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WHEN A LIE IS THE TRUTH: PANDERING CHILD PORNOGRAPHY

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ABSTRACT

In 2003 Congress enacted the Prosecutorial Remedies and Other Tools against the Exploitation of Children Today Act to discourage trafficking in child pornography. The Act contained, among other provisions, a pandering provision that prohibited offers to provide, or requests to obtain, child pornography. Against a challenge of overbreadth and vagueness, the Supreme Court in United States v. Williams held that the pandering provision did not prohibit a substantial amount of protected speech, and that the language of the statute, along with its intent requirement, created a sufficiently clear fact-based scheme. In reaching its decision, the Court focused on the illegality of the materials described in the pandering provision as justifying the limitations on speech. This article argues that rather than focus on the nature of the materials underlying a proposed transaction, the Court could have rendered a more persuasive decision had it instead focused on the nature of the speech itself.

THE U.S. SUPREME COURT AND HR DECISION MAKING

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ABSTRACT

Recent terms of the Supreme Court have produced a number of important decisions impacting decision making with respect to an organization's human resources. For example, in the 2007/2008 term, the Court issued important decisions involving age discrimination and retaliation. These decisions have been characterized as expanding an employer's burden of proof in responding to allegations and potentially increasing the cost to defend themselves in responding to allegations of discrimination (Smith, 2008-B & AHI's Employment Law Today, 2008). The purpose of this paper is to examine the Court's decisions in these two areas.

INTRODUCTION

In the 2007/2008 term, the Court issued important decisions involving age discrimination and retaliation. These decisions have been characterized as expanding employers' burden of proof in responding to allegations and potentially increasing the cost to defend themselves in responding to allegations of discrimination (Smith, 2008-B & AHI's Employment Law Today, 2008). The purpose of this paper is to examine the Court's decisions in these two areas and to present policy and practice suggestions for organizations to reduce their exposure to litigation and cost in the future.

With respect to the purpose of this study, four cases will be examined. Three cases deal with age discrimination under the Age Discrimination in Employment Act (ADEA), Meacham v. Knolls Atomic Power Lab, and Federal Express v. Holowecki et al., are most relevant. The Gomez-Perez v. Potter case also involved the ADEA, but the key issue in the case was whether discrimination based on age includes retaliation under the ADEA. The CBOCS West, Inc. v. Humphries decision addressed the application of the 1866 Civil Rights Act in retaliation cases.

RECENT RETALIATION CASES

The question before the Court in the Gomez-Perez v. Potter case was "whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA" (Gomez-Perez v. Potter, 2008). Gomez-Perez was a 45 year old window distribution clerk for the United States Postal Service who filed an age discrimination complaint against the Postal Service. She alleged that she suffered numerous forms of retaliation as a result of filing the complaint, including "groundless complaints leveled at her, that her name was written on unit sexual harassment posters, that she was falsely accused of sexual harassment, that her co-workers told her to go back to where she belonged, and that her work hours were drastically reduced" (Gomez-Perez v. Potter, 2008). While the District Court and the Appeals Court ruled for the employer and dismissed the suit, a majority of the Supreme Court held that the ADEA does prohibit retaliation against a federal employee who complains of age discrimination, and remanded the case for further proceedings consistent with the opinion (Gomez-Perez v. Potter, 2008). While this decision will expand the number of individuals who may bring retaliation claims under the ADEA, the impact of the CBOCS West Inc. v. Humphries decision will effect even more employers (Smith-A, 2008).

The question before the Court in the CBOCS West Inc. v. Humphries case was whether 42 U.S.C. § 1981 (the Civil Rights Act of 1866) "encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related rights" (CBOCS West Inc. v. Humphries, 2008). Hedrick G. Humphries was an assistant manager of a Cracker Barrel restaurant owned by CBOCS West, Inc. Humphries alleged that he was dismissed "(1) because of racial bias (Humphries is a black man) and (2) because he had complained to managers that a fellow assistant manager had dismissed another black employee, Venus Green, for race-based reasons" (CBOCS West Inc. v. Humphries, 2008). Humphries initial complaint alleged that CBOCS had violated both Title VII of the 1964 Civil Rights Act and § 1981 of the 1866 Civil Rights Act. The District Court dismissed his Title VII claims "for failure to pay necessary filing fees on a timely basis" and granted CBOCS request for summary judgment on the § 1981 claims (CBOCS West Inc. v. Humphries, 2008). Humphries appealed to the Seventh Circuit Court of Appeals, and while they upheld the District Court's decision with respect to the Title VII claim they upheld Humphries § 1981 claim and remanded it for trial (CBOCS West Inc. v. Humphries, 2008). CBOCS appealed to the Supreme Court to consider the issue. A majority of the Supreme Court agreed with the Seventh Circuit ruling, thus sending this case back for further consideration (CBOCS West Inc. v. Humphries, 2008).

IMPLICATIONS OF THE RETALIATION DECISIONS FOR EMPLOYERS

The most significant implication for employers associated with these two Court decisions is the broadening of employees' rights to file retaliation claims "under two laws that do not expressly state this right" (AHI's Employment Law Today, 2008). The CBOCS West Inc. decision is especially significant, because it now extends § 1981 of the Civil Rights Act of 1866 to include retaliation claims. "Section 1981 of the Civil Rights Act of 1866 ... is a post-Civil War statute that gives "[a]ll persons...the same...right...to make and enforce contracts...as is enjoyed by white persons" (AHI's Employment Law Today, 2008, CBOCS West Inc. v. Humphries). The CBOCS West Inc. decision will extend § 1981 protection from retaliation "to all private employers, even those that do not have the 15 employees needed to be covered by Title VII" (Smith-A, 2008). Additionally, under Title VII, individuals have 180 days (300 days in states that have "work sharing agreements" with the Equal Employment Opportunity Commission (EEOC)) to file complaints with the EEOC and 90 days to file a lawsuit once the EEOC has issued a right-to-sue letter (EEOC, 2008-B). Under § 1981, a four-year statute of limitations applies (Smith-A, 2008). Smith asserts that these differences may make it more difficult for employers to defend against retaliation claims under § 1981 "if key witnesses have departed" and, quoting Florida attorney Allan Weitzman, "will result in more old retaliation claims" (Smith-A, 2008). AHI's Employment Law Today notes even "more bad news for employers: Section 1981, unlike Title VII, does not place a cap on damages"(AHI's Employment Law Today, 2008).

RECENT AGE DISCRIMINATION CASES

In Federal Express v. Holowecki, the central question before the Court was the "timeliness of the suit filed by one of the plaintiffs" and a "requirement in the ADEA that an employee file a charge of discrimination with the EEOC before pursuing a case in federal court (Federal Express v. Holowecki, 2008). Those requirements are "intended to give the EEOC a chance to notify the company, investigate the claim and seek conciliation between the employer and employee before lawyers and judges become involved"(Barnes, 2007). The plaintiffs in this case, 14 current and former FedEx couriers over the age of 40, alleged that two programs initiated by the company to make the "courier network more productive", were "veiled attempts to force older workers out of the company before they would be entitled to receive retirement benefits" (Federal Express v. Holowecki, 2008). One of the plaintiffs had filed EEOC Form 283, an Intake Questionnaire on December 11, 2001. The plaintiffs then filed their law suit on April 30, 2002. Federal Express moved to dismiss the suit, arguing the respondent had not filed her charge with the EEOC at least 60 days before filing suit, as required by the statute (Federal Express v. Holowecki, 2008). Federal Express moved to dismiss the case, contending that a "charge" required by § 626(d) had not been filed. The District Court granted Federal Express's motion but the Second Circuit Court of Appeals reversed (Federal Express v. Holowecki, 2008). Federal Express argued that because the EEOC did not act on the Form 283 filing, the lawsuit should be dismissed. The Court rejected Federal Express's argument in a 7-2 decision.

In Meacham v. Knolls Atomic Power Laboratory, the question before the Court was "whether an employer facing a disparate-impact claim and planning to defend on the basis of a Reasonable Factor Other than Age (ROFA) must not only produce evidence raising the defense, but also persuade the fact finder of its merit"(Meacham v. Knolls Atomic Power Laboratory, 2008). The plaintiffs in this case were twenty-eight former salaried employees of Knolls Atomic Power Laboratory. They were part of a group of 31 employees laid off in a reduction in force (RIF), "30 who were at least 40 years old"(Meacham v. Knolls Atomic Power Laboratory, 2008). The plaintiffs alleged that Knolls had "designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA protected employees"(Meacham v. Knolls Atomic Power Laboratory, 2008). Responding to a change in demand for its products, Knolls was ordered to reduce its work force. After a number of employees had accepted the Knoll's buyout offer, they still had 31 jobs to cut. Knolls instructed its managers to select employees for layoff based on three scales, "performance", "flexibility", and "critical skills"(Meacham v. Knolls Atomic Power Laboratory, 2008). The employee "scores were summed along with points for years of service, and the totals determined who should be let go"(Meacham v. Knolls Atomic Power Laboratory, 2008).

At the District Court level, the jury found for Meacham on the disparate-impact claim. The Second Circuit Court of Appeals, while initially affirming the District Court decision, eventually ruled in Knolls favor and determined that Meacham "had not carried the burden of persuasion"(Meacham v. Knolls Atomic Power Laboratory, 2008). The Supreme Court, responded to a conflicting decision issued by the Ninth Circuit Court of Appeals, granting certiorari. The Supreme Court concluded that "the burden was improperly placed on the employees to show that the employer's criteria were unreasonable, since RFOA was an affirmative defense for which the employer bore both the burden of production and the burden of persuasion"(Meacham v. Knolls Atomic Power Laboratory, 2008). Further, the Court noted that "while employees were required to identify the challenged layoff factors, the employer that sought to benefit from the RFOA exemption was required to prove that the exemption applied"(Meacham v. Knolls Atomic Power Laboratory, 2008).

IMPLICATIONS OF AGE DISCRIMINATION DECISIONS FOR EMPLOYERS

Employers and their legal representatives must stay abreast of EEOC pronouncements and changes in regulations in light of this ruling. While the key question in this case focused on the timeliness of the suit, in light of the Meacham v. Knolls Atomic Power Laboratory decision, employers must be sure to check for adverse impact on older workers and employ procedures and criteria that will be perceived as reasonable. While that may be a tall and costly order for employers, the jury in the Meacham v. Knolls Atomic Power Laboratory case awarded the plaintiffs damages and attorney fees of more than $6 million (Meacham v. Knolls Atomic Power Laboratory, 2002). Employers must "take a more critical look at their factors for reduction in force" and "that the more subjective the factors, the more they might be subject to challenge" (Smith-B, 2008).

REFERENCES

AHI's Employment Law Today (2008). U.S. Supreme Court's retaliation rulings land on the side of employees, Alexander Hamilton Institute, June 10, 2008. Retrieved 6/11/2008 from http://www.legalworkplace.com/print.aspx?id=6524 .

CBOCS West Inc. v. Humphries (2008). No. 06-1431; 128 S. Ct. 1951; 2008 U.S. Lexis 4516; Retrieved 6/27/2008 from http://www.lexisnexis.com/us/lnacademic/delivery/PrintDoc.do?fromCart=false&dnldFilePath=%2Fl-n%2... .

EEOC (2008-B). Filing a charge of employment discrimination. Retrieved 8/18/2008 from http://eeoc.gov/charge/overview_charge_filing.html .

Federal Express v. Holowecki (2008). No. 06-1322; 128 S. Ct. 1147; 170 L. Ed. 2d 10; 2008 Lexis 2196; Retrieved 6/27/2008 from http://www.lexisnexis.com/us/lnacademic/delivery/PrintDoc.do?fromCart=false&dnldFilePath=%2Fl-n%2... .

Gomez-Perez v. Potter (2008). No. 06-1321; 128 S. Ct. 1931; 2008 U.S. Lexis 4518; Retrieved 6/27/2008 from http://www.lexisnexis.com/us/lnacademic/delivery/PrintDoc.do?fromCart=false&dnldFilePath=%2Fl-n%2... .

Meacham v. Knolls Atomic Power Laboratory, (2008). No. 06-1505; 2008 U.S. Lexis 5029; Retrieved 6/27/2008 from http://www.lexisnexis.com/us/lnacademic/delivery/PrintDoc.do?fromCart=false&dnldFilePath=%2Fl-n%2... .

Meacham v. Knolls Atomic Power Laboratory, (2002). No. 97-CV-12 (DRH) (Lead Case), No. 97-CV-45 (DHR) (Member Case), United States district Court for the Northern District of New York, 185 F. Supp. 2d 193; 2002 U.S. Dist. LEXIS 2197, February 13, 2002, Retrieved 8/19/2008 from http://www.lexisnexis.com/us/lnacademic/delivery/PrintDoc.do?fromCart=false&dnldFilePath=%2Fl-n%2... .

Smith, Allen (2008-A). Supreme court permits retaliation claims under two more federal laws, *Society for Human Resource Management Workplace Law Library - Employee Relations*, Retrieved 5/29/2008 from http://www.shrm.org/law/library/CMS_025683.asp#P-6_0 .

Smith, Allen (2008-B). Supreme court places burden of persuasion on employers in ADEA cases, *Society for Human Resource Management Workplace Law Library – Employee Relations*, Retrieved 6/24/2008 from http://www.shrm.org/law/library/CMS_025894.asp .

A PRELIMINARY INVESTIGATION OF BUSINESS ETHICS IN TANZANIA

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ABSTRACT

The limited business ethics research in Africa focused exclusively on the Republic of South Africa. Our research attempts to gain an exploratory view of the role of business ethics in Tanzania, and in future projects explore these views in detail. Our current project will introduce the reader to Tanzania, their economy, and the ethical climate in Africa. We then examine the limited past research on this topic. Next we explain our survey and discuss the preliminary findings. We conclude with implications for further research in this area.

Siasa Tanzanianya maisha Tanzanianya
Bad politics, bad economy
Kenyan expression

INTRODUCTION

Tanzania is best known for the Serengeti, where each May nearly two million zebras and 90,000 tourists congregate (Price, 2006). But Tanzania is not just wilderness. Tanzania has experienced a period of rapid transformation from a socialist, one-party state to a multi-party system based on capitalism (Debrah and Ofori, 2005). The future looks bright as Tanzania has finally made arrangements to use the water from Lake Victoria which will bring water to six million residents throughout the country (Ankomah, 2007).

Prior business ethics research focused exclusively on Western nations or on the Republic of South Africa. Our research attempts to gain an exploratory view of the role of business ethics in Tanzania, and in future projects explore these views in detail.

Our current project will introduce the reader to Tanzania, their economy, the region, and the ethical climate in Africa. We then examine the limited past research on this topic. Next we explain our survey and discuss the preliminary findings. We conclude with implications for further research in this area.

ABOUT TANZANIA

Tanzania is a unique nation. Culturally diverse, they have dual national languages of Kiswahili and English (Mohamed and Banda, 2008). The major crisis facing Tanzania, besides climate problems, is AIDS. Life expectancy is under age 50 because of the spread of HIV/AIDS (Ellis and Freeman, 2004). For example, in the town of Bukombe, 18% of the population is believed to have AIDS (*Economist*, 2007). As a result of the devastating effect of AIDS, half of Tanzanians are under 17 years old (*Economist*, 2007).

Further complicating matters is the lack of investment capital and low literacy rates, below 70% (Baerlocher, 2007). Both of these factors harm economic prospects for Tanzania, and most nations in Africa.

TANZANIAN ECONOMY

Prior to independence, the economy was completely dependent on subsistence agriculture (Debrah and Ofori, 2005). As of 2008, Tanzania is one of the poorest countries in the world (Central Intelligence Agency, 2008). The per capita GNI in Tanzania in year 2000 was $280 (Ellis and Freeman, 2004).

To put this into perspective, under 6% of Tanzanian households own a cow (Ellis and Freeman, 2004). Even with the economy based on agriculture, land ownership is rare, with over 55% owning no land or only enough for a residence (Ellis and Freeman, 2004). Over a third (35%) of Tanzanians lives in poverty by Tanzanian standards (Ellis and Freeman, 2004). Other nations have seen their plight, and Tanzania has been one of Africa's top aid recipients (*Emerging Markets Monitor*, 2007).

But the economy in Tanzania has grown. Personal income has tripled, to $860 in 2007 (*Economist*, 2007). There has been a surge in foreign direct investment, growing sixteen fold from 1998-1999 (Debrah and Ofori, 2005). The FDI has increased due to the privatization of state-owned enterprises (Portelli and Narula, 2006). As a result, Tanzania has had five straight years of over 5% growth (Green, 2007).

This contrasts with 1988-2000, when Tanzania averaged only 0.5% growth a year (Ellis and Freeman, 2004). Their limited industry is overwhelming small businesses (Satta, 2007). Small-scale enterprises in Tanzania are growing (Nelson and De Bruijn, 2005). In 2007, expect 7% growth (*Economist*, 2007).

Openness has not all been beneficial. While new economic policies have brought increased foreign investment, it has also allowed foreign firms to conduct business in Tanzania, to the detriment of local firms (Debrah and Ofori, 2005). Economy heavily dependent on FDI, as this accounts for 80% of all their foreign exchange (Portelli and Narula, 2006). For example, South African Breweries has bought Tanzania Breweries Limited (Portelli and Narula, 2006) and RJ Reynolds Tobacco bought 51% of the Tanzanian Cigarette Company once it privatized (Portelli and Narula, 2006).

While FDI has brought more investment, this has been at the expense of the Tanzanian workers. For example, Tanzania Breweries has dropped their number of employees from 4000 to 1250 (Portelli and Narula, 2006). For example, Tanzanian Cigarette Company has dropped its number of employees in half while more than doubling their per employee productivity (Portelli and Narula, 2006). Vertical linkages have also benefited Tanzania as locally grown tobacco goes into their increasing cigarette production (Portelli and Narula, 2006).

Tanzania suffers not just from a lack of investment capital, but a shortage of human capital. Professional competencies in developing countries are poor (Debrah and Ofori, 2005). Tanzania has a desperate need for training in the fundamentals of management (Debrah and Ofori, 2005).

ETHICAL CLIMATE IN AFRICA

Ethical judgments derive from the local community (Gichure, 2006). Cultural differences influenced responses to ethical dilemmas (Cohen et al 1995). Many African languages do not have a word that directly translates into ethics (Gichure, 2006). There is a distinct flavor of business ethics in Africa because economy is very dependent on the government (Rossouw, 2000).

Ethical lapses by Western standards are commonplace. For example, the losses in Uganda due to fraud are $400 million (Gichure, 2000). In South Africa, the losses due to fraud are bigger than GDP (Gichure, 2000). For small nations, with limited investment potential, the problems for fraud make a dire situation even more extreme.

SURVEY OF RECENT LITERATURE

There have been less than 200 publications on business ethics in Africa (Barkhuysen and Rossouw, 2000). South Africa has dominated the attention of researchers (Abratt and Penman, 2000; Brenardi, 2006; and Mullin-Martin et al, 2001). Most of the business ethics classes offered within Africa were in the Republic of South Africa (Barkhuysen and Rossouw, 2000). The first business ethics conference in Africa was held in 1999 (Rossouw, 2000).

However, the authors can find no studies that attempted to examine Tanzanian business students. Of the limited African research, there were some consistent problems. First, women were underrepresented in previous African surveys (Gifford and McBurney, 1988). In that research, most ethical dilemmas involved sex (Gifford & McBurney, 1988).

That research found significant differences between genders found in South Africa, as well as in America, China, Ireland, Ecuador, Spain, and Australia (Bernardi, 2006).

METHOD

The respondents were from Arusha, a city of a quarter million inhabitants in eastern Tanzania. Arusha's clocktower is supposedly situated halfway between Cairo and Cape Town under the British Empire. Arusha lies near Mount Maru and Mount Kilimanjaro, which keeps cool dry air in the region. As a result, Arusha is a major tourism destination in Africa. The respondents attended the Tanzanian program at the East and Southern Africa Institute of Management. The group was surveyed in fall, 2006 (n=29).

The respondents were 62% females, which was a surprise. We estimated that the majority would be male. Slightly more than half were married, and 69% were full time employees. They were fairly distributed among the age groups, with 37% being between the ages of 31 and 35. Tobacco use was different from our expectations. We expected tobacco use to be high, as it is in most developing nations, but in our respondents, less than one in five smoked. This factor is also heavily correlated with gender, as females do not smoke as much as males. Since our sample had a majority of females, the number of smokers should be small.

DISCUSSION

The issues this research attempts to clarify are whether Tanzanian business students understand the Enron controversy from the United States. Being the most current and largest controversy in business ethics, the Enron controversy defines this generation of business students. In an indirect way, this research also tests for exposure to western media and texts on business topics.

HYPOTHESIS ONE: The majority of Tanzanian graduate students in business will be able to identify the name of Enron's CEO.

This assumption was high, (hoping for a majority as a baseline) but we surveyed graduate students, already possessing a business degree, and most working full time. They should have been well aware of current events in business. 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. While all these names were familiar, none except Kenneth Lay was connected to business controversies.

In our pilot group, less than one in three students could correctly identify Kenneth Lay, a result equal to random chance. As a result, Hypothesis One could not be supported.

HYPOTHESIS TWO: The majority of Tanzanian students will be able to identify Enron's industry.

Students were asked to select Enron's industry. The choices were: medical supplies; real estate development; oil and electricity; sporting goods; clothing/apparel; and agriculture. In our pilot group, less than 38% of students could correctly identify oil and electricity, a better result than the first question, and better than random chance, but still less than our benchmark.

Considering the amount of media attention that has focused not just on Enron, but on the energy industry, and their strong ties to the Bush Administration, the numbers should be much higher. As a result, Hypothesis Two has a very marginal amount of support.

HYPOTHESIS THREE: The majority of Tanzanian students will be able to identify Enron's improper action.

Students were asked to select Enron wrongdoing. The choices were: polluting rivers; hiring illegal immigrants; refusing to pay taxes; false financial reports; and unsafe working conditions. In our pilot group, almost half (45%) could correctly identify false financial reports as the bad action. This is not quite 50%, but very close, and considering the small sample size, the difference only represents a single response. As a result, Hypothesis Three was supported.

Perhaps the results should not be surprising. While as business educators we are very concerned over every detail of these incidents, our attention to detail might be displaced. For business students, the only important fact, and the one worth remembering is the type of wrongdoing, namely the false financial reports.

We asked students if the only difference between the executives at Enron and those at most other big companies was that those at Enron got caught. A majority (58%) agreed or strongly agreed.

No one disagreed or strongly disagreed. The remaining 41% had no opinion. The findings support, but do not prove that Tanzanian students thought Enron's behavior to be typical of American businesses. This was a surprise. This finding may also explain why the respondents had so little knowledge about the Enron controversy. If they viewed Enron as typical behavior, it would not be remembered.

What have we learned from this preliminary investigation? First, business students in Tanzania are aware of ethical controversies in America. They may not have the detail of knowledge we would expect from American students, but they do recognize the problem and what the firm did wrong. Obviously, these results should only be seen as preliminary.

IMPLICATIONS FOR FURTHER RESEARCH

Several lines of future research are possible. First, these results should be viewed as a pilot study because of the small sample size. When the respondents were divided by demographic factors, the groups were too small to draw any significant comparisons. The findings need to be replicated with a much larger sample involving multiple schools.

Further, business and non-business majors should be compared. Next, future research must overcome the language barrier. With seven languages in Tanzania, this becomes a difficult task. Future research should investigate the impact of race on decisions; past research has (Gifford and McBurney, 1988).

Next, use more specific figures for income and political affiliation. Per capita income was less than $1000 on average, so figures need to be adjusted. Our results also did not differentiate the chaotic political climate. By our choices offered, all respondents were heavily dominated by one political party.

CONCLUSION

We hope this project encourages further research on business ethics in other African nations. If we are to become a global society, we must become educated about the cultural and business behavior differences among our various cultures. However, in the past, we have largely ignored the continent of Africa, except for a great deal of examination on the Republic of South Africa. As we become more global, we cannot ignore the culture of an entire continent.

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REFERENCES

Abratt, R. and N. Penman. (2002). Understanding factors affecting salespeople's perceptions of ethical behavior in South Africa. *Journal of Business Ethics* 35, 269-280.

Ankomah, B. (2007). The way forward. *New African* (July), 70-72.

Baerlocher, M.P. (2007). Adult literacy rates in African and Mediterranean countries. 177.11 *Canadian Medical Association Journal* (Nov. 20). 1347.

Barkhuysen, B. and G.J. Rossouw. (2000). Business ethics as academic field in Africa: Its current status. *Business Ethics: A European Review* 9(4), 229-235.

Baskin, J. (2006). Corporate responsibility in emerging markets. *Journal of Corporate Citizenship* 24, 29-47.

Bernardi, R.A. (2006). Associations between Hofstede's cultural constructs and social desirability response bias. *Journal of Business Ethics* 65, 43-53.

Brents, B.G. and D.S. Mshigeni. (2004). Terrorism in context: Race, religion, party and violent conflict in Zanzibar. *American Sociologist* (Summer), 60-74.

Burke, A., M. Harper, H. Rudnick, and G. Kruger. (2007). Moving beyond statutory ethical codes: Practitioner ethics as a contextual, character-based enterprise. *South African Journal of Psychology* 37(1), 107-120.

Central Intelligence Agency. (2008). *World Factbook: Tanzania*, found at http://www.cia.gov/library/publications/the-world-factbook/geos/tz.html last accessed on February 29, 2008. Author retains a copy.

Debrah, Y.A. and G. Ofori. (2005). Emerging managerial competencies of professionals in the Tanzanian construction industry. 16.8 *International Journal of Human Resource Management* (Aug.) 1399-1414.

Economist. (2007). President Kikwete's hard road ahead. (Sept. 1). 44-45.

Ellis, F. and H.A. Freeman. (2004). Rural livelihoods and poverty reduction strategies in four African countries. 40.4 *Journal of Development Studies* (April), 1-30.

Emerging Markets Monitor. (2007). Tanzania: IMF inflow conundrum. (July 9), 21.

Encyclopedia Britanica. (1994). 11, 549.

Fischer, K. and W. Kigotho. (2008). Violence in Kenya affects universities and study-abroad programs. *Chronicle of Higher Education* (Jan. 18), 54.19, A24.

Gichure, C. (2006). Teaching business ethics in Africa: What ethical orientation? The case of East and Central Africa. *Journal of Business Ethics* 63, 39-52.

Gichure, C. (2000). Fraud and the African renaissance. *Business Ethics: A European Review* 9(4), 236-247.

Gifford, P., and P. McBurney. (1988). The ethical concerns of contemporary Zimbabwean managers: A preliminary sounding. *Journal of Business Ethics* 7, 363-372.

Green, P.L. (2007). A continent on the cusp. *Global Finance* (May, 2007), 20.

Mohamed, H.I. and F. Banda. (2008). Classroom discourse and discursive practices in higher education in Tanzania. 29.2 J. of Multilingual and Multicultural Development. 95-112.

Mullin Marta, J.K., A. Singhapakdi, and N. Higgs-Kleyn. (2001). Corporate ethical values in South Africa. *Thunderbird International Business Review* 43(6), 755-772.

Nelson, E.G. and E.J. De Bruijn. (2005). The voluntary formalization of enterprises in a developing economy – the case of Tanzania. *Journal of International Development* 17, 575-593.

Painter-Morland, M. (2006). Triple bottom-line reporting as social grammar: Integrating corporate social responsibility and corporate codes of conduct. *Business Ethics: A European Review* 15(4), 352-362.

Portelli, B. and R. Narula. (2006). Foreign direct investment through acquisitions and implications for technological upgrading: Case evidence from Tanzania. *European Journal of Development Research* (March), 18.1, 59-85.

Price, S. (2006). The Serengeti: Tanzania's treasure. *New African* (Nov.). 48-49.

Rossouw, G.J. (2000). Out of Africa: An introduction. *Business Ethics: A European Review* 9(4), 225-228.

Satta, T.A. (2007). Scaling up small firms' access to finance in developing countries: Evidence from Tanzania. 20.4 Journal of Small Business and Entrepreneurship. 417-438.

ELECTRONIC DISCOVERY UPDATE: ZUBULAKE AND BEYOND

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ABSTRACT

Zubulake and some earlier cases first attempted to set the rules for discovery of electronic documents, but there have been many changes since adotpion of the new Federal Rules of Civil Procedure. Business executives need to understand the new rules and the value of and the role of a computer forensics expert in the electronic discovery process. The rule changes involve several new requirements in the law including the new highly praised but frequently misunderstood "safe harbor" provision that may protect a party from sanctions during litigation. This paper reviews the historical development of electronic discovery and examines the current state of the eDiscovery law.

LABOR LAW IN THE UNITED ARAB EMIRATES: A REVIEW AND RECOMMENDATIONS

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ABSTRACT

This article examines the Labor Law of the United Arab Emirates. The author investigates the law, its structure, its regulations and then discusses major issues pertaining to the UAE labor law.

The article starts by giving a concise overview of labor law in general, and then outlines a brief history of legislation in the UAE. Next, the provides an insight into the structure and regulations of the UAE labor law, and stresses the major and most commonly used sections and articles.

Next, the article looks at the relationship between the UAE labor law and the International Labor Organization's rules and regulations. Then the article investigates several major issues that are linked to the UAE labor law:

- *Emiratization*
- *Employment Bans*
- *Labor Disputes*
- *Discrimination*

The article concludes with a summary of the study as well as recommendations for areas of further investigation and development.

INTRODUCTION

Legislation in the United Arab Emirates has witnessed various developments which have kept pace with country's vast political, social and economic development. The country has already achieved great progress in its continuous endeavors to spread the principles of true justice throughout the country and to further strengthen the overall advancement and comprehensive development of the Federal State.

Before creation of the Federal State, the individual Emirates applied legislation derived originally from local conventions and customs in addition to Sharia Islamic Law, dealing with issues of personal status, commerce, the sale and purchase of goods and services, contracts and other civil and criminal matters. The Sharia Islamic Law was the fundamental source of legislation in the "Reconciled Emirates" and henceforth in the Federal State.

Laws, decrees, resolutions, executive regulations, rules, instructions etc. were formerly being issued for each emirate separately to serve the basic objectives of organizing the public and private affairs of each Emirate so as to safeguard the rights of its citizens. However this was followed by the institution of the Federal State, comprising of the seven emirates of Abu-Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain, Fujairah and Ras Al Khaima.

Almost all of the Islamic Laws of the former Emirates were based on the Holy Koran and the honorable prophetic *sunna* (advice) were maintained. In addition, subsequent federal and local legislation also was derived from theses sources.

The United Arab Emirates, being fully aware of the fact that legislation is essential for the control and development of the community within a legal framework has formed a high committee to frame all federal legislation necessary for this purpose, taking into consideration the necessity of being in line with all current factors of development as well as the general context of the religious, cultural and moral heritage of the Arab nations and its honorable religion thereby conforming the fact that people of the UAE are an inseparable part of the Arab Nation, and their culture is derived from the roots of it prestigious heritage. *("Background on the United Arab Emirates (UAE) Legal System,"2001)*

Several laws, resolutions and executive regulations, in different fields, have been enacted and executed in recent years.

The UAE's labor force is made up of approximately 90 percent expatriate workers. The Ministry of Labor and Social Affairs normally oversees employment of workers in the industrial and service sectors under contracts that are subject to review. The purpose of the review is to ensure that the pay will satisfy the employee's basic needs and secure a means of living.

For the resolution of work-related disputes, workers must rely on conciliation committees organized by the Ministry of Labor and Social Affairs or on special labor courts. Labor laws do not cover government employees, domestic servants and agricultural workers. The latter two groups face great difficulty in obtaining any assistance in resolving disputes with employers. While any worker may seek redress through the courts, this process puts a heavy financial burden on those in lower income brackets. However, some unscrupulous employment agents bring foreign workers to the UAE under conditions approaching indenture.

Labor regulations prohibit employment of persons under the age of 15 and have special provisions for employing those aged from 15 to 18. The department of labor enforces laws prohibiting the employment of children. Labor regulations allow contracts only for adult foreign workers. Despite tough federal laws prohibiting child labor, there remain concerns about the import of child labor, some as young as two years of age, to serve as camel jockeys, a practice that has been condemned by both the local and the international media. This practice is now completely abolished in the UAE and robotic camel jockeys are use. However, one can see on the various camel farms children used to warm up racing camels in practice sessions.

There is no legislated or administrative minimum wage. Supply and demand determine compensation. However, according to the Ministry of Labor and Social Affairs, there is an unofficial, unwritten minimum wage rate which would afford a worker and family a minimal standard of living. The Ministry of Labor and Social Affairs reviews labor contracts and does not approve any contract that stipulates a clearly unacceptable wage. In practice, this requirement is, reportedly, often not enforced.

The standard workday and workweek are set at eight hours per day, six days per week, but these standards are not strictly enforced. Certain types of workers, notably domestic servants, may be obliged to work longer than the mandated standard hours. The law also provides for a minimum of 24 days per year of annual leave plus 10 national and religious holidays. In addition, manual labor are not permitted to perform outdoor work when the temperature exceeds 45 degrees Celsius (112

F). In the hottest months of the summer outside manual laborers are not permitted to work from 12:00 AM until 4:00 PM. This practice has met with various degrees of compliance.

Most foreign workers receive either employer-provided housing or a housing allowance, medical care, and homeward passage from their employers. The vast majority of such workers, however, do not earn the minimum salary of AED5000 (approximately US$1370) per month currently required for them to sponsor their families for a UAE residence visa. Manual laborers often receive monthly salaries of AED400 (approximately US$110).

Employers have the option to petition for a ban from the workforce of one year for any foreign employee who leaves his job without fulfilling the terms of his contract. The government sets health and safety standards, which are enforced by the Ministry of Health, the Ministry of Labor and Social Affairs, municipalities, and civil defense units. Every large industrial entity is required to employ an occupational safety officer certified by the Ministry of Labor. If an accident occurs, a worker is entitled to fair compensation. Health standards are not uniformly observed in the housing camps provided by employers. Workers' jobs are not protected if they remove themselves from what they consider to be unsafe working conditions. However, the Ministry of Labor may require employers to reinstate workers following an investigation of the alleged unsafe working conditions. All workers have the right to file complaints with the Ministry of Labor and Social Affairs, whose officials are accessible to any grievance, and an effort is made to investigate all complaints. The ministry, which oversees worker compensation, is, however, chronically understaffed and under budgeted, and hence complaints and compensation claims are backlogged. *"Country Information for United Arab Emirates"*

Priority for work in UAE is given only to UAE nationals. In the event of the unavailability of national employees, the priority of employment of others will be as follows:

1. Arab employees who are nationals of Arab States
2. Employees of other nationalities.

When recruiting an employee, the new recruit is issued with a registration certificate. The registration certificate shall be given a serial number and will include the applicant's name, age, place of residence, profession, qualifications and previous experience.*(Daoud A. Abdo (2004))*

Non-nationals cannot be recruited for work in the United Arab Emirates before the approval of the labor department and obtainment of work permit according to the procedures and rules determined by the Ministry of Labor and Social Affairs. Such a permit shall not be issued unless the following conditions are satisfied:

- The employee must possess the professional competence needed by the country
- The employee must have entered the country in a legal manner and must satisfy the conditions provided for in the residence regulations prevailing in the state.

Theoretically, the Labor Department must not approve recruitment of non-nationals unless it ascertains from its registers that there are no registered unemployed nationals capable of performing the required work, although this is not always applied in practice.

The ministry of labor and Social Affairs may also cancel the work permit issued to a non-national in any of the following cases:

1. If the employee remained unemployed for more than three successive months
2. If they violate one or more of the conditions according to which he was given the labor card.
3. If it is find out that a national employee is qualified to replace him. However, in this case the employee shall remain in his job up to the expiry of his contract or expiry of his labor card, whichever occurs earlier.

Employment of juveniles

Juveniles of both sexes must not be employed before reaching fifteen years of age. Before employing a juvenile, the employer shall obtain the following:

- His birth certificate or an official extract from it or age estimation certificate issued by a specialized physician
- Certificate of physical fitness for the required work
- A written consent from the juvenile's legal guardian

Juveniles are not permitted to engage work at night. (Night Period: From 8:pm to 6:00am). They also must not be employed in hazardous jobs or work that are harmful to their health. Their maximum hours of work shall be six hours per day with one hour break. Juveniles must not be ordered to work at overtime and not to stay after their fixed working hours.

Foreign workers in the U.A.E face the threat of employment bans. There are two types of bans, one imposed by the labor ministry on workers who break the labor law or fail to abide by the terms stipulated in their employment contracts. This is a year-long ban. The second, which is for a duration of six months, is imposed by the immigration authorities on expatriate workers who quit and leave for home regardless of qualification.

One year Ban

The one-year ban slammed by the Ministry of Labor and Social Affairs (MLSA) on offenders' passports is not for those workers who cancel their employment visas and is not given arbitrarily or upon the request of employers, but it is governed by rules stipulated in Federal Labor Law No 8 of 1980. It is applied in the cases where the worker adopts a false identity or submits forged documents, if they cause losses to their company or let out its secrets, if sentenced by a competent court on an offence involving honor, honesty or public morals, if they absent themselves from work for seven consecutive days or twenty non-consecutive days, if found drunk on the job, if they leave work without notice or before the expiry of the notice period in a limited contract, among other reasons. In addition, if an expatriate worker submits their resignation before the expiry of their employment contract, this entails that a one-year ban imposed against them on the grounds of violating the terms of their contract. This one year precludes them from having any employment visa issued. *("One year ban on workers is not arbitary",2004)* At this point, they cannot even have a visit visa issued in their favor simply for the reason that their name is blacklisted on the federal computer database. Neither the nature or style of their position nor their educational qualifications would have any effect on the ban. In case the residence visa expires under a contract of a limited period while the expatriate is still in service and does not receive any notification from the company for its intention not to renew it, the company is obliged to renew it. In addition, under an unlimited period contract, if the company is not willing to renew the expatriate's visa upon its expiry or wishes to terminate their service, the company must notify the expatriate. In case of cancellation, a pre-defined form must be signed to the effect that the worker has received all their dues including any end-of-service benefits (gratuity). Upon canceling their visa, the residence visas of all the persons sponsored by the former employee also will be cancelled.

This rule is enforced to tighten measures against violation of the laws and to streamline the market and safeguard the rights of sponsors to protect their businesses. ("How to avoid ban in case of limited contract,"2004)

The Dubai Naturalization and Residency Department (DNRD) imposes a six-month ban on expatriate employees upon cancellation of their employment visas irrespective of their professions and qualifications. Expatriate workers who have their residence visas cancelled will receive a six-month ban that prohibits them from taking on another job during this period. Immigration authorities do not issue any visas for those who receive this ban. The six months ban is not based on nationality or qualifications. In addition, the ban is imposed on expatriate employees who are not in one of the exempted categories. Those expatriates who are on the ban list must leave the UAE for at least six months if their visas are cancelled.

The expatriate employees that are exempted from the six month ban are: engineers, doctors, pharmacists, nurses, university and high college teachers, lawyers and other legal advisers, economic and financial experts who hold university degrees, computer programmers who hold university or college degrees, sports coaches, pilots and aircraft and ship navigators as well as those working in the oil sector and associated industries. The category of employees exempted from the ban is based on their visa category mentioned in work permit rather than their actual job. For example: If an expatriate employee works as an accountant, and his visa category states that he is a clerk then he is likely to get a ban. The department of immigration takes into consideration the visa category and not the actual job of the expatriate at the time of canceling the visa. ("Lifting of 6 month ban for select groups under study,"2004)

EXPLORING UNIONISM IN THE SOUTHEASTERN STATES: THE CASE OF J.P. STEVENS-1977

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ABSTRACT

This paper was written from notes taken in 1977 and reports on the J.P. Stevens case up to that point. In 1963, the Textile Workers Union of America (TWUA) selected J.P. Stevens Corporation as its target company to begin union organizing drives. The union thought that if it could organize labor within the J.P. Stevens Corporation, which employs 45,000 workers in the Carolinas, the rest of the southern textile corporations would fall into place. By attacking and unionizing the south's largest industry (the textile industry), the TWUA believed that other southern industries would also yield to union resistance. Because the textile industry in general and the J.P. Stevens Company in particular are so diversified in their outputs, it has proved to be a difficult task for the union to organize.

INTRODUCTION

In the late 1970s, organized labor appeared to be in trouble. The U.S. work force is growing, but union membership remains stable. Because of this lack of membership growth, union members make up only about 21% of the workforce in the late 1970s. The growing textile industry continues to move from unionized states in the northeast to the south, which is still largely non-union (Anonymous, 1976, December). Because of this context, it is easy to understand why the textiles industry is the main target of the AFL-CIO. There are about 700,000 textile workers in eight southern states, only approximately 10% belong to a union, and there are over 400,000 garment workers in these same states.

The Textile Workers Union of America (TWUA) had begun its organizing efforts against Stevens in Roanoke Rapids, N.C. in 1963 (Anonymous, 1976, January). In 1965, 59% of the workers voted against union representation at that plant. Since then, the union has called for 14 elections. It has won only one election. This was the 1974 election in Roanoke Rapids, where about 54% of the workers voting wanted union representation.

A main problem area for the union is its inability to secure a contract at the Roanoke Rapids complex. For over two years the union has charged Stevens with not bargaining in good faith. Stevens contends that it is bargaining, but that the union demands are unreasonable. Since the company will not bargain, the union has resorted to a weapon which has worked in the past at forcing companies to cooperate--the national boycott (Anonymous, 1977, June).

Organizing a boycott against Stevens has proven to be a difficult task. The union is trying to boycott one of the world's largest textile producers. Stevens produces a myriad of finished products under an equally great number of brand names. Some of these finished products are carpets, draperies, towels, table linens, sheets, and blankets. The average consumer just is not aware whether a product is Stevens-produced or not because of the company's diversity.

The union organizing campaign that has been thrust upon Roanoke Rapids is far from normal, and so is the growth of the "Committee," an anti-organizing group (Anonymous, 1976, June). Over two years have passed since the TWUA won a narrow vote at the Stevens complex. A contract has yet to be signed. Both the company and the union have charged each other with failure to bargain in good faith, but the NLRB has enforced the union's charges.

HISTORY OF THE DISPUTE

Since 1963, the union has conducted about 25 campaigns at Stevens plants and the NLRB has conducted 14 elections (Woosten, 1975, December). During this campaign, the board has ruled on 15 occasions that Stevens engaged in unfair labor practices. Three of these charges have been reversed by the courts. These cases have become a major issue in the nationwide boycott campaign.

The AFL-CIO has stated that Stevens is the leading labor law violator in the United States. The records show that there were almost 35,000 unfair labor practice charges filed with the NLRB during 1976 (Anonymous, 1977, June). Many times unions have not fared well against these charges. For example, since 1966, the NLRB has ruled against the Teamsters 191 times, and the Teamsters lost on 28 decisions in 1972 alone. The plumbers' union has had 49 decisions against it in 1966, and the NLRB ruled against the carpenters' union 31 times between 1966 and 1969 (Anonymous, 1977, June).

After the ACTWU began planning for the boycott, some employees in Roanoke Rapids started their own plan to throw out the union and halt the boycott. The Committee formed when three Stevens workers met one night in a local motel in Roanoke Rapids. They were organizing on their own, because company management is prohibited from recognizing the group or offering assistance in any way. One of the main goals of this committee is to get at least 30% of the Stevens workforce to sign white cards as opposed to the union's blue cards. The 30% goal has not been reached, but according to Committee officials, the number of those signing white cards looks "encouraging" (Anonymous, 1976, June).

Some workers are signing white cards because they feel the union has failed in its promises. Many feel that no company could grant everything that the union claimed that it could get for its workers and stay in business. Committee members feel that employees basically fall into two groups: those who care about their jobs and are thinking of the future and those who do not. Those who care about their work are joining the Committee. However, the union has made it plain to Committee members that it intends to keep attacking Stevens with the boycott. The Committee members feel that the boycott will only hurt the workers, referring to the situation at Farah Company, where thousands of workers lost their jobs because of the boycott. The workers at Farah lost more because of the boycott, stemming from the fact that over half of their plants had to be shut down and workers had to be laid off (Anonymous, 1976, August).

Labor consultants have pointed out that even if the Committee does get enough employees' signatures to call for a decertification election, it has already lost one round with the regional NLRB office. However, the Committee filed a petition to intervene in unfair labor practice hearings, claiming that they directly affected Committee members' jobs. The NLRB ruled against the

Committee, stating that they found Stevens guilty of various unfair labor practices, and that the company is also charged with intimidation of numerous pro-union employees (Borstein, 1976, December).

In the light of the white card signing, some people may still ask, "What are the chances that the boycott will prove to be a success?" The union and its supporters face obstacles in the form of numerous brand names. Some of the better known Stevens products are Gulistan carpeting and Utica sheets, but as stated before, the average consumer cannot possibly memorize all of Stevens' products. The ACTWU will be faced with two choices if the Committee of anti-union workers succeeds in gaining public attention and the accompanying financial support. The union could deflate its image considerably by calling off the boycott and thus lessening some of the Committee's fury, or it could charge full speed ahead as planned with the boycott (McConville, 1976, October). As of 1977, the union has decided to stick with the boycott plan.

LABOR'S LOBBYING EFFORTS

Because of the change from a Republican administration to a Democratic one in 1977, labor is beginning to exert its influence on members of Congress. Congress has never been so populated with members who openly advocate the causes of organized labor. Organized labor is pushing Congress for legislation to overhaul the Taft-Hartley Act. They are seeking legislation that would ease the organizing efforts of unions. The key to labor's organizing efforts is the enactment of the Labor Reform Act of 1977.

For the first time since the CIO abandoned its large organizing campaign in the south in the early 1950s, labor is acting on what it sees as an anti-union climate in the business community and a shift in the nation's manufacturing base to the south and southwestern states. Unions are seeking to change what they believe is an imbalance in the federal laws that permits employers to quell union organizing efforts with excessive delaying tactics. Under current NLRB procedures, union officials argue, many companies have found it cheaper to break federal laws and pay the legal costs and fines than to allow union organization of their operations (Anonymous, 1975, February).

To remedy this situation, the AFL-CIO is supporting Thompson's bill, HR 77, which would require that union elections for bargaining recognition be held within 45 days after an election petition has been filed with the NLRB. The bill would certify a union automatically as the legal bargaining representative when 55% of the appropriate work force has signed valid union authorization cards. The bill would also delegate authority to NLRB administrative law judges to make final decisions and issue orders for the board. The full board would retain discretionary review power. Another feature of the bill is to ban federal contractors who commit flagrant or repeated violations of NLRB orders. The debarment would apply for up to three years. The last step of the bill would award treble damages to workers who have been illegally fired for union activities.

The reform proposal would also give the NLRB self-endorsement powers similar to other federal regulatory agencies by putting the burden of court review on the aggrieved party rather than requiring the board to seek court enforcement of its order. What this means is that in most cases, the employer is prejudged to be guilty until proven innocent. In addition, the bill would require that injunction processes be tightened against employers who violate NLRB orders.

Union officials maintain that the proposed changes would prevent employers from dragging the case on until the employee under question is financially depleted. Labor is insisting that changes be made in the Taft-Hartley Act rather than in NLRB procedures. Union officials contend that they have dealt for eight years with a business-oriented administration in the Capitol, and so they now want changes concerning labor laws. But industry and the business community would challenge this approach, considering what many believe to be a pro-labor leaning by the NLRB and the Appellate Courts. Although President Carter has not yet taken a stand on HR 77, presidential aide Stuart Eizenstat has endorsed inclusion of the general proposal in the Democratic platform, and Labor Secretary Ray Marshall has indicated that proposals to permit treble damages and to give the NLRB remedies to enforce its orders "deserve consideration" (Anonymous, 1977, March).

THE UNION'S GOAL

The underlying purpose of the union's drive to organize Stevens is to raise the wages of the hourly employees and to obtain better pension benefits for these workers (Anonymous, 1975, February). There is widespread controversy among economists concerning the extent to which unions influence wages and prices. Employers state that unions are responsible for price increases for their products, while union officials say they are only responsible for wage hikes. The fact is that the influence of unions cannot be studied alone, but must be viewed in light of the economic forces at work in each market situation. This means that the degree of competition in the final product market and the level of capital intensity in the production process must be considered. These factors are tightly interrelated. That is, if the production process is highly capital intensive, then it means that the system can accommodate fewer firms because each one must produce a larger output in order to spread the fixed cost. But high capital requirements also mean that potential competition faces a formidable entry barrier, which in turn permits a form of implicit price fixing. The cotton textile industry, for example, is most competitive, especially at the gray goods level, where firms are not protected by product differentiation (Anonymous, 1969, July). In such industries as steel, the industry can offset wage increases by some combination of higher prices and substitution of labor saving devices. In times of rising incomes, price increases are the more expedient route for keeping up with wage increases. This could explain why big business has joined forces with big labor in urging that the government inject more money into the economy.

The unfair aspect of this is that firms which face a competitive market cannot raise prices without suffering a decline in sales. This is typical of the textile industry and J.P. Stevens in particular. However, they must compete in the labor and other resource markets with users who are in protected situations, including government agencies and contractors. This leads to more inflation, which means that firms that cannot pass cost increases along to the buyers are forced out of business. Contrary to myth, then, inflation is not a cure for unemployment but is a cause.

As prices increase, unions demand higher wages, invariably citing inflation as the justification even though their members are usually the ones protected by automatic cost-of- living allowances. Hence, those unions and employers who cause inflation are the ones who are protected against its effects. It is not an accident that inflation occurs because a firm inflates prices in excess of values. Big business and big labor jointly impose inflation as a tax and then bargain over the proceeds.

CONCLUSION

The union's headstrong tactics are based upon the faulty premise that southern workers want union representation, and that only the company intervention has prevented it. The union leaders will not accept the fact that many workers, and in the Stevens case, the majority of those workers, have no need for a union. The majority of Stevens workers are satisfied and resent union interference. They want to negotiate directly with their employer. Stevens' management personnel have on occasion admitted that mistakes have been made in the past. However, textile mills, including Stevens' mills, have been making steady progress toward change.

J.P. Stevens has resisted union organization for two basic reasons. One, they believe that the great majority of their workers do not want to be unionized, and two, Stevens stands firm in its belief that unionization would not be in the best interest of either workers or shareowners.

REFERENCES

Anonymous (1969, July). Million-Dollar Back-Pay Bonanza: Awards to Mill Workers, *BusinessWeek*, 8-26, pp. 29-31.

Anonymous (1975, February). Standing up to the Bossman: Efforts to Unionize. *Progressive*, Vol. 39, p. 41.

Anonymous (1976, January). All Out Campaign Against J.P. Stevens, Boycott by Amalgamated Clothing and Textile Workers Union, *BusinessWeek,* 1-14, pp. 28-29.

Anonymous (1976, June). Taking on Stevens: Amalgamated Clothing and Textile Workers Union, *Newsweek*, Vol. 87, 6-14, p. 87.

Anonymous (1976, August). Merged Union Approves Boycott of J.P. Stevens. *Monthly Labor Review*, Vol. 99, p. 47.

Anonymous (1976, December). Boycott Battle to Win the South: Boycott Against J.P. Stevens & Co., *BusinessWeek*, 12-6, pp. 80-81.

Anonymous (1977, March). Stevens Digs its Heels in Deeper: Boycott by Amalgamated Clothing and Textile Workers to Force Unionization, *BusinessWeek*, 3-14, p. 29.

Anonymous (1977, June). When a Union Goes All Out in a Boycott Drive, *U.S. News & World Report*, Vol. 82, 6-20, pp. 71-72.

Bornstein, L. (1976, December). Court of Appeals Holds J.P. Stevens in Contempt. *Monthly Labor Review,* Vol. 99, p. 55.

Gaillard, F. (1977, February). Organizing J.P. Stevens. *Progressive*, Vol. 41, p. 37.

McConville, E. (1976, October). Two Years After Union Victory: The Southern Textile War. *Nation*, Vol. 223, pp. 294-9.

Wooten, J. R. (1975, December). When Unions Try to Gain Ground in Southern Textile Mills, *U.S. News & World Report,* Vol. 79, pp. 60-61.

FREE ENTERPRISE FUND V. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD: THE COURT OF APPEALS UPHOLDS THE CONSTITUTIONALITY OF THE PCAOB

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ABSTRACT

On August 22, 2008, the Federal Court of Appeals for the D.C. Circuit decided a case that threatened a major upheaval in the federal regulatory infrastructure. The plaintiffs in Free Enterprise Fund (FEF) v. Public Company Accounting Oversight Board (PCAOB) had challenged the constitutionality of a regulatory agency created by the Sarbanes-Oxley Act of 2002 (SOX).

The plaintiffs in this case alleged constitutional infirmity in three counts: (1) that the Act violates the Separation of Powers Doctrine; (2) that the Act violates the Appointments Clause; and (3) that the Act violates the Non-Delegation Doctrine. Had it been successful, the FEF lawsuit would have terminated the existence of an agency that is a cornerstone of the reform legislation of SOX. In addition, it would have called into question the legitimacy of many Self Regulatory Organizations (SROs) like the New York Stock Exchange and the National Association of Securities Dealers. These organizations, like the PCAOB, are public, not for profit corporations exercising regulatory authority. This paper reviews and examines this important Court of Appeals decision.

A SARBANES-OXLEY APPROACH TO THE CREDIT CRISIS

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ABSTRACT

The United States is in the midst of the worst credit crisis in the last 25 years. On July 31, 2008, President Bush signed into law the Housing and Economic Recovery Act (HERA), a new law aimed at dealing with this crisis. The Act created a new regulatory agency, the Federal Housing Finance Agency (FHFA), and it authorized spending billions of dollars to back up our credit market.

The purpose of this paper is first, to examine some of the causes of the credit crisis; and second, to propose regulatory solutions patterned after the Sarbanes-Oxley Act (SOX), which dealt with similar problems. The paper begins by examining how the lack of due diligence has contributed to the crisis, and how an agency patterned after the one created by SOX can address this problem. The paper then turns to the problem of conflict of interest. It shows how SOX's approach of enhancing the independence of securities analysts can be applied to firms that rate the safety of mortgage-backed securities. Finally, the paper shows how a SOX approach can reinforce the fiduciary duties owed by mortgage originators, and by firms that securitize and sell mortgage-backed securities.

INTRODUCTION

The United States is in the midst of the worst credit crisis in the last 25 years. Federal Reserve Chairman Ben Bernanke described the financial crisis as a "gale force" that has created "one of the most challenging economic and policy environments in memory". The New York Times recently reported that "across the United States, neighborhoods are littered with an estimated 900,000 vacant homes, the result of foreclosures, bank repossessions and abandonment". The Wall Street Journal recently estimated that "at least $2.7 trillion has been wiped off the market value of European and U.S. Banks, insurers and asset managers". Earlier in 2008 the Federal Reserve engineered a bailout of the Wall Street investment firm of Bear Stearns, which might cost taxpayers $30 billion.

Congress reacted to this crisis on July 31, 2008 by enacting the Housing and Economic Recovery Act (HERA), the most comprehensive (and potentially the most expensive) bailout of the mortgage lending industry in history. HERA authorized the Federal Housing Administration (FHA) to insure up to $300 billion in refinanced mortgages; it created a new regulatory agency, the Federal Housing Finance Agency (FHFA) to regulate the mortgage giants Fannie Mae and Freddie Mac; and it authorized the Treasury Department to pump an unlimited amount of money into Fannie Mae and Freddie Mac to prevent their collapse.

This mortgage-driven credit crisis presents legal, ethical and regulatory issues. Lawmakers and others are assessing whether the Federal Housing Finance Agency (FHFA), the new regulatory agency created to oversee Fannie Mae and Freddie Mac, is enough to deal with the crisis and its underlying causes.

The Sarbanes-Oxley Act (SOX) was enacted in response to massive corporate failures in 2000-2001, including Enron, Tyco, and WorldCom, due in part to the failure of public accounting firms like Arthur Anderson to assure the reliability of financial information. A crisis in investor confidence ensued, with losses estimated at between $300 billion and $460 billion. Today we face a crisis of confidence in the credit markets, with losses estimated at over $2.7 trillion.

This paper will show how the lessons of the Sarbanes-Oxley Act (SOX) can be applied to the subprime mortgage crisis. SOX dealt with problems in public accounting and corporate governance that in many ways are analogous to the problems that led to the current credit crisis. Among these are failure to exercise due diligence, conflict of interest, and violation of fiduciary duties. This paper proposes a regulatory approach to the credit crisis that is similar to the approach taken by SOX.

A SARBANES-OXLEY APPROACH TO CREDIT REGULATION

Due Diligence

One of the causes of the financial meltdown of Enron, Tyco and others that led to the Sarbanes-Oxley Act was the failure of auditors to exercise due diligence: to be sufficiently thorough or aggressive in certifying the reliability of corporate financial information. This allowed corporations to get away with "cooking the books", overstating their profits and understating their liabilities. When the truth came out, precipitous drops in stock prices wiped out billions of dollars, and investor confidence in our securities market was shaken.

To assure due diligence, SOX created a new regulatory agency for public accounting, the Public Company Accounting Oversight Board (PCAOB). The Board enforces the exercise of due diligence through a system of inspections and investigations. In effect, the PCAOB audits the auditors. At least once every three years an inspection team visits an accounting firm that conducts up to 100 audits of public companies. If the auditors conduct more than 100 per year they are inspected annually. The PCAOB inspection team consists of experienced auditors, who have worked at least five years in this field. They review a sample of audits. If they find irregularities or violations, then an investigation may ensue. The investigators, armed with subpoena power, take a more prosecutorial approach. Substantial civil and criminal penalties can be imposed. The PCAOB can also terminate an accounting firm's right to engage in public company auditing.

Lack of due diligence also played an important role in the current credit crisis. Mortgage originators (brokers and lenders) had the ability to maximize their compensation by originating as many mortgages as possible. Traditionally, this had been tempered by the lenders' concern over loan repayment (credit risk). But following the securitization explosion of the 1990s, most mortgages were quickly resold in the secondary market. Loan originators thus relieved themselves of credit risk. If there was a default, it was no longer their problem. Loan originators therefore relaxed their lending standards just as accounting firms doing consulting work had relaxed their audit standards and vigilance. The result was a tremendous increase in subprime and other "innovative" mortgages that contained high credit risk.

A Sarbanes-Oxley approach to this problem would be to create a new regulatory agency with powers similar to those of the PCAOB. Let's call this new agency the Mortgage Origination Oversight Board (MOOB). Like all regulatory agencies, MOOB would promulgate rules and standards; these would promote sound lending practices. MOOB would then enforce its rules with periodic inspections and investigations. MOOB could also enforce the Truth in Lending Act (TILA) as it relates to mortgages. It might choose to reinforce the TILA with regulations that more forcefully deter predatory mortgage lending. Inspectors who were experienced mortgage professionals would conduct periodic inspections of all mortgage originators to assure compliance with those rules and standards. Irregularities or violations would trigger an investigation, which could result in civil or criminal fines and even jail sentences for willful, intentional misconduct.

Conflict of Interest

Another cause of the financial melt-down of 2000-2001 was that some securities analysts wrote biased reports on new issues of securities that were being sold by the investment banks that employed the analysts. SOX Section 501 addressed that problem. It does not forbid an analyst from reporting on securities being sold by her firm, but it mandates a "wall of separation" between the departments within the firm that deals with sale of new issues and those that write reports. Section 501(a)(1)(B) requires that "supervision and compensatory evaluation of securities analysts" must not be done by persons engaged in sales. Section 501(a)(1)(C) goes on to prohibit retaliation within the investment firm against an analyst who writes "an adverse, negative, or otherwise unfavorable research report".

The problem of overly optimistic ratings of mortgage-backed securities by rating firms is closely analogous to the problem of overly optimistic reports by securities analysts prior to Sarbanes-Oxley. In both cases the authors had a financial interest in issuing positive ratings or reports. Ratings firms were compensated by the firms issuing the securities, and analysts were compensated by their own firms, who were issuing the securities. In both cases there were opportunities for pressure to be brought on those writing the reports or determining the ratings.

A Sarbanes-Oxley approach to this problem of rating agency bias would be to provide more independence to the professionals making ratings determinations, just as SOX Sec. 501 provides more independence to securities analysts. This could be accomplished in much the same way as in Sec. 501. The professional staff determining ratings could be protected by a "wall of separation" within the ratings firm, and retaliation against the author of a negative or unfavorable rating could be prohibited.

Another conflict of interest problem addressed by SOX was the "cozy" relations that developed between auditors and their corporate clients after many years. Audit firm partners and corporate CEOs often became personal friends, making tough, objective audits more difficult. SOX attempts to remedy this problem in Section 203, which mandates rotating the "lead (or coordinating) audit partner having primary responsibility for the audit" at least every five years.

This Sarbanes-Oxley approach could be applied to the securitized mortgage area by requiring rotation of ratings firms every five years. Ratings firms would know that if they had been too generous in their ratings, this would probably be discovered by the next ratings firm that reviewed those securities.

Breach of Fiduciary Duty

Breach of fiduciary duty was a problem addressed by the Sarbanes-Oxley Act. Chief Financial Officers (CFOs) and Chief Executive Officers (CEOs) are agents who owe a fiduciary duty to their corporations and to stockholders. This requires utmost loyalty, as well as due diligence. In order to reinforce corporate managers' compliance with this duty, SOX Sec. 302 requires that CFOs and CEOs sign the periodic reports submitted to the Securities and Exchange Commission.

Mortgage originators owe a fiduciary duty to their customers, the borrowers. Nevertheless, in their zeal to issue as many mortgages as possible, many originators ignored the credit-worthiness of their customers and issued subprime and other "innovative" mortgages that contained a high risk of default. Default damages the borrower in many ways. A SOX approach to this problem would be to require the person originating the loan to sign a statement that based on his or her knowledge the mortgage loan is in compliance with sound lending practices and standards, as established by an agency like MOOB. In addition, the CFOs and CEOs of mortgage firms could be required to follow the example of SOX and be required to sign the periodic reports filed with regulatory agencies.

Another approach taken by SOX is contained in Section 404, which requires that public companies establish strong internal controls. Internal controls allow accountants to detect improper financial flows within the firm. They often provide the first warning of improper conduct. This requirement could be usefully applied to mortgage origination firms and also to investment firms that securitize mortgages.

CONCLUSION

If an American home buyer from 1850 could be transported to today, she would see a totally transformed credit landscape. Instead of the small groups of friends and neighbors that had banded together to build one house at a time, she would see a dizzyingly complex system of mortgage origination and securitization in which mortgages are pooled, sliced, and diced then sold by securities firms domestically and around the world. She would also see the most serious credit crisis of the last 25 years, fueled by defaulting subprime mortgages.

This crisis was brought about by massive securitization of subprime loans that were not credit-worthy. Mortgage loan originators quickly sold them into the securitized secondary market. If the borrower defaulted, the originator suffered no loss. Thus liberated from the moderating influence of credit risk, mortgage originators drastically relaxed their lending standards, issuing subprime "liar loans" requiring no documentation, interest only mortgages, no down payment mortgages, adjustable rate mortgages, and mortgages to people with impaired credit. Predatory lending also took place.

This paper proposes reform of the credit market directed at the loan origination process, using a Sarbanes-Oxley (SOX) approach. While SOX is not perfect, and has not completely eliminated the misconduct that contributed to the financial meltdown of 2000-2001, it has deterred abuse. SOX dealt with problems similar to those that caused our current credit crisis: lack of due diligence, conflict of interest, and breach of fiduciary duties. Using a SOX approach, a new federal regulatory agency would be created, patterned after the Public Company Accounting Oversight Board (PCAOB) created by SOX. This new agency would promulgate sound mortgage lending practices and standards, and then it would enforce them with periodic inspections and investigations.

A SOX approach to credit regulation would also include increasing the independence of firms like Standard and Poor's, that provide ratings for mortgage-backed securities. It would require strong internal controls for firms that originate or securitize mortgages. It would also require the CFOs and CEOs of those firms to sign and confirm the reliability of their firms' financial reports.

Many observers feel that more regulation of the credit market is on the way. Our experience with SOX over the last six years can act as a useful guide in dealing with the current credit crisis.

THE SUPREME COURT FAVORS PREEMPTION IN ITS 2008 TERM

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ABSTRACT

During its 2008 term, the United States Supreme Court addressed the issue of preemption in six cases. In each case, a different justice wrote the majority opinion, but all showed judicial approval for preemption. Even where the court declined to permit preemption, it made it clear it did so because Congress had not specifically indicated the doctrine was included in the appropriate statute. One former assistant to the solicitor general of the United States in summing up the justices attitude toward preemption noted that liberal and conservative justices had joined in these cases because one faction believed in deference to federal agencies and another faction did not want regulation by jury.

INTRODUCTION

The first case, Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc. (Stoneridge, 2008), dealt with the issue of whether investors could hold liable suppliers and customers of the company which committed securities fraud on the basis of aiding and abetting the company under the Securities Exchange Act. The second case, Preston v. Ferrer (Preston, 2008), raised the issue of whether the California Talent Agencies Act was preempted by the Federal Arbitration Act where the parties had agreed by contract to arbitrate contractual disputes. The third case, Rowe v. New Hampshire Motor Transport Association (Rowe, 2008), asked whether the Federal Aviation Administration Authorization Act preempted a Maine statute which sought to impose on carriers of tobacco products specific duties to prevent minors from obtaining tobacco. The fourth case, Riegel v. Medtronic, Inc. (Riegel, 2008), raised the issue of whether the Medical Device Amendments created a federal procedure for approval which preempted state common law actions for product liability. The fifth case, Chamber of Commerce of the United States v. Brown (Chamber, 2008), was concerned with whether the National Labor Relations Act prohibits states from regulating areas that Congress intended to be unregulated in favoring or not favoring unions. The sixth case, Exxon Shipping Company v. Baker (Exxon, 2008), raised the issue of whether the Clean Water Act's penalties for water pollution preempted maritime common law on punitive damages.

STONERIDGE INVESTMENT PARTNERS v. SCIENTIFIC-ATLANTA, INC.

In Stoneridge, investors in Charter Communications, Inc., filed a class action suit against Charter, its independent auditor, Arthur Andersen LLP, Scientific-Atlanta, Inc. and Motorola, Inc. The investors alleged that Charter had issued fraudulent quarterly reports to meet Wall Street estimates for cable customer growth and operating cash flow. When Charter executives realized their company would miss expected cash flow numbers by $15-$20 million, they asked Scientific-Atlanta and Motorola to modify their existing contracts. The two firms sold Charter digital cable converter boxes which Charter leased to its customers. Charter proposed to overpay its vendors $20 for each cable box until the end of 2000. In return, the vendors would return the overpayment by buying advertising from Charter. Charter would record the advertising as revenue and capitalized its purchase of the cable boxes. These bookkeeping transactions were in violation of generally accepted accounting principles and would fool its auditor into approving a financial statement which showed it met Wall Street's projected revenue and operating cash flow numbers. Scientific-Atlanta and Motorola agreed to these change of terms (Stoneridge,766).

To further disguise these fraudulent actions from its auditor, Charter and its vendors created documents to give the appearance that the increase in cable box costs and purchase of advertising were unrelated. Charter requested and Scientific-Atlanta responded by sending a false notice to Charter that it had increased production costs. Motorola agreed to sell to Charter a specified number of cable boxes and pay liquidated damages of $20 for each box it did not take. The goal was for Charter not to purchase the specified number and pay the liquidated damages. To return the money to Charter, Scientific-Atlanta and Motorola agreed by contract to buy advertising time for a price higher than market value. The agreements to pay more for the boxes were backdated to give the appearance they were confected a month before the advertising contracts. Charter used its falsely inflated revenue and cash flow figures on its financial statements which were filed with the Securities and Exchange Commission and reported to the public. Its vendors treated these transactions as a wash in their own financial statements (767).

Both the district court and appeals court dismissed Scientific-Atlanta and Motorola from the case on the grounds that the shareholders of Charter had not relied on any misstatements made by them nor did they have a duty to disclose what Charter had asked them to do. Justice Kennedy writing for a 5 court majority concurred. Until Congress specifically gave the right of a private cause of action against aiders and abetters in the Securities Exchange Act, the Court would not permit it (769).

PRESTON v. FERRER

In Preston, a contract between Alex Ferrer, who appears on television as "Judge Alex," and Arnold Preston, an entertainment industry attorney, required arbitration of any contractual dispute. When his fees were not paid, Preston filed for arbitration. Ferrer responded by filing a petition with the California Labor Commissioner alleging the contract was invalid under the California Talent Agencies Act because Preston acted as a talent agent without the license required by the state statute. While the California state courts thought a state agency was not bound by prior court decisions favoring arbitration, the Supreme Court reversed. Writing for a 8 court majority, Justice Ginsburg found the issue was who decides whether Preston acted as a personal manager, which would not be governed by the California statute, or as a talent agent (Preston, 982-983). The eight court majority ruled in favor of the arbitration clause.

ROWE v. NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION

In Rowe, the state of Maine in an attempt to prevent minors from ordering tobacco products adopted state statutes which specified that a state licensed tobacco shipper must use a delivery company that provides recipient verification service and confirms the buyer is of legal age and, in forbidding unlicensed tobacco shipments into Maine, presumed the person receiving tobacco products is deemed to know shipment contains tobacco if it is marked with a Maine licensed tobacco retailer or if it is received from someone whose name is on an official list of unlicensed tobacco retailers distributed to package delivery companies. The shippers association sued to enjoin these state statutes on the ground that they were preempted by federal law governing interstate commerce and in particular the Federal Aviation Administration Authorization Act and the Motor Carrier Act of l980. In 1994, Congress had specified that a state could not pass laws dealing with price, route, or service of any motor carrier with respect to the transportation of property (Rowe, 993). Maine thought its statutes should be exempted from the general prohibitions in the federal statutes because it dealt with a public health issue, i.e., preventing minors from acquiring tobacco products on the internet. Justice Breyer, writing for eight judge majority and one concurring, noted that the federal act included specific exceptions such as motor vehicle safety and local route controls, but did not list public health (996-997). Justice Scalia's concurrence was only one paragraph. He concurred with the majority except for its reliance on reports of Congressional committees to show the intent of the full House when the text of the act was clear on the issue before the Court (999).

RIEGEL v. MEDTRONIC, INC.

In Riegel, the issue was whether the preemption clause in the Medical Devices Amendments of 1976 prevented the use of common law product liability claims for damages caused by a medical device given premarket approval by the Food and Drug Administration. Justice Scalia, writing for an eight court majority, held Congress had specifically preempted state common law from application to the FDA approval process of medical devices. The unusual feature of this case was that under common law product liability tort law Medtronic had two defenses. One was the instructions accompanying the Evergreen Balloon Catheter stated its use was contraindicated for patients with calcified arteries and two, the catheter should not be inflated above its rated burst pressure of eight atmospheres. When Charles Riegel underwent coronary angioplasty his artery was heavily calcified. Riegel's doctor inflated the catheter to a pressure of ten atmospheres when it burst. From those events came this suit. The Court noted that Congress passed the Medical Devices Amendments to the Food and Drug Administration Act in 1976 to eliminate state regulations and impose a detailed federal procedure for approval of medical devices. Congress included a specific preemption provision. The Court noted the only grounds on which to sue the manufacturer of a medical device covered by the act was to allege that the device did not meet prior federal approved standards (Riegel,1003-1005).

CHAMBER OF COMMERCE OF THE UNITED STATES v. BROWN

California passed a statute which prohibited employers that receive state funds from using the funds "to assist, promote, or deter union organizing." The issue before the Court was whether two of its provisions covering grant applicants and covering private employers receiving more than $10,000 in state funds were preempted by federal law which ordered certain zones of labor activity be unregulated (Chamber, 2410-2411). Justice Stevens, writing for a seven judge majority, cited a prior decision, Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 140 (1976), as controlling. Machinists preemption applies to areas which Congress wanted reserved for market freedom. Machinists forbids both the National Labor Relations Board and states to regulate conduct that Congress intended to be unregulated and left to the free play of economic forces (2412).

EXXON SHIPPING COMPANY v. BAKER

There were three issues before the Court. First, whether a ship owner could be liable for punitive damages by an employee without actively approving those employee actions which caused the harm. Second, whether punitive damages have been preemptively barred implicitly by federal statutory law which makes no mention of them. Third whether the award of $2.5 billion in punitive damages is greater than maritime law permits. Since Justice Alito recused himself from this case, the first issue was not binding because there was a tie. The Court could not muster a majority to say whether Exxon could be held vicariously liable under maritime law for the punitive damages caused by the captain of the Exxon Valdes which ran onto a reef in Alaska's Prince William Sound. Because of the tie, the holding of the Ninth Circuit Court of Appeals became final and Exxon was held liable for punitive damages for the acts of its managerial agent, Captain Hazelwood (Exxon, 2614-2616). On the second issue, Exxon argued that the Clean Water Act preempted the award of maritime punitive damages. However, there was the questions of when had Exxon specifically raised the Clean Water Act as preempting maritime law. Clearly, the Court thought it had not raised the issue timely (2616-2617). Nevertheless, since the Ninth Circuit had addressed it, the Court agreed that the Clean Water Act claim should fail. Based on the text of the Clean Water Act, the majority found no indication of congressional intent to preempt punitive damages (2619).

CONCLUSION

Patricia Millett, who served eleven years as an assistant to the solicitor general of the United States and has argued before the Supreme Court twenty-five other times, in summing up the preemption cases heard by the Court in the 2008 term noted how the conservative and liberal wings of the Court came together. Some of the justices believe in deference to federal agencies and some do not want regulation by jury (Legal Times, 2008). If Congress wants to preempt state action and common law, it must explicitly say so. If it does, the Court will uphold it, provided it has the Constitutional authority to legislate in the area. Based on the Riegel case, one reporter thought that federal agency rules would preempt common law tort suits as long as the manufacturer could show that it met federal standards (McConnaughey, 2008).

REFERENCES

Chamber of Commerce of the United States v. Brown, 128 S.Ct. 2408 (2008).

Exxon Shipping Company v. Baker et al., 128 S.Ct. 2605 (2008).

Legal Times. Sizing up the 2007-08 supreme court term. Retrieved July 30, 2008, from http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202423364326

McConnaughey, Janet. Feds: rules pre-empt suits. *The Baton Rouge Advocate*, March 31, 2008, 4B.

Preston v. Ferrer, 128 S.Ct. 978 (2008).

Riegel v. Medtronic, Inc., 128 S.Ct. 999 (2008).

Rowe v. New Hampshire Motor Transport Association, 128 S.Ct. 989 (2008).

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc. et al., 128 S.Ct. 761 (2008).