing and etiquette (Personnel Journal, 1995). The current curriculum of the KAPOW program focuses on job and career awareness, self-awareness, positive work habits, teamwork, overcoming bias and stereotype, communication, and decision making (National Child Labor Committee, 2007).

Jennifer Ann Drobac in her article focusing on adolescent consent presents an eye-opening example of the problem of the sexual harassment of teenagers (Drobac, 2006). Drobac details the case of a fifteen year old girl and the behavior of her forty-year old registered sex offender manager that eventually led to the manager being prosecuted for statutory rape. Drobac goes on to cite statistical evidence developed by Susan Fineran to support the seriousness of the problem (Drobac, 2006). Fineran found in her study that thirty-five percent of high school students who worked part time had experienced sexual harassment (Fineran, 2002). Drobac also cites more recent unpublished survey work of Fineran and Gruber that found that 46.3% of working students had been sexually harassed in the last year (Drobac, 2006). Drobac, again citing the survey work of Fineran and Gruber, reported that youth restaurant workers experienced more harassment than care workers who engaged in tasks such as babysitting and housekeeping (Drobac, 2007).

In launching the Youth@Work initiative, EEOC Chairwoman Naomi Earp and many others associated with the issue, agree that teenagers are "more vulnerable" to sexual harassment and discrimination in the workplace. Many "experts" assert that the vulnerability is due primarily to their inexperience and that "they often don't understand what is and isn't appropriate workplace

behavior"(Flahardy, 2005). Flahardy goes on to point out that many teens work in food service and retail, establishments that are often "casual environments that foster a social environment". Naomi Earp states that "drawing a line of distinction between appropriate behavior at work, in the mall and in internet chat rooms, and what is appropriate at work, is not always clear to younger workers"(Flahardy, 2005). In addition to this vulnerability, if teen workers are also reluctant to report inappropriate behavior because they are ignorant as to their rights under the law, the potential for a very negative first work experience is very real.

RECENT LITIGATION AND SETTLEMENTS

In March of 2007, the EEOC announced a $550,000 settlement of a sexual harassment lawsuit against GLC Restaurants, Inc. (GLC) doing business as McDonald's Restaurants in Arizona and California (EEOC, 2007). The lawsuit alleged that a group of teenage workers in Cordes Junction, Arizona, "some who were only 14 years old at the time", were sexually harassed by a middle-aged male supervisor, including unwanted touching and lewd comments. The EEOC alleged in its lawsuit that the male supervisor in question was a repeat offender who had previously harassed teen female employees at GLC's Camp Verde, Arizona location. The EEOC alleged that GLC knew of the manager's previous conduct but failed to take appropriate action to prevent him from repeating the unlawful behavior at the Cordes Junction location. According to published reports, GLC had notice of the supervisor's sexually harassing conduct within weeks of his hiring and, that after more than a year of "continuous complaints" simply transferred the supervisor to another location. There, he continued to sexually harass the teen female employees for two more years. Included among the allegations were that he reached down the pants pockets of an employee, told the same teenager that he wanted to have oral sex with her, cornered another employee in the freezer and pushed himself on her, and even pinned down an employee and kissed her. After four years of reports of this type of behavior, GLC finally terminated the supervisor (Reynolds, 2007). In addition to the $550,000 in monetary relief, GLC is required to provide training and other relief aimed at educating its employees about sexual harassment and their rights under the law. According to EEOC trial Attorney Michelle Marshall, " no one should have to endure sexual harassment to earn a paycheck" - and - Employers must be extra vigilant in protecting teen workers, who are one of the most vulnerable segments of the labor force" (EEOC, 2007).

In September of 2005, Carmike Cinemas, Inc. (Carmike), a large movie theater chain operating theaters in 36 states, agreed to pay $765,000 to settle an EEOC lawsuit. The suit alleged that between February and October 2003, 14 young men working in various positions at Carmike were subjected to unwelcome sexual touching, egregious sexual comments, sexual advances and requests for sexual favors from their male supervisor, a convicted sex offender, (EEOC, 2005).

In December of 2004, the St. Louis District of the EEOC settled a lawsuit against Midamerica Hotels Corp. (EEOC, 2004). In that lawsuit, the EEOC alleged that in one of the company's Burger King locations, the restaurant manager subjected female employees, most of them teenagers, to repeated groping, sexual comments, and demands for sex over a 6-month period. The women complained to their first line supervisors and to a district manager, but no action was taken until the women learned how to contact the corporate office (EEOC, 2004).

SUMMARY AND RECOMMENDATIONS FOR EMPLOYERS

In many of the cases reviewed in researching this paper, alleged victims voiced complaints to various levels of management. In GLC case, it took four years for management to take action to effectively stop the harassing behavior. Management was clearly aware of the alleged harasser's behavior during his first year of employment but, did little more than transfer him to another location where he continued to allegedly harass teen employees for an additional two years before terminating him (EEOC, 2007). In the Midamerica Hotels Corp. situation, lower level managers failed to take action after six months of complaints from many of the female employees at the Peerless Park, Missouri location (EEOC, 2004). Another disturbing element in two of the cases cited in this paper, a convicted sex offender was also the harasser (Drobac, 2006 and EEOC, 2005).

In settling these lawsuits with the EEOC, the agreements that employers enter into with the EEOC generally include an agreement to implement training of all of its employees about sexual harassment. The suggestion that firms step up training in regard to discrimination and harassment is not new (Willman, 2004).

In addition to more extensive training, to avoid the potential problems of putting sexual predators in a position of supervising teenagers, employers should conduct more thorough background checks for supervisory positions involving teen employees. When hiring in any service related occupation, it is becoming more apparent that a criminal background check must be part of the applicant screening process (Socolof and Jordan, 2006).

The EEOC in June of 2006 issued the following suggestions to promote "voluntary compliance and prevent discrimination cases involving young workers":

> *Encourage open, positive and respectful interactions with young workers.*
> *Remember that awareness, through early education and communication, is the key to preventing discrimination or harassment.*
> *Establish a strong corporate policy for handling complaints of discrimination or harassment.*
> *Provide alternate avenues, other than directly to the employee's manager, to report complaints and identify appropriate staff to contact.*
> *Encourage young workers to come forward with concerns and protect employees who report problems or otherwise participate in EEO investigations from retaliation.*
> *Post company policies on discrimination and complaint processing in visible locations such as near the time clock or break area, or include the information in the young worker's first paycheck.*
> *Clearly communicate, update, and reinforce discrimination policies and procedures in a language and a manner that young people can understand.*
> *Provide early training to managers and employees, especially front-line supervisors. Remind them the EEO laws apply to young people as well.*
> *Consider hosting an information seminar for the parents or guardians of teens working for your organization (EEOC, 2006).*

Effective orientation and training of all new employees and the maintenance of effective complaint procedures are critical to an organization's efforts to reduce its exposure to harassment allegations. In addition to effective selection, training and development of supervisory personnel is also especially critical if organizations are to create working environments that will provide young workers with positive first work experiences.

REFERENCES

Armour, Stephanie (2006). Companies try to educate teen workers about harassment, *USA Today*, 10/19/2006, Section: Money, page 3b.

Drobac, Jennifer Ann (2007). I can't to i kant: the sexual harassment of working adolescents, competing theories and ethical dilemmas, *Albany Law Review*, 70 Alb. L. Rec. 675, downloaded 6/15/2007 from http://web.lexis-nexis.com/universe/printdoc.

Drobac, Jennifer Ann (2006). Developing capacity: adolescent consent at work, at law and in the sciences of the mind, *UC Davis Journal of Juvenile Law & Policy*, Winter, downloaded 6/15/2007 from http://web.lexis-nexis.com/universe/printdoc.

EEOC, (2007). GLC restaurants to pay $550,000 for sexual harassment of teen workers by male boss, U.S. Equal Employment Opportunity Commission press release, March 22, 2007.

EEOC, (2006). EEOC offers tips to companies that employ teens, U. S. Equal Employment Opportunity Commission press release, June 20, 2006, downloaded 9/17/2007 from http://eeoc.gov/press/6-20-06.html .

EEOC, (2005). Carmike cinemas to pay $765,000 to settle rare case of male-on-male teen harassment, U.S. Equal Employment Opportunity Commission press release, September 27, 2005, downloaded 8/10/2007 from http://www.eeoc.gov/press/9-27-05.html .

EEOC, (2004). EEOC v. Midamerica hotels corp. d/b/a burger king, No. 4:032CV00107 HEA (E.D. Mo. December 7, 2004). Downloaded 8/10/2007 from http://eeoc.gov/litigation/settlements/settlement12-04.html .

Fineran, Susan (2002). Adolescents at work: gender issues and sexual harassment, 8 *Violence Against Women* 953, 960.

Flahardy, Cathleen (2005). EEOC responds to harassment complaints from teens, *Inside Counsel*, downloaded 6/15/2007 from http://www.insidecounsel.com/issues/insidecounsel/15_168/labor/218-1.html .

National Child Labor Committee, (2007). KAPOW Questions & Answers, downloaded 7/31/2007 from http://www.kapow.org/q_a.htm .

Personnel Journal (1995). Give today's kids a taste of work - - and you'll get better employees tomorrow, Vol. 74, Issue 8, downloaded 6/15/2007 from http://web.ebscohost.com/ehost/delivery?vid=9hid=117&sid=14b7c46e-eceb-46d8-b39a...

Phillips, Jr., John B. (2007). HR's teen worker challenge: employment law pitfalls you may not know about, downloaded 8/10/2007 from http://hrhero.com/audio/teen/ .

Reynolds, Karen C. (2007). Settlement serves as a reminder of EEOC's focus on teenage workforce, *Arizona Employment Law Letter*, Volume 13, Issue 12, downloaded 7/19/2007 from http://web.lexis-nexis.com.

Socolof, Jon and Jordan, Julie (2006). Best practices for health care background screening, *Journal of Health Care Compliance*, September-October, 2006, [[/ 5-10, 61-62.

Willman, Sue (2004). The new law of training, *HR Magazine*, Vol. 49, No. 5, 115-118.

YOUTUBE'S COPYRIGHT WOES

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ABSTRACT

As the Internet evolves, so does the law that regulates it. The Supreme Court decided cases involving music sharing on Napster and Grokster. Now the courts are preparing to look at YouTube, a popular web site for posting video clips. Users post a variety of video clips on YouTube's bulletin board. Many of the clips are homemade, but copyrighted material is also posted. Posting by the owner of the copyright would not create a legal problem. Some of the most popular videos are clips from television shows, like Saturday Night Live. These postings of copyrighted material are generally made by other individuals without permission. On March 13, 2007, Viacom International, Inc. filed a suit against YouTube, Inc. and Google, Inc. for copyright infringement (Viacom International, Inc. v. YouTube, Inc., No. 07-CV2103 (S.D.N.Y., filed 03/13/2007)). In November 2006, Google acquired YouTube for $1.65 billion. Google set aside more than $200 million to defend against its potential legal liability. In addition, 12.5 percent of the shares issued to buy YouTube were placed in escrow for a year "to secure certain indemnification obligations." Google did not elaborate on what those obligations were. The authors believe the escrow was established in anticipation of law suits. It is undisputed that material owned by Viacom has been posted on YouTube. However, YouTube claims that it is protected by the Digital Millennium Copyright Act (DMCA) safe harbor provisions. The DMCA created safe harbors for Internet service providers who host bulletin boards when the providers store or transmit infringing materials posted by users. To be eligible for the safe harbor, the service provider must establish a notice and take down procedure. The service provider must also designate an agent to accept the take down notices and register the agent with the Copyright Office. The authors will summarize the parties' contentions, the facts in the case, and the DMCA safe harbor provisions. The authors will attempt to predict the courts' decisions.

INTRODUCTION

The Internet is changing society and technology is changing both of them. File sharing technology allows users to share files at work and in their personal lives. Napster, Grokster, Streamcast, and host of other P2P file sharing internet servers allow or have allowed users to copy one another's music. YouTube and similar sites allow users to share videos. Video sharing now thrives with faster Internet connections. YouTube and similar services allow users to search for and share videos. YouTube is relatively easy to use. For instance, Michael Miller has authored a handbook for users entitled *YouTube 4 You.* In Chapter 11, he effectively describes how copyright law applies to the posting of videos on YouTube. In Chapter 14, he informs readers about how they

can make money by posting videos on web sites, like Revver and Flixya, which share the revenue with the individual who posts the video.

YOUTUBE CASE

A. YouTube

In 2006, Time Magazine named its *Person of the Year: You.* Time credited YouTube and similar web sites for their decision (Grossman, 2006, at 41). It is relatively easy to post "your" own video and Benderoff describes the steps briefly (Benderoff, 2006). However, not all of the material posted on YouTube and similar sites is original. It is difficult to know exactly how much of the material on YouTube is infringing, but there are various estimates about how much of YouTube's content is copyrighted by non-users. One estimate is that roughly 90% of the material on YouTube violates copyright (Gustin, 2006, at p. 40).

B. Viacom International's Complaint

On March 13, 2007, Viacom International, Inc. announced that it filed a suit against YouTube, Inc. and Google, Inc. Viacom is a fairly litigious company. Ralph Baruch and Lee Roderick provided an interesting history of Viacom (Baruch, 2007). The authors refer to this as the YouTube lawsuit to distinguish it from other suits against Google and/or YouTube. Viacom requested more than $1 billion in damages and an injunction against further copyright infringement. Viacom alleged direct copyright infringement through public performance, direct copyright infringement through public display, direct copyright infringement through reproduction, inducement of copyright infringement, contributory copyright infringement, and vicarious copyright infringement (Complaint, 2007, Counts I-VI at paragraphs 46-89). Viacom also alleges that Google has started a search feature on the Google web site that returns thumbnails and videos that are available on Google, thereby also participating in the infringement (Complaint, 2007, at paragraph 28).

According to Viacom's complaint, it has identified more than 150,000 unauthorized clips of Viacom programming on YouTube, which have been viewed 1.5 billion times (Complaint, 2007, at paragraph 3; *Viacom Files $1 Billion Suit,* 2007). Viacom contends that it is one of the world's preeminent creators, producers, and distributors of programming with legitimate licensed channels for dissemination of its works. Viacom also claims that although YouTube claims to be a forum for users to share their own original work, in reality a vast amount of its video content is Viacom's copyrighted work reproduced without permission (Complaint, 2007, at paragraph 3). Viacom also contends that YouTube actively promotes and induces infringement. It claims that YouTube itself infringes on the copyright by performing the videos on the YouTube Web site and other Web sites (Complaint, 2007, at paragraph 4). Plaintiff contends that YouTube knows and intends that a substantial amount of content consists of infringing copies and that YouTube has done little to prevent the infringement (Complaint, 2007, at paragraph 5). Viacom accuses YouTube of deliberately building a vast library of copyrighted works to bring traffic to the site, improve market share, raise revenue, and increase the value of the enterprise. Plaintiff contends that this is the

cornerstone of YouTube's business plan (Complaint, 2007, at paragraph 5). Viacom alleges that YouTube has actual knowledge of the massive amount of infringement taking place on its web site (Complaint, 2007, at paragraph 36).

C. YouTube's (and Google's) Response

Defendant YouTube admitted "that YouTube encourages users to upload video clips to the service that the users have the right to upload, and that clips uploaded to the service are typically available for viewing free of charge by members of the public who have Internet access." (Defendant's Answer, 2007, at paragraph 30). It admitted that "when a user uploads a video to the YouTube service, the video is copied into a software format, stored on YouTube's computers, and made available for viewing through the YouTube service." (Defendants' Answer, 2007, at paragraph 31). It admitted that "a YouTube user can send another person an email message containing a link to a video clip stored on the YouTube service, and that if the recipient of the email message clicks on the link the recipient will be able to view the video clip on the YouTube service." (Defendants' Answer, 2007, at paragraph 33). In short, YouTube admitted most of the basic factual claims about how the website functions. It, however, denied creating a library of popular copyrighted works. It denied infringing duplication, public performance, and public display. It denied embedding videos. It denied willfully infringing and facilitating or inducing infringement. Further it denied actual knowledge and notice of a massive quantity of infringing videos. It denied that its business plan includes the presence of infringing copyrighted material on its site. It also denied deriving advertising revenues attributable to infringing works.

D. YouTube Compared to Napster and Grokster

Napster and Grokster recognize indirect liability for others' infringement because the businesses encouraged or induced the direct infringement. YouTube does not as obviously induce illegal copying or viewing. The following is a summary of cases involving indirect liability for others' copyright infringement through use of a peer to peer file sharing sites.

Copyright gives the owner of an original work of authorship an exclusive right to make and market copies of its work (Copyright Act, 2005). Copyright's goal is to promote creation and dissemination of original works. Inherent in the recognition of copyright is the protection of two conflicting interests: the public right to access and the private right to exclusive ownership. It is presumed that enabling an owner of a work to reap a financial reward from marketing copies of the work will promote the progress of science and useful arts. The incentive to create more and better works of authorship arises through copyright's marketing reward, purportedly an exclusive or monopoly right.

Three Internet file sharing cases led to the Supreme Court's decision to review the Ninth Circuit's opinion in *Grokster*. They are *Napster*, *Aimster*, and the Ninth Circuit's opinion in *Grokster*. All three cases interpreted the doctrines refined in the aftermath of *Sony*: contributory copyright infringement, vicarious copyright infringement, and the staple article of commerce doctrine.

The Court continued from *Sony*, which had said that if the defendant had knowledge of infringing uses of the technology, then it could be held indirectly liable. The Court added that, even without actual knowledge of specific acts of infringement, a defendant could be liable for indirect infringement if it actively induced infringement. "Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*'s staple-article rule will not preclude liability." (*Grokster*, 2005 at p. 935). The Court found three facts that caused it concern about inducing others to copy. First, the defendants publicly stated that the objective of using the programs was to copy copyrighted works. Second, the defendants did not develop safeguards or deterrents to prevent infringing activity. Third, the defendants profited from the activity by selling advertising (Tehranian, 2005, at 38). The Court held "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." (*Grokster,* 2005, at 936-937).

DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

The YouTube case is distinguishable from the cases mentioned above because of *the application of the Digital Millennium Copyright Act of 1998 (DMCA).* Title II created four "safe harbors" which can be used as defenses. The four "safe harbors" can provide protection for (1) transitory digital network communications in subsection a, (2) system caching in subsection b, (3) information residing on systems or networks at the direction of users in subsection c, and (4) information location tools in subsection d. It does not create separate standards for copyright infringement against online entities, but provides a partial defense to copyright infringement actions. Section 512 (c) limits the liability of service providers for infringing material on websites hosted on their systems.

CONCLUSION

The case involves claims of direct copying, indirect copying, and exceptions to copyright liability for internet service providers. YouTube does not as overtly promote copying of copyrighted material on its website as did the owners of the websites in *Napster* and in *Grokster*. It is difficult to predict what evidence will be produced at trial and what evidence the jury will believe. The authors' crystal ball is no better than the reader's on this point. Will the court believe the plaintiffs' or defendants' versions of what happened? The court will be able to examine the parties' evidence. The "proof" can be significantly different from the pleadings of Viacom and YouTube!

The authors predict that Viacom and YouTube will try to settle the case when the trial date nears. However, YouTube seems to believe that it has the "upper hand" and may not offer an attractive package to Viacom.

REFERENCES

1976 Copyright Act, 17 U.S.C. § 106 (2005).

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

Baruch, R. with L. Roderick (2007). *Television tightrope: How I escaped Hitler, survived CBS, and fathered Viacom.* Los Angeles, CA: Probitas Press.

Benderoff, E. (2006). *You, Too, Can Upload Videos to YouTube,* Chi. Trib., Oct. 21, 2006, at Business and Financial News.

Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302, 304).

Defendants' Answer and Demand for Jury Trial, Viacom Int'l, Inc. v. YouTube, Inc., No. 07-CV2103, 2007 WL 775611 (S.D.N.Y. 2007).

Digest, The Houston Chronicle, 3 Star Edition, Nov. 15, 2006, at Business, p. 1.

Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 105th Cong., 2d Sess. Oct. 8, 1998, codified in 17 U.S.C. §§ 1201 *et seq.* (2005).

Driscoll, M. (2007), Comment, *Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?*, 6 J. Marshall Rev. Intell. Prop. L. 550 (2007).

England Soccer League Files Suit Against Google over YouTube: Football Ass'n Premier League Ltd. v. YouTube, Inc., No. 07-3582 (S.D.N.Y. complaint filed May 4, 2007), 05/31/2007 Class Action Law Monitor 3 (May 31, 2007).

Grossman, L. (2006). *Person of the Year: You,* Time, Dec. 25, 2006, at p. 41.

Gustin, S. (2006). *YouTube's Got a Fat Idea of Itself,* N.Y. Post, Sept. 21, 2006, at p. 40.

In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

Kohler, D., Comment, This Town Ain't Big Enough for the Both of Us—Or Is It? Reflections on Copyright, the First Amendment and Google's Use of Others' Content, 2007 Duke L. & Tech. Rev. 5 (2007).

Lessig, L. (2007). "Make Way for Copyright Chaos," The New York Times, March 18, 2007, Section 4; Column 1; Editorial Desk; Pg. 12.

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, 380 F.3d 1154, 1160 (9th Cir. 2004), *remanded*, 545 U.S. 913 (2005)

Metro-Goldwyn-Mayer Studios, Inc. *v. Grokster, Ltd.,* 545 U.S. 913 (2005).

Miller, M. (2007), *YouTube 4 you.* Indianapolis, IN: Que Publishing.

Part of YouTube Price in Escrow Account for Year, The Toronto Star, Nov. 15, 2006, at F02.

Plaintiffs' Complaint, Viacom Int'l, Inc. v. YouTube, Inc., No. 07-CV2103, 2007 WL 775611 (S.D.N.Y. 2007).

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

Tehranian, J., *Copyright Liability After Grokster*, California Lawyer, Nov. 2005, at 37.

U.S. Copyright Office Summary, The Digital Millennium Copyright Act of 1998, December 1998.

CHALLENGES FROM A SURVEY OF CHINESE BUSINESS STUDENTS: A THREE YEAR PRELIMINARY PROJECT ON ENRON'S EFFECTS

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ABSTRACT

This paper details an exploratory three year survey of the ethical attitudes of Chinese graduate business (MBA) students. The findings show that Chinese students know a few details about the Enron controversy, but the knowledge is limited. Further, the knowledge has shown little affect in the attitudes of the students. The paper also details many of the difficulties of survey research in China, such as language barriers, cultural barriers, systemic barriers, and extreme test anxiety. It concludes by discussing the implications for further research in this area.

INTRODUCTION

While it seems hard to imagine, the future of China as a major economic power will only increase. By 2016, China's workforce age population will be over 1 billion (SinoCast China Business Daily News, 2007). By 2033, China's overall population will exceed 1.5 billion (Xinhua News Agency, 2007).

In exports, China's economy has dominated the headlines. China's trade surplus in 2006 should exceed $130 billion, breaking the record from 2005 (Browne, 2006a). China's trade surplus in 2006 grew 55% in one year (Batson, 2006). By itself, Wal-Mart is the sixth largest export market for Chinese goods with annual total of $18 billion (Elliott and Powell, 2005).

The MBA students are not just the leaders of China's future industries, but are poised to be the leaders of the world's biggest economy in the future. Wang and Lin's (2003) survey found that 63.9% of Chinese students want to work for a foreign enterprise after graduation. Working for a foreign enterprise brings not only higher wages, but higher social status within China. As of August, 2006, 422 of the Fortune 500 have factories in the Pudong New Area, a free enterprise zone near Shanghai (Ping, 2006). These are the world's future business leaders.

This paper details an exploratory three year survey of the ethical attitudes of Chinese graduate business (MBA) students. The findings show that Chinese students know a few details about the Enron controversy, but the knowledge is limited. Further, the knowledge has shown little affect in the attitudes of the students. The paper also details many of the difficulties of survey research in China, such as language barriers, cultural barriers, systemic barriers, and extreme test anxiety. It concludes by discussing the implications for further research in this area.

Enron Controversy

The demise of Enron would rival any soap opera for the deceit, corruption, and disaster. The troubles began on November 9 2001, when Enron admitted to over-reporting it earnings by $586 million (Feeley, 2002). Less than a month later, Enron filed for bankruptcy protection on December 2, 2001.

Kenneth Lay, former CEO of Enron, died on July 5, 2006, after being convicted of six counts of fraud and conspiracy (McLean and Elkind, 2006). His co-defendant, Jeffrey Skilling was convicted of 18 criminal charges (Farrell, 2006).

Do Chinese business students know about the Enron controversy? If so, how much do they know? Does that knowledge affect their views toward business? This survey is a preliminary attempt to find the answers.

Survey of Recent Literature

Omitted

Method

Three convenience samples of graduate students were surveyed over a three year period. The students attended a private southwestern American university's Master in Business Administration (MBA) program held in Tianjin, an industrial city in the northwest of China. The program lasted 12 months, and the students completed the courses as a set. The students were administered the survey during the same course in three different cycles. As a result, there should have been no overlap of students between groups. The first group was surveyed in November, 2003 (n=40). The second group was surveyed in August, 2004 (n=39). The third group was surveyed in November, 2005 (n=50).

Of the 129 respondents, they were almost evenly split between males and females. About a third were married, 75% were full time employees while taking the MBA program, and they were overwhelmingly young, with 80% in their 20s. One demographic difference which was a surprise was tobacco use. China has 350 million smokers, more than any other nation (Fairclough, 2007). Unlike Americans, the Chinese smokers are almost all male (Fairclough, 2007). Within our samples, none of the women reported tobacco use.

Discussion

We started by examining students' knowledge of the Enron controversy. We asked three questions to explore their knowledge. Students were asked to select the former CEO of Enron. The choices were: Kenneth Lay, William Sanders, Kenneth Norton, William Bennett, and Paul O'Neil.

Next, we asked students to complete this sentence: "Enron got in trouble for?" The choices were: false financial reports, hiring illegal immigrants, polluting rivers, refusing to pay taxes, unsafe working conditions. Finally, we asked to choose Enron's primary industry. The choices were: Oil and electricity; medical supplies; real estate development; sporting goods; clothing-apparel; and agriculture.

The results were not as promising as we had hoped. See Table 1 for complete results. The overwhelming majority of students knew that Enron submitted false financial reports. Over half the students knew that Enron was involved in oil and electricity. However, questions about the specific

individuals were disappointing, not significantly different from random chance. Obviously, the students' understanding of Enron is shallow.

Table 1. Correct Answers

Question and Correct Answers	Number	Percentage
Who is the former Chief Executive Officer of Enron? (Lay)	25	19.38%
Enron got in trouble for: (False Financial Reports)	120	93.20%
Enron was primarily involved in what industry? (Energy)	76	58.91%
Answered all three questions correctly:	12	9.30%

We wanted to see if students were confident in their knowledge of Enron. We asked students to describe their personal understanding of the Enron problem. See Table 2 for complete results. Fewer than 7% of students considered themselves familiar with Enron. Twice as many students (18.5%) indicated they either knew very little, or had never heard of Enron. While many people in society paid passing attention to this controversy, for graduate business students, this concerned us.

Table 2. Self-reported knowledge

How knowledgeable are you about the events of the U.S. company called "Enron"?	Number	Percentage
I am very familiar with it	9	6.98%
I know a little about it, but not many details	95	73.64%
I don't know anything about it, but I have heard of Enron	19	14.73%
I've never heard of Enron	5	3.88%

Attitudes/Ethical Beliefs

We were curious as to whether the Chinese students thought Enron was indicative of normal business practice, or was just an aberration. We asked students if the only difference between the executives and Enron and those at most other big companies was that those at Enron got caught. A slight majority (52%) agreed or strongly agreed. Less than a third (28.69%) disagreed or strongly disagreed. Nearly two in ten had no opinion. The findings support, but do not prove that Chinese students thought Enron's behavior to be more typical of American businesses.

We also were curious whether Chinese students would avoid working for unethical businesses. We asked if they would you want to work for a company that had been accused of unethical business practices? Those who responded positively were just over 10%. The unsure students were just under a quarter of the respondents. The strong majority (65%) said they did not want to work for a company accused of unethical behavior. The students seem to have made a strong position for ethical behavior at least when regarding their employment

The Language Barrier

One problem which we experienced was the language barrier. While many graduate students spoke Chinese, they often lacked an understanding of the culture and customs, as well as the educational traditions. Past research has found many MBA students lack enough language skills to participate in a class discussion (Du-Babcock, 2006). Du-Babcock (2006) found nearly 75% of Chinese MBA students had limited English proficiency. Even those who can translate have difficulty with embedded cultural context in language (Du-Babcock, 2006).

While the Chinese students were proficient in translating, much of the information was lost. They were not familiar with educational terminology used by Americans. For example, while this was an MBA program, over 30% percent (39/127) of the students said they were not "business" majors. In the November, 2005 sample, 60% (30/50) did not describe themselves as graduate students. Clearly, there is a problem which translation alone cannot solve.

The Cultural Barrier

The classroom is a reflection of Chinese society in general, which emphasizes unequal power structure (such as ruler and subject) to keep stability (Rodrigues, 1997). Chinese culture makes teachers authority figures and students are expected to be passive learners (Rao, 2006). Hofstede & Bond (1988) described this as "Confucian Dynamism." Confucianism has greatly influenced the Chinese learning culture (Flowerdew, 1998; Oxford, 1995). Offering your opinion is considered bold and immodest (Holmes, 2004) if not egotistical and selfish (Kennedy, 2002).

The Chinese students only shared their views if they felt certain they were correct (Thompson, 2000). They expected the classroom to be a very formal environment (Holmes, 2004; Watkins, 1988). As such, they were uncomfortable when asked their opinions. The Chinese educational system emphasized one correct answer, which must be learned by memorization from the masters, and repetition (Rao, 2006; Holmes, 2004; Hammond and Gao, 2002; Thompson, 2000; Thompson and Gui, 2000; Carson, 1992; Redding, 1980; Cragg, 1954). Chinese students expected issues to be straightforward, without dispute (Watkins, 1991). They tended to be passive in the classroom (Kumaravadivelu, 2003). They did not like confrontation among their peers (Carson and Nelson, 1996) or with their professors (Liu, 1998). The tradition of repetition stemmed from the teaching of writing Chinese characters, which must be practiced until they were perfect (Rao, 2006).

Extreme Test Anxiety

China's long tradition of education emphasized examinations. Over a thousand years ago, China used an imperial civil service exam (ke ju) to select government officials (Rao, 2006). The ke ju was an important (if not the only) way for a Chinese family to raise their income and social status (Rao, 2006). The ke ju was replaced in modern times with the National Matriculation Examination, which affected the student's career for their lifetime (Rao, 2006). The pressure on students was very strong. Culture motivated the people and failure reflected not just on their students, but on their entire family and social group (Rao, 2006).

While administering the surveys, the students panicked. They were worried they would not have "the correct" answer. Chinese people (especially the young) were not expected to give their opinions (Yun, 1994). To avoid panic in the classroom, students collected the surveys, ensured no one had put names on them, and mixed them before giving them to the proctor.

The Systemic Barrier

The Chinese educational system made survey research difficult. Large scale surveys required cooperation and permission from authorities, which rarely occurred (Thompson & Gui, 2000). The dramatic political and social changes clashed with China's new openness. Chinese workers expected to get permission for any new or novel action. Often this took months. After the reforms, there was no one to ask for the permission. Without the approval of someone in the educational hierarchy,

many would not participate. This prevented a lot of wide scale survey research, especially related to ethics (Smith, 2004). To compensate, surveys used students from Hong Kong (Leung and Wong, 2001; Thompson, 2000; Thompson and Gui, 2000) or expatriates (Lim, 2001; Patel et al, 2002; Tan and Snell, 2002) to represent the views of those in mainland China.

Implications for Further Research

Several lines of future research are possible. These results should be viewed as preliminary because of the small sample size. Groups based on demographic factors were too small to draw any significant comparisons. The findings need to be replicated with a much larger sample involving multiple schools. With a small sample, breaking up the sample into demographic groups becomes even more troubling. We have previously mentioned the difficulty of acquiring a large sample in the Chinese student community.

The scope of students being surveyed also should be expanded. A diversity of majors should be examined in future research.

Ethics differ across cultures, even if within the same country (Alas, 2006). Future research should examine the cultural differences within China.

Another line of inquiry should explore the effects, if any, of business ethics courses. Does the business ethics course indoctrinate students into certain ethical views or not? What topics are presented to Chinese business students, and do these concepts really translate into similar ideas to the Chinese students? In America, taking an ethics course had not translated into changed ethical views (Ludlum and Moskaloinov, 2004). As ethical studies expand in China, we should examine the effect of business ethics teaching on the beliefs of students.

ACKNOWLEDGMENTS

The authors wish to express their thanks to Lea Ann Hall and Kristi Fields for their many hours of input on the survey results. The authors would also like to thank Jenean Jones for her assistance with the spreadsheet calculations. Any errors or omissions are solely that of the author. A previous draft of this paper was presented to Southern Academy of Legal Studies in Business, March 9-11, 2006, San Antonio, Texas

REFERENCES

Omitted

COMPLAINTS AGAINST OKLAHOMA ATTORNEYS: FIFTEEN YEARS OF ETHICS IN PRACTICE

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ABSTRACT

This paper examined formal and informal complaints against attorneys during the most recent fifteen year period (1989-2003). The data suggest that the growth of attorneys in Oklahoma has been staggering. However, the per capita amount of complaints is fairly constant. Examination of the complaints reveals many facts of interest to the legal practitioner. First, the most common complaint is neglect, one which can easily be avoided. Second, family law and criminal law seem to draw the most complaints. Finally, more experienced attorneys receive far more complaints that their younger counterparts, which again reinforces the main problem is neglect, not poor quality representation. The findings are consistent with those in other states. The paper concludes with implications for further research in this area.

INTRODUCTION

In 2004, Professors Jenkins and Stowe reported on their examination of nine years of reports of ethical complaints against Texas attorneys. The present paper is an attempt to replicate that examination using Oklahoma attorneys as a sample. Before reporting on the complaints against Oklahoma attorneys, a brief summary of the procedure is warranted.

Oklahoma has adopted the rules of professional conduct used by the American Bar Association in 1983. For example, conviction of a crime demonstrating moral unfitness shall be grounds for discipline. But discipline is not limited to criminal behavior of attorneys. In fact, being disciplined in another jurisdiction and not reporting it to the state bar is grounds for discipline. Any action, whether done in a professional capacity or otherwise which harms the legal profession can be subject to discipline. The grounds for discipline are meant to be broad, and not all-inclusive.

After the General Counsel makes an investigation, the matter is referred to the Professional Responsibility Commission, who decides whether formal proceedings are needed. If so, a formal allegation is made and forwarded to the respondent attorney. The respondent lawyer must respond to the allegations. Deliberate misrepresentation in the response is grounds for discipline. In addition, failing to respond within twenty days is also grounds for discipline.

Hearings concerning the complaints are handled by the Professional Responsibility Tribunal. If the respondent attorney is found to have violated the professional rules, he/she faces discipline, which can consist of a private reprimand, a public censure, suspension, or disbarment.

Costs of the investigation and hearing(s) are surcharged against the disciplined lawyer with rare exception. Failure to pay the costs are again grounds for discipline, resulting in automatic suspension until payment is made.

Data on complaints against Oklahoma attorneys is kept by the General Counsel of the Oklahoma Bar Association. The data is accumulated and reported annually in Oklahoma Bar Journal. The data examined for this paper covers the most recent fifteen year period, from 1989 to 2003.

In the past fifteen years, the population of Oklahoma has increased 11.5%. During that same period, the population of Oklahoma attorneys has increased nearly 24% from 12,222 to 15,062. In other words, the population of attorneys is growing more than twice as fast as the population.

The numbers are surging and the problem is not unique to Oklahoma. Texas has seen the population of lawyers per capita more than double since 1970. Specifically, Texas has experienced attorney population growth, from 27,855 in 1976 to 61,638 in 1996, a 121% increase over two decades.

The problem is national. The number of practicing attorneys in America increased from 169,489 in 1948 , to 542,205 in 1980, to over 1,2000,000 today. The growth rate of lawyers is more than double the rate of any other profession. New York lawyers have grown at 26 times the rate of growth of the population. If current trends continue, by the year 2188 lawyers will outnumber people in America. The explosive growth of lawyers has caused an undiplomatic columnist to comment "America's lawyer population is breeding like maggots."

Ironically, while the growth in the number of attorneys has surged, the number of complaints against attorneys has slowly declined, at least in Oklahoma. The highest year was 1997, which resulted in 370 complaints. The lowest year was 1989, which saw only 244 complaints.

This could be explained by several factors, some positive, some negative. On the positive side, perhaps attorneys are becoming more ethical and/or competent, resulting in fewer complaints. On the negative side, there are two different explanations. First, it is possible that the public expects unethical behavior of attorneys, so bad conduct does not result in complaints. Second, it is possible that the public perceives that complaints would do little. Since the State Bar is run by attorneys, the public perceives that attorneys will not condemn each other. Since these three factors are not mutually exclusive, all may influence the decline in the number of bar complaints.

During the fifteen year period which this paper examines, the likelihood of an attorney getting a bar complaint is one in ten over the course of a year. This does not take into account that most attorneys who receive bar complaints get multiple complaints.

Many of the complaints made do not result in discipline. Many simply lack merit, and the records indicate 75% of the complaints are dismissed without imposing any kind of discipline. The likelihood of getting a complaint which results in discipline is one in forty. The likelihood of getting the ultimate sanction, disbarment, is very unlikely, as this result occurs to less than 1/10th of 1% of the bar membership each year.

The types of violations resulting in discipline showed both worry and promise. Overwhelmingly, the greatest number of complaints were based on neglect, which ranged from 30%-47% of the total during the fifteen year period. Neglect was always the biggest category of complaints, usually double the next largest category. The worry and he promise is that these complaints are the easiest to avoid. If the biggest problem was incompetence or stealing money from clients, they would be difficult and expensive to remedy. Since most complaints involve neglect, there is hope to remedy the bar.

The Oklahoma Bar Association also breaks down complaints by the area of law resulting in the complaint. Family law drew the most complaints every year except one. Litigation and criminal law are second and third respectively. Employment law and corporate/commercial law drew the fewest complaints.

The Bar also reports complaints by the number of years in practice. Ironically, the greatest complaints are not against the newest attorneys struggling to learn, but are from the most experienced attorneys. Since most complaints involve neglect, an easy theory is that older attorneys with an established clientele are busy and often neglect their clients. Younger attorneys, with a smaller client base, have time to communicate with their clients, and avoid the largest category of complaints.

There are several lessons to be taken from this analysis. First, few attorneys receive ethical complaints of substance. Second, most of the complaints can be easily remedied by persistence and effort of individual attorneys.

The report has many implications for future research. Attorneys from different jurisdictions should be compared to see if there are regional/state differences. If distinct sub-groups of attorneys can be isolated, perhaps remedies can be made to decrease the attorney complaints for that group.

Attorneys, being self-regulated, must pay special attention to allegations of wrongdoing, no matter how severe. By analyzing the pattern of complaints, and identifying those areas in need, the bar can better serve it members, who can better serve the public.

References available on request

SOX AS SAFEGUARD AND SIGNAL: THE SARBANES-OXLEY ACT OF 2002 IN TRANSACTION COST ECONOMICS TERMS

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ABSTRACT

Recent corporate scandals at Enron, Tyco, and MCI highlight the issue of opportunistic management behavior. The U.S. Congress responded to these scandals by passing the Sarbanes-Oxley Act of 2002 (SOX). SOX imposed additional management responsibilities and corporate operating costs on companies trading under SEC regulations. This paper examines three options for corporations responding to SOX: compliance with SOX, taking a company private, or moving to a non-SEC-regulated exchange. The paper then uses Transactions Cost Economics (TCE; Williamson, 1985) to develop propositions regarding which options firms may select and what market signals may result from the choices made. The paper proposes that SOX materially increased the transaction costs. Some firms may be able to reduce overall expenses if internalization is a viable option in the face of needs for stock liquidity and access to capital markets. Smaller firms with access to efficient debt markets may be best served by internalization if they believe the threat of moral hazard is remaining the same or decreasing over time. However, firms not willing to internalize may want to consider the signaling costs of moving outside of SEC regulation on the markets they still face.

HEDONIC DAMAGES: LEGAL REVIEW AND ECONOMIC ISSUES

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ABSTRACT

As litigation becomes more complex, finance, economics and accounting professionals can provide increasingly valuable services to attorneys. Economics and finance professionals may help calculate hedonic damages, i.e., damages for loss of the enjoyment of life. This paper presents a legal review of the use of claims for hedonic damage and methods of valuation. In the majority of states there has not yet been an appellate decision on whether to allow expert economic testimony or other methods for valuing hedonic damages. However, several states do allow recovery of hedonic damages, separate from damages for pain and suffering and disability. Case analysis will determine what courts consider in determining the admissibility of such evidence. Finally, some economic issues of allowing recovery for hedonic damages will be discussed.

ASSESSING THE IMPACT OF SARBANES-OXLEY ON CORPORATE GOVERNANCE

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ABSTRACT

The Sarbanes-Oxley Act(SOX) is the most significant new federal regulatory statute affecting corporate governance since the Securities Acts of 1933 and 1934. Corporate scandals involving Enron, WorldCom and others had shaken public confidence in American capital markets. The need for reform led to the passage of SOX which was signed into law on July30, 2002.

This paper reviews and assesses Sarbanes-Oxley's attempt to improve corporate governance. Some of SOX's reform strategies are: (1) Requiring new (and expensive) internal financial control systems, and also requiring separate audits to make sure they are effective. (2) Established new independence requirements for corporate board audit committees. (3) Prohibiting loans from the corporation to its management. (4) Requiring new attestation statements and signatures by Chief Executive Officers (CEO)s and Chief Financial Officers (CFO)s for reports to the Securities Exchange Commission. (5) Increasing penalties for fraud. This paper will apply a cost-benefit analysis to determine the effectiveness of these reforms.

REGULATION RECONSIDERED: THE CONSTITUTIONALITY OF THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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ABSTRACT

In 2002 Congress passed the Sarbanes-Oxley Act (SOX), a reform statute intended to restore confidence in American capital markets following corporate and accounting scandals. SOX created a new regulatory agency for the accounting profession, the Public Company Accounting Oversight Board (PCAOB). In 2006 the PCAOB was sued by plaintiffs who claimed that the PCAOB violated the Constitution. If the plaintiffs are successful, the PCAOB would cease to exist, several key provisions of SOX would cease to operate, and the entire federal regulatory infrastructure would be called into question. This paper analyzes this constitutional challenge. It will help business managers and students understand the legal issues involved in government regulation, including constitutional restraints on the powers of regulatory agencies.

INTRODUCTION

In the wake of corporate scandals involving Enron, Tyco, Arthur Anderson, and others, Congress passed the Sarbanes-Oxley Act (SOX) of 2002, the most sweeping reform of securities law since the 1930s. SOX, and especially the Public Company Accounting Oversight Board (PCAOB) which the Act created, have had a significant impact on corporate management and on the accounting profession. The PCAOB is the first federal agency regulating public accounting. In addition, SOX imposed new ethics and reporting requirements related to corporate governance and internal corporate financial controls.

Many of SOX's reforms are threatened by a lawsuit that was filed in U.S. District Court on February 7, 2006: Free Enterprise Fund (FEF) v. The Public Company Accounting Oversight Board (PCAOB). This lawsuit challenges the constitutionality of the PCAOB, a central feature of SOX. If it is successful, the PCAOB would cease to exist, and many of the reform provisions of SOX, including its controversial requirement for internal control audits (Section 404) would also terminate.

This case is critical to securities regulation and to the public accounting profession. It is also critical to the system of business regulation in the United States. The PCAOB enjoys the status of being a private, not for profit corporation that is invested with regulatory power. This is the same status enjoyed by many Self Regulatory Organizations (SROs). These include such entities as the New York Stock Exchange and the National Association of Securities Dealers (NASD). If the FEF legal challenge to the constitutionality of SOX is successful, it would by implication also call into

question many of the SROs that currently function as part of the federal regulatory infrastructure.

The importance of this case is reflected in the prominence of counsel representing the parties. The FEF is represented by Kenneth Star, a former federal Court of Appeals judge and special prosecutor. The PCAOB is represented by the General Counsel of the Securities and Exchange Commission (SEC) and is supported by amicus briefs from seven former Chairmen of the SEC. This important case will affect the future of corporate governance and public accounting.

EVALUATION OF THE CONSTITUTIONAL ARGUMENTS

The FEF made three claims of unconstitutionality relating to the PCAOB. Judge Robertson ruled against the FEF on all three counts. This section of the paper will evaluate the parties' arguments and Judge Robertson's decision.

Count 1 of the FEF lawsuit challenged the PCAOB on the basis of separation of powers. The Constitution, Article II Section 1, states that "The executive Power shall be vested in a President of the United States of America". Section 3 states that the President "shall take Care that the Laws be faithfully executed". The FEF argued that the PCAOB was so independent that the President had no control of it, thus violating Article I. This lack of control, or excessive independence of the agency, it was argued, resulted because the PCAOB, an independent agency, was itself appointed by another independent agency, the SEC. Moreover, the FEF claimed that removal of PCAOB Board members could only be done for willful, not negligent misconduct, further increasing the PCAOB's independence.

Judge Robertson rejected those claims, holding in effect that independence twice removed still left enough control in the President to pass constitutional muster. Judge Robertson's decision is certainly tenable, but the question remains: is there a limit on how independent an agency can become before it is completely outside of Presidential control? Congress established numerous independent agencies whose head or heads serve fixed terms, removable for cause but not at the pleasure of the President. This allows these independent agencies to be relatively free of political influence. In these cases the President retains a modicum of control because he can remove agency heads for cause.

But the PCAOB is doubly insulated from executive control. The President can not remove Board members even if he has proper cause. SOX provides that only the SEC Commissioners can do that. For the President to remove a PCAOB Board member, he or she would have to request the SEC Commissioners to act; if they did not act, the President would have to prove that their refusal to act was itself just cause to remove those SEC Commissioners. The President would then have to appoint new SEC Commissioners who would follow the President's directives. But, these new Commissioners would need to be confirmed by the Senate. In a situation (such as the present one) in which the Presidency was controlled by a different political party than the Senate, this might be an insurmountable obstacle. In this situation, where the regulatory agency is doubly insulated from Presidential control, the agency might be said to be ultra independent. Does this attenuation of the President's power to control the agency deny the President his constitutional right and duty to "take Care that the Laws be faithfully executed" as provided by Article II? This argument was not well

developed by the plaintiffs. However, as the case progresses to the appellate level, it might be better articulated.

If a conservative Supreme Court wished to slow the drift towards a regulatory state, it could hold that ultra independent agencies like the PCAOB violate the President's Constitutional powers enumerated in Article II.

Count 2 of the FEF lawsuit was a challenge based on the Appointments Clause. This is the FEF's strongest constitutional argument. In order to survive a constitutional challenge based on the Appointments Clause, the PCAOB Board members must be found to be "inferior officers" appointed by the "head" of a "department". A strong case can be made that the Board members are inferior officers because they are subordinate to the SEC. However, the Supreme Court has never determined whether an agency like the SEC may be considered a "department" under the Appointments Clause, and the Court has also never determined whether a collectivity like a commission or board can be a department "head".

This uncertainty presents an opening for the FEF to challenge Sarbanes-Oxley's compliance with the Appointments Clause. Judge Robertson's finding that the SEC should be considered a department is certainly justified based on the implication of the Freytag case and also based upon the practical consideration that a contrary finding would cause great upheaval in the federal regulatory infrastructure.

However, Judge Robertson's finding that the SEC Commissioners were not the head or heads of the SEC seems, at least to this author, to be questionable. The SEC Commissioners as a collectivity act as a reviewing tribunal for PCAOB disciplinary actions, they approve new rules proposed by the PCAOB, and they can, collectively, remove PCAOB Board members for cause. The SEC Commissioners certainly act collectively as that agency's head. The fact that the Commissioners do not select their Chairman seems to this author a small circumstance in the totality of circumstances relating to who controls, or heads the agency.

Judge Robertson avoided the consequence of his finding that the PCAOB Board members were not properly appointed, by a bit of legal judo: he held that this infirmity had caused no harm to the plaintiffs and so he rejected their summary judgment argument based on this point.

When the Supreme Court reviews this case, it should not sidestep this issue. A clarification from the Court as to what is meant by "department" and whether a department can be headed by a collectivity will provide welcome clarification and will dispel the uncertainty that now exists in the law. If the Court holds that a collectivity might be considered a "head", it will need to issue criteria to determine when a particular collectivity can be considered a "head".

Count 3 of the FEF lawsuit was a challenge based on the Non-Delegation Doctrine. The plaintiffs seemed to recognize that this was their weakest argument, as established precedent has made it clear that where Congress has restricted its delegation of legislative authority with intelligible standards, the delegation passed constitutional muster. SOX provides substantial restriction on the PCAOB's rule-making authority. Perhaps the plaintiffs were inviting eventual Supreme Court review in which the non-delegation doctrine will be reconsidered. It can certainly be argued that minimal restriction can become so attenuated as to not be any real restriction at all.

CONCLUSION

The FEF lawsuit challenging the constitutionality of the Public Company Accounting Oversight Board raises fundamental questions regarding government regulation in the United States. The core question is: have some ultra-independent regulatory agencies like the PCAOB become too independent and powerful, in violation of Constitutional limitations?

Very early in our history Congress realized that administrative agencies were necessary to do much of the work of government. In order to operate efficiently, these agencies typically conflate legislative, executive and judicial power in one entity. But this violates the separation of powers principle, leading Justice Jackson to complain in 1952 that agencies "have become a veritable fourth branch of government".

The Administrative Procedure Act (APA) and oversight by the traditional branches of government can curb regulatory agency abuses. However, in some cases these checks on agency power are very limited. This leaves some agencies with a vast reservoir of unchecked power. Is such power excessive? How much power is too much? Have we progressed too far along the path to a regulatory state?

If the Supreme Court ultimately decides this case, it will have the opportunity to recalibrate the balance of power between the regulators and the regulated. The Court will have the option of moving in one of two directions.

If the Court chooses to move in the direction of reducing the power of regulatory agencies, it can affirm Judge Robertson's holding that the Constitution's Appointments Clause is violated by SOX. This would terminate the PCAOB and PCAOB-related portions of SOX such as Section 404, which requires internal financial control systems and reports. There is certainly much pressure from the business community to do exactly that. Another approach the Court could take would be to take SOX at its plain meaning and to hold that the PCAOB was indeed a private, not for profit corporation; it could then find it improper for such a private corporation to exercise substantial government regulatory authority. This would not only stop the PCAOB; it would also call into question the legality of many similarly organized Self Regulatory Organizations (SROs) like the New York Stock Exchange. A third approach the Court could take, if it wants to reduce regulatory agency power, would be to hold that the separation of powers doctrine is violated by ultra-independent agencies like the PCAOB, which are not subject to effective Presidential control. Such a holding would be consistent with the current administration's theory of a "unitary executive" in which all executive power is centered in the President.

This is how the Supreme Court might hold if it wants to re-calibrate the balance of power between regulators and regulated in favor of the regulated. These holdings are entirely logical and supportable, but they would shake the current infrastructure of federal government regulation to its core.

On the other hand, the Court could take a pragmatic approach. Such an approach would recognize the vital role that regulatory agencies and SROs play in our securities markets and in our economy. The Supreme Court tends to be mindful of the impact its decisions will have. If the Supreme Court chose pragmatism, it would be following the famous dictum of Justice Oliver Wendell Holmes, who wrote "the life of the law is experience, not logic". A pragmatic Court would hold that agencies like the SEC are "departments" under the Appointments Clause, and their "head"

may be constituted in a collectivity. The Court could fashion a holding to the effect that where the collectivity exercises effective overall control of the agency, that collectivity is the "head" of the agency under the Appointments Clause. The Court could also confirm the constitutional legitimacy of government regulatory authority exercised by private not for profit corporations so long as they were supervised and controlled by proper constitutional officers. Such a pragmatic holding would confirm the present infrastructure of federal government regulation.

It will be most interesting to see whether the Court chooses logic (and perhaps ideology) or pragmatism.

MANAGING QUALITY OF LIFE IN COMMUNITIES: THEORY AND APPLICATIONS

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ABSTRACT

This paper posits that one experiences a sense of wellbeing (quality of life (QOL)) when the needs one feels are appreciably reduced. Local public officials and managers can promote policies and take actions to create an environment where these needs are addressed or the status is achieved. Based on an empirical analysis of quality of life perceptions among non-metropolitan residents in Illinois, this research offers guidelines for managing QOL perceptions at the community level. Specifically, satisfaction with K-12 education and basic medical services play a prominent role in influencing QOL perceptions. In summary, the paper not only highlights the meaning of QOL, but also shows how it could be managed.

A FRAMEWORK FOR INTEGRATING APPLIED ETHICS INTO A BUSINESS COURSE

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ABSTRACT

Since learning about ethics in an undergraduate academic program occurs both in and out of the classroom, students can engage in a dialogue of ethical issues without a distinct course in ethics. Two instructors at Eastern Oregon University have collaborated to develop a framework that can incorporate an ethics component into any business course. Their effort introduces students to a threefold framework for applying ethics: knowing what's important; sharing what's important; and action with integrity. This framework helps students to articulate what's important to them; to recognize what's important for others, whether in school, at work or in the community; and to understand the need for action that is consistent with what's important to themselves and others.

This framework and ethical dialogue helps students to recognize the knowledge, tools and resources they already have to address ethical issues, and also demonstrates the need for continued development of ethical decision making skills by knowing and sharing what's important followed by action with integrity.

This paper briefly describes a framework for applying ethics and details how it can be integrated into a business course.