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The Changing Face of the American Workplace

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FOREWORD

THE CHANGING FACE OF THE AMERICAN WORKPLACE

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As with many aspects of American life, the workplace has changed dramatically over the past few decades. A once overwhelmingly male, majority white workforce which was solidly unionized and had a legitimate expectation of stable employment with a single employer, has evolved into a diverse group, whose status is increasingly part-time or contingent, with one of the lowest unionization rates for industrialized countries.[1] In

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1. In 1964 65.2% of the workforce was male, 34.8% was female, and 11.2% was nonwhite. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1965, at 216, tbl.296 (86th ed., 1965). By 1996, 53.8% of the workforce was male, 46.2% was female, 11.3% was African-American, 4.3% was Asian and 9.5% was Hispanic. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Civilian labor force by sex, age, race, and Hispanic origin, 1986, 1996, and projected 2006* (last modified Dec. 29, 1997) <http://www.bls.gov/news.release/ecopro.table1.htm>.

In 1955 82.5% of the workforce was employed in full-time jobs. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1975, at 218, tbl.326 (91st ed., 1970). By 1995, the percentage of full-time employed had dropped to 74.5%. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 405, tbl.630 (116th ed. 1996). As of February, 1997, 6.7% of the workforce were independent contractors, 1.6% were on-call workers, 1% worked for temporary firms and 0.6% worked for contract firms. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Contingent and Alternative Employment Arrangements* (visited Mar. 2, 1997) <ftp://146.4.23/pub/news.release/conemp.txt>.

Individuals, particularly men, with fewer than twelve years of education are substantially less likely to be in jobs with long tenure than twenty years ago. *See* HENRY S. FARBER, ARE LIFETIME JOBS DISAPPEARING? JOB DURATION IN THE UNITED STATES: 1973-1993 (National Bureau of Economic Research Working Paper No. 5014, 1995).

In 1964, 29.5% of the workforce was unionized. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1969, at 326, tbl.345 (90th ed. 1969). In 1997, union members account for 14.1% of the workforce. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Members Summary* (last modified Jan. 28, 1998) <http://stats.bls.gov/news.release/union2.nws.htm>. This latter number compares with 24% for Japan, 35.2% for Australia, 37.4% for Canada, 28.9% for Germany and 32.9%

some instances, the law has been in the forefront in creating this change, as was the case with the passage of Title VII of the Civil Rights Act of 1964[2] and the Americans with Disabilities Act of 1990.[3] In other circumstances, lawyers have creatively used existing legal doctrines to respond to these changes, as in the development of the tort of wrongful discharge and the implied-in-fact employment contract. In still other situations, the law has yet to create effective means to deal with new challenges, as in the case of developing mechanisms for ameliorating the increasing power of multi-national corporations *vis-a-vis* their workforce. The articles in this symposium issue examine certain aspects of this workplace evolution and discuss how law can, and should, cope with these changes.

Opening the workforce to participation by minorities and women has created numerous opportunities, but has also led to increasing friction, which often expresses itself in the form of racial, religious or sexual harassment. The Supreme Court, in its current Term (1997-1998), has granted certiorari in several cases focusing on the legal issues under Title VII arising from sexual harassment. In *Oncale v. Sundowner Offshore Services Inc.*,[4] the Court unanimously decided that same-sex sexual harassment is cognizable under Title VII. *Faragher v. City of Boca Raton*,[5] requires the Court to determine the standard for assessing liability against the employer when a supervisor engages in hostile environment harassment.[6] A third case, *Burlington Industries, Inc. v. Ellerth*,[7] presents the question whether an employer is strictly liable for supervisory quid pro quo harassment where the supervisor's threat of adverse employment action was never implemented. In this symposium, three of the articles also tackle legal issues raised in the sexual harassment context.

In order to prevail in a Title VII sexual harassment hostile environment case, a plaintiff must prove, *inter alia*, that the con-

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for the United Kingdom. *See* International Labor Organization, *ILO Highlights Global Challenge to Trade Unions* (last modified Nov. 7, 1997) <http://www.ilo.org/public/english/235press/pr/1997/28.htm>.

2. 42 U.S.C. §§ 2000e-2000e-17 (1994).

3. 42 U.S.C. §§ 12101-12213 (1994).

4. 118 S. Ct. 998 (1998).

5. 118 S. Ct. 438 (1997), *granting cert. to* 111 F.3d 1530 (5th Cir.).

6. A related issue is presented in *Gebser v. Lago Vista Independent School District*, 118 S.Ct. 595 (1997), *granting cert. to Doe v. Lago Vista Independent School District*, 106 F.3d 1223 (5th Cir.), regarding the appropriate standard for liability of a school district under Title IX when a teacher sexually harasses a student.

7. 118 S. Ct. 876 (1998), *granting cert. to* Jansen v. Packaging Corp. of Am., 123 F.3d 490 (7th Cir. 1997).

duct in question is severe and pervasive enough to create both an *objectively* hostile work environment as well as a *subjectively* hostile one.[8] The courts of appeal have struggled to determine the appropriate objective perspective to employ. Should the offending conduct be considered from the perspective of the reasonable woman, the reasonable person, a reasonable person of the same sex as the victim, or the reasonable person who works in that particular workplace?

Professor Phelps, in her article *Gendered Space and the Reasonableness Standard in Sexual Harassment Cases,* suggests that perhaps the courts are focusing on the wrong aspects of the issue. Instead of focusing on from whose perspective to view the harassment, the courts should consider the concept of the gendered space in which the harassing conduct occurs. Professor Phelps posits that "if we utilize the lens of gendered space, we need not rely on the politically-charged reasonable woman or man standard." The concept of gendered space makes it clear "that anyone, regardless of gender, struggling to fit into a workplace that is gendered other may well respond with heightened sensitivity to subtle reminders, in the form of sex-laden remarks and conduct that one is an outsider."

In trying to decide whether *subjectively* the plaintiff perceived the conduct as unwelcome and abusive, the Supreme Court has indicated that evidence of a plaintiff's sexually provocative speech or dress is not irrelevant to the inquiry, but may constitute part of the totality of the circumstances for evaluating a claim of sexual harassment.[9] Subsequent lower court decisions have given varying weight to evidence relating to the plaintiff's prior sexual history. Richard Bell's Note, *Shielding Parties to Title VII Actions for Sexual Harassment from the Discovery of their Sexual History,* examines the impact of the new Federal Rule of Evidence 412 on the discovery of evidence of a victim's sexual history.

In 1994 Congress extended the federal criminal rape shield rule to civil cases alleging sexual misconduct, making inadmissible evidence offered to prove any alleged victim's sexual predisposition unless such evidence is "otherwise admissible under [the] rules and its probative value substantially outweighs the danger of harm to [the] victim . . . ."[10] Part of the rationale for extending the rule to civil cases was the potential which the disclosure of such information has for discouraging victims from bringing legitimate civil claims and its tendency to unnecessarily

8. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

9. *See* Meritor Sav. Bank v. Vinson, 447 U.S. 57, 68-69 (1986).

10. FED. R. EVID. 412(b)(2).

embarrass litigants. This rule, however, governs admissibility but not discovery.

This latter issue continues to be governed by Federal Rule of Civil Procedure 26's broad-based grant of discovery for any information that is unprivileged and reasonably calculated to lead to admissible evidence. The same concerns which led Congress to limit the admissibility of sexual history, however, apply with equal force to the discovery of such information. The Advisory Committee notes to Rule 412 suggest that courts should issue protective orders barring discovery of such evidence "unless the party seeking discovery makes a showing that the evidence . . . would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery."[11] The article examines this relationship between Federal Rule of Evidence 412 and Federal Rule of Civil Procedure 26 as applied to the discovery of sexual history evidence in sexual harassment cases.

Conversely, while Rule 412 seeks to protect victims from use of evidence of prior sexual conduct, Federal Rule of Evidence 415 provides that evidence of prior sexual assaults is admissible in a civil case against a party where the claim for damages is based on that "party's alleged commission of conduct constituting . . . sexual assault."[12] In many cases involving sexual harassment, the conduct of the alleged harasser can be characterized as sexual assault, thus seemingly allowing for the use of propensity evidence against the defendant. Daniel Overbey's Note, *Federal Rule of Evidence 415 and* Paula Corbin Jones v. William Jefferson Clinton, examines the history leading to the enactment of Rule 415 and the (perhaps unintended) effect of the rule on the litigation of sexual harassment cases.

Just as Title VII opened the workplace doors to racial, religious and gender minorities, the Americans with Disabilities Act removed the obstacles at the doorway which precluded the entry of individuals with disabilities. The statute not only prohibits discrimination because of disability, but also imposes the affirmative obligation on employers to provide reasonable accommodation to employees with disabilities unless such accommodation causes an undue hardship. Such accommodation may take the form of removing structural barriers in the workplace, job restructuring, or providing assistive technology.[13]

Some critics of the ADA contend that the costs associated with the statute's accommodation requirement outweigh the

11. FED. R. EVID. 412 advisory committee's note.
12. FED. R. EVID. 415(a).
13. *See* 42 U.S.C. § 12111(9) (1994).

benefits afforded to individual disabled workers. Several courts have also applied a cost-benefit analysis in evaluating whether a requested accommodation is reasonable, as distinct from the evaluation of whether the accommodation causes an undue hardship. Drs. Heidi Berven and Peter Blanck in their article, *The Economics of the Americans with Disabilities Act: Patents and Innovations in Assistive Technology,* argue that the critics and courts are focusing on too narrow a range of cost-benefit factors.

Their study suggests that a consequence of the passage of the ADA has been increased innovation in the field of assistive technology, thereby creating economic opportunities for researchers and manufacturers. These benefits need to be considered in the mix when evaluating the effectiveness and efficiency of the ADA. Moreover, they argue, even when viewing the cost of the accommodation in isolation, data shows that the direct cost is relatively inexpensive, and providing accommodation not only benefits the individual worker but also "has been shown to produce substantial economic benefits to companies, in terms of increased work productivity, injury prevention, reduced workers' compensation costs, and workplace effectiveness and efficiency."

Berven and Blanck's article also provides an example of the law of unintended consequences—while the ADA was enacted for the purpose of providing equal access to employment opportunities for individuals with disabilities, an additional and unintended consequence has been the stimulation of technological innovation. Similar unintended consequences have flowed from the decline of unionization among the workforce. Employees who are represented by unions and covered under the terms of a collective bargaining agreement, are protected against unjust discharge pursuant to the contract's "just cause" provisions. These employees can challenge their discharge through the use of the contractual grievance and arbitration mechanism. As fewer and fewer employees are represented by unions, more and more workers are forced to look elsewhere to secure the just cause protection afforded by union contracts. Before corporate America had the chance to "enjoy" its new found "freedom" from unions, it found itself involved in million dollar wrongful discharge tort litigation and bound by the terms of implied-in-fact contracts. As a defense to the time and expense (both in terms of litigation costs as well as damages awarded) of these lawsuits (as well as causes of action arising under discrimination statutes), many employers have [re]turned to mandatory arbitration of employment disputes.

In the article *Mandatory Arbitration of Statutory Employment Disputes,* Professor Leona Green explores the increasing use of mandatory arbitration in the employment setting and highlights some of its inherent shortcomings as a means for obtaining the just resolution of legitimate employee claims. The author particularly focuses on the failure of employer-mandated arbitration systems to protect both individual as well as societal interests due to "(1) the inequality in bargaining power between the employer and the prospective employee; (2) the lack of adequate discovery procedures that are essential to prove instances of discrimination; (3) the lack of legal training possessed by arbitrators; and (4) the lack of a mechanism for social vindication."

Unionization rates are not the only indicia of changed status among the workforce. The relationship between the employer and the worker, their status *vis-a-vis* one another, is changing as well. The increase in the number of part-time, temporary and contract workers has led to the use of the term contingency workforce to describe a growing segment of the working population. The American workforce is beginning to mirror the Japanese model, with a core of full-time workers surrounded by a contingency workforce which employers tap into as the needs of their business dictate. While contingency status provides flexibility and freedom for some workers, for others it connotes job insecurity, lower wages and lack of fringe benefits.

Whether an individual possesses employee status *vis-a-vis* a particular employer is not determined by the title which an employer gives the individual, as some employers have learned to their chagrin. As recounted by Professor Gregory in his article, *The Problematic Employment Dynamics of Student Internships,* the relationship between student interns and employers is particularly fraught with legal landmines. Many unpaid student intern opportunities may actually constitute violations of the minimum wage and overtime laws. Similarly, the recent Microsoft litigation illuminated the pitfalls of improperly designating as independent contractors individuals who are actually employees.[14]

Conversely, individuals who, in the past, were not considered employees, are now claiming employee status due to changes in their working conditions. Professor Gregory's article discusses two groups seeking to overturn decades old NLRB pre-

14. *See* Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997), *cert. denied,* 118 S. Ct. 899 (1998). Not only had Microsoft failed to withhold income taxes or make FICA contributions on behalf of the workers, but the Court found that it also erred in rejecting the employees' request to participate in certain benefit plans.

cedent concerning the employee status of graduate student teaching assistants and medical interns. Cases decided by the Board in the 1970s held that both groups were students, not employees.[15] The Board is reviewing the continuing validity of these precedents in light of the changed nature of the relationship between graduate teaching assistants and their universities and interns and their hospitals.[16] Doctors, who in the past have been considered independent contractors are claiming employee status in order to engage in collective bargaining with HMOs and insurance companies. The doctors claim these entities control their livelihood and the way in which they practice medicine by "deselecting" doctors who do not comply with guidelines concerning patient treatment.[17]

Many of the issues raised by the changing nature of the workplace at heart raise questions about the fair and ethical treatment of workers by the entity which employs them. Many states have passed corporate constituency statutes which allow managers to take into account the interests of non-shareholder stakeholders (including employees) when making decisions. As noted by Professor Timothy Fort in his article, *Religion in the Workplace: Mediating Religion's Good, Bad and Ugly Naturally*, increasingly businesses are being called upon to establish codes of ethical conduct to guide their behavior with respect to a vast array of constituencies. He argues that religious principles and beliefs can and should play a role in developing such codes; religion not only provides a moral imperative for the enactment of such codes but also supplies fundamental principles to guide their substantive content. Professor Fort acknowledges that the use of religion in corporate decision making can, however, cause

15. *Stanford University*, 214 N.L.R.B. 621 (1974), and *Adelphi University*, 195 N.L.R.B. 639 (1972), held that graduate students are students, not employees, and therefore are not entitled to the protection afforded to employees under the National Labor Relations Act. *St. Clare's Hospital*, 229 N.L.R.B. 1000 (1977) and *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251 (1976), reached a similar conclusion with regard to medical interns.

16. In an unfair labor practice case alleging that Yale University violated sections 8(a)(1) and (3) of the NLRA, *see* 28 U.S.C. §§ 158(a)(1)-(3) (1994), counsel for the General Counsel argued that the teaching assistants at Yale are employees for purposes of the NLRA. *See Yale Univ.*, 34-CA-7347, 1997 N.L.R.B. LEXIS 619 (N.L.R.B., Aug. 6, 1997). The Board has requested interested parties to submit briefs in a case involving the Boston Medical Center on the issue of whether interns and residents are employees entitled to the protections of the NLRA. *See* Michelle Amber, *Health Care Employees: Parties Respond to NLRB Request for Briefs on Employment Status of Interns, Residents*, Daily Lab. Rep. (BNA), No. 31, at C-1 (Feb. 17, 1998).

17. *See* Merrill Goozner, *Doctors Unions Battle Insurers*, CHI. TRIB., Jan. 25, 1998, at A3.

problems when used to proselytize or oppress workers of different faith traditions. He suggests that with respect to religiously-based ethics codes, the oppressive aspects of religion can be ameliorated by providing for employee participation in the creation of such codes.

While the articles in this symposium mainly focus on the domestic legal aspects of the changing workplace, an ever increasing emphasis needs to be placed on transnational and international aspects. The inter-connectedness of workers around the world is becoming ever more apparent and, fortunately, workers and their representatives are recognizing this trend. John Sweeney, the president of the AFL-CIO, visited his Mexican labor union counterparts in January, 1998, to encourage Mexican and American labor unions to help each other in cross-border organizing drives and bargaining strategies. Such cooperation is evidenced by the joint efforts of U.S. and Canadian labor unions, acting with the Authentic Labor Front (a politically independent Mexican trade union) to support Mexican workers engaged in a union campaign at the Itapsa brake shoe plant outside Mexico City. These unions are also putting pressure on the parent corporation, Echlin, Inc. which operates unionized plants in both the United States and Canada.[18] Similarly, coordinated efforts by unionized dockworkers protesting the firing of their counterparts in Liverpool, England, prevented the Neptune Jade, a container ship, from unloading at docks in Oakland, California, Vancouver, British Columbia, Yokohama and Kobe, Japan. This type of global strategy is not limited to American workers and their unions. For example, the Australian Council of Trade Unions announced a strategy to fight anti-union companies on a global scale by linking with international unions and pressuring world financial institutions.[19] Professor Gregory's article alludes to the apparent success of consumer boycotts in stemming some of the more egregious abuses of child labor worldwide, and suggests that this type of coordinated effort might serve as a pattern for dealing with other types of transnational labor issues.

The workplace will continue to evolve, raising new social, economic and legal challenges. The articles presented herein will provide the reader with a base line for thoughtful consideration of where we are now and where we might be heading.

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18. *See* Sam Dillon, *U.S. Labor Forges Ties Across Mexican Border*, N.Y.TIMES Dec. 20, 1997, at A4.

19. *See* Brad Norrington, *Unions Go Global in Fight with Rio Tinto*, SYDNEY MORNING HERALD, Nov. 21, 1997, at 5.