

Hearsay

A Publication of the Minnesota State Bar Association New Lawyers Section

Fourth Edition 2009

Volume XI, No. 4

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If you have any questions about the publication or would like to submit an article for a future issue, please contact Shanda Pearson or Samuel Edmunds.

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Greetings from the Chair

Erika Donner

I hope everyone enjoyed their summer, as we end one Bar year and start another. I am at the end of my tenure as New Lawyers Section Chair. You are in great hands with Lacey Anderson, the new Chair.

I am proud of the many accomplishments of the year, including that we were able to yet again give back to the community while having fun at the same time. At our two big socials this year, we raised money for Toys for Tots and Second Harvest and collected hundreds of toys and canned goods.

At our last event of the year, the New Lawyers Section hosted its annual Late Night Social at the MSBA Convention in Duluth. After dancing, we also hosted the traditional hospitality suite, where we socialized with judges and networked with other attorneys.

In addition to the many events and activities we planned through the year, we also updated the Section's bylaws and discussed legislative topics. It was a big year for legislation that affects attorneys, and often new lawyers were especially impacted. MSBA was successful in its work towards defeating a tax on attorney services. New lawyers played a role in contacting their legislators and advocating against this legislation. We should be proud for helping to defeat the tax on legal services.

Please plan to attend the first New Lawyers Section meeting of the 2009-2010 year, which is scheduled for Thursday, September 17th, at 5:30 p.m., at the MSBA offices. Thank you to everyone who made the past Bar year so successful.

Erika Donner is the outgoing chair of the MSBA New Lawyers Section and a business litigation attorney at The Kuhn Law Firm, PLLC. Erika can be reached at erikadonner@thekuhnlawfirm.com.



Human Trafficking in Minnesota: The Problem and Responses

Angela Bortel

Although many find it hard to believe, human trafficking occurs in Minnesota. From 2006 to 2008, Minnesota service providers reported working with 831 victims of sex trafficking and 93 victims of labor trafficking. Due to the clandestine nature of the crime and under-identification of victims, the actual numbers of victims likely exceeds those numbers.

In response, the State of Minnesota has passed new laws and gathered a significant body of data to address human trafficking. This article provides a brief overview of the problem of human trafficking in Minnesota and the state-level responses to that problem. This article closes by examining the roles Minnesota lawyers can play in securing justice for trafficking victims.

The Problem

Human trafficking denotes a range of exploitative practices pre-dating the late twentieth century movement to combat this problem. Human trafficking is often divided into two categories: sex trafficking and labor trafficking. The crime of sex trafficking involves exploitation for the purpose of prostitution. Recent federal prosecutions involved schemes prostituting adult women in brothels located in rental properties throughout the metro area and Austin, Minnesota, and promoting juvenile prostitution on www.craigslist.com in Minneapolis suburbs. As illustrated by the latter case, the crime of human trafficking affects U.S. citizens and foreign nationals alike and does not require movement across an international, national, or even a state border. The trafficking of Native American girls into prostitution throughout the

state has been a growing point of concern for advocates and law enforcement.

Labor trafficking involves exploitation for the purpose of debt bondage, forced labor or services, slavery or practices similar to slavery, or organ extraction. Traffickers exploit victims in various settings: domestic workers, restaurants, food processing facilities, and factories. Minnesota service providers reported working with victims originally from Mexico, China, Guatemala, Russia, as well as other Central and South American, Asian, and African countries.

Traffickers violate victims' human rights by depriving them of security of person, freedom of movement, humane working conditions, and myriad fundamental rights. At the same time, trafficking is often the culmination of past human rights violations, such as lack of housing, lack of access to education, and physical and sexual violence.

Traffickers use tactics such as subtle forms of coercion, debt bondage, threats, lies, isolation, and outright physical force to lure and maintain victims in situations of forced labor or prostitution. Victims often sustain physical, psychological, and emotional harm that endures well beyond the trafficking episode. Human trafficking not only impacts victims, but also their families, friends, home communities, and communities where the trafficking occurs.

Demand drives human trafficking. Sex trafficking satisfies some men's demand for access to predominantly women and children for sexual and psychological abuse.

Labor trafficking is fueled by demand for cheap goods and services. Globalization has facilitated this dynamic through the increased scope of markets and mobility of people.

Minnesota's Response

Since the passage of the first Trafficking Victims Protection Act in 2000, the federal government has spent millions of dollars combating human trafficking in the United States and abroad.

Minnesota law has made significant strides in creating a state-level infrastructure to address human trafficking. A state-level response provides additional means to hold perpetrators accountable, assist victims, and raise awareness while taking into account the particular features of the problem in that state.

Minnesota's 2005 human trafficking bill criminalized sex and labor trafficking. It also created the crime of unlawfully retaining identity documents to further a labor or sex trafficking scheme—a coercive tactic commonly used against both foreign nationals and U.S. citizens. This law also created a civil cause of action for trafficking victims, a procedure for forfeitures in trafficking cases, and a statewide, multi-disciplinary advisory committee on human trafficking in Minnesota.

Additional provisions passed in 2006 reconfigured the advisory committee into a statewide taskforce responsible for collecting and analyzing data on trafficking in Minnesota. The legislation established and funded a statewide human trafficking hotline. It also appropriated funds for the Ramsey County Safe Harbor Youth Intervention Project (SHYIP), gang strike and narcotic taskforces, legal advocacy for trafficking victims, and an assessment of available services for victims.

2009 Legislation

New legislation on human trafficking overwhelmingly passed in the Minnesota House and Senate during the 2009 session. The bill primarily addressed concerns about the clarity and utility of the criminal provisions on sex trafficking and prostitution. Criminal liability for sex and labor trafficking now includes “receiving profit or anything of value, knowing or having reason to know it is derived” from trafficking. This provision mirrors federal law and will enable prosecutors to charge those who profit from the trafficking scheme, even if they do not directly participate in its execution. The legislation also revised the felony statute for promotion of prostitution and sex trafficking to make it easier to charge and collect data. It similarly modified the statute on misdemeanor prostitution offenses for individuals in prostitution and their patrons to clarify the crime and possible penalties.

Other provisions of the bill sought to more fully cross-reference the crime of sex trafficking throughout Minnesota's statutes. For example, sex trafficking is now considered a “crime of violence” for the purpose of firearms regulation.

Lastly, the Office of Justice Programs will now conduct its annual statistical analysis on trafficking in Minnesota biannually instead of annually.

Next Steps

Despite the considerable knowledge base and success, much remains to be done on the state level. Minnesota must continue to support law enforcement and prosecutors in their education and responses to trafficking. This can be done by funding regular training appropriate to the needs of specific agencies and mandating specific training on human

trafficking as a part of continuing education requirements. State fiscal support for agencies investigating and prosecuting trafficking cases is also crucial, particularly since human trafficking investigations are among the most resource intensive investigations law enforcement undertakes.

Individuals working with trafficking victims at non-governmental agencies and medical facilities need funding and training to support their critical work. The public at-large must be made aware of the problem because in many cases teachers, neighbors, or clergy members are the first point of contact for trafficking victims. Minnesota should also research and fund effective means to prevent human trafficking.

Minnesota should also establish and fund public assistance programs for trafficking victims who satisfy the state's definition of a victim. The need for such assistance is particularly acute for victims with legal permanent residency (often called a green card) or U.S. citizenship because they are often not otherwise eligible for those benefits.

Lastly, sentences for traffickers of adult victims must be increased to account for the horrific nature of the crime. Current sentencing guidelines consider sex trafficking of an adult a Level V offense, which includes simple robbery and residential burglary. A first-time sex trafficking offense with no prior criminal history will yield a presumptive stayed sentence of 18 months. Probation is not an appropriate sanction for human trafficking.

Conclusion

The State of Minnesota has made considerable strides in crafting laws and infrastructure to address this complex problem. While improvements remain necessary, the large body of statewide data and engaged advocates in multiple

disciplines are priceless assets in crafting more comprehensive responses.

Lawyers have and will continue to play an important role in combating human trafficking. Obviously, prosecutors play a critical role in providing compassionate support to victims and witnesses, as well as holding perpetrators accountable. Criminal defense attorneys also are on the frontlines of identifying trafficking victims, as in the case of a woman arrested and sentenced to six months in jail whose defense attorney subsequently identified her as a trafficking victim.

Victims' needs and rights do not stop with the criminal proceedings against their traffickers. Trafficking victims have great need for zealous representation in civil and administrative matters. Foreign nationals will often need experienced immigration lawyers and public benefits specialists to navigate the immigration benefits and public assistance available to trafficking victims from the federal government. Trafficking victims may also have recourse for violations in the areas of employment, civil rights, and tort law, making experienced plaintiffs' attorneys critically important. As more lawyers become fluent in the issues surrounding human trafficking, they will pioneer additional innovative remedies for victims of this grave human rights abuse.

Angela Bortel is the founder of The Bortel Firm, LLC, in Minneapolis, Minnesota—a law firm focusing on immigration and nationality law and civil litigation. Since 1997, she has engaged in policy advocacy, direct services, technical support and training sex trafficking in the United States and in Russia. In 2008, Ms. Bortel was the



primary author of the report *Sex Trafficking Needs Assessment for the State of Minnesota* published by *The Advocates for Human Rights*. She also participated in initial discussions, research, and drafting of the human trafficking bill passed by the Minnesota state legislature in 2009. She serves on the board of directors of *Miramed*, an international non-governmental organization devoted to working with vulnerable youth and eliminating sex trafficking in Russia. Angela can be reached at abortel@bortelfirm.com and 612.388.3366.

Notes

¹ Minn. Office of Justice Programs & Minn. Statistical Analysis Ctr., *Human Trafficking in Minnesota: a Report to the State Legislature 2* (2008), http://www.ojp.state.mn.us/cj/publications/Reports/2008_Human_Trafficking_Report.pdf [hereinafter 2008 Report].

² While the 2008 Report and its 2006 and 2007 predecessors comprise one of the most comprehensive attempts to assess the problem of human trafficking on a statewide level, collecting data on trafficking victims poses numerous methodological limitations. As each of the reports acknowledges, the lack of systematic recordkeeping and the ability to count only victims properly identified by a first responder necessarily means that the statistics represent an underestimation of the problem. *Id.* at 4-5. Additionally, the underlying definition of a trafficking victim can influence data. For example, the 2008 Report employs the definition of human trafficking devised by the Minnesota Human Trafficking Task Force. *See id.* at 1. This definition includes a wider range of conduct than either state or federal law.

³ Some organizations and advocates, however, subsume sex trafficking under the broader category of labor trafficking. This analysis reflects an understanding of prostitution and work in the sex industry as forms of work entitled to protection. *See, e.g.,* Int'l Labour Office, *A Global Alliance Against Forced Labour: Global Report Under the Follow-up to the ILO Declaration of Fundamental Principles and Rights at Work 6, 7* (2005), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1015&context=forcedlabor>; Jo Dozema, *Loose Women or Lost Women? The Re-emergence of the Myth of 'White Slavery' in Contemporary Discourses of Trafficking in Women*, 18 *Gender Issues* 23 (2000).

⁴ S.F. 1505, 86th Leg. Sess., Reg. Sess. (Minn. 2009) (to be codified at Minn. Stat. §§ 609.321, subd. 7a, 609.322, subds. 1(a)(4), 1a(4)). Federal law prohibits recruiting, enticing, harboring, providing, or obtaining of a person for the purpose of a "commercial sex act." 18 U.S.C. § 1591(a) (2008).

⁵ Superseding Indictment, *United States v. Ramirez*, No. 07-166 (D. Minn. May 21, 2007). This case never yielded charges for trafficking crimes for any of the defendants. Ramirez ultimately plead guilty to conspiracy, illegal entry after deportation, and money laundering. Plea Hearing Minutes, *Ramirez* (Apr. 3, 2008).

⁶ See Judgment, *United States v. Reisdorf*, No. 07-276 (D. Minn. Jan. 14, 2008); Affidavit to Criminal Complaint at 1, *Reisdorf* (Jan. 14, 2008).

⁷ In cases of sex trafficking, federal law requires that the trafficking episode occur in or affect interstate or foreign commerce. See 18 U.S.C. § 1591 (2008).

⁸ Minn. Stat. § 609.281 (2008).

⁹ 2008 Report at 2.

¹⁰ *Id.*

¹¹ See *The Advocates for Human Rights, Sex Trafficking Needs Assessment for the State of Minnesota 59-71* (2008), http://www.theadvocatesforhumanrights.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/REPORT_FINAL.10.13.08_2.pdf (discussing health problems and healthcare needs of trafficking victims) [hereinafter *Sex Trafficking Needs Assessment*].

¹² See *id.* at 28-31 (summary of federal laws and policy on human trafficking).

¹³ See Minn. Stat. §§ 609.282, 609.321, subd. 7(7) & subd. 7a (2008). Minnesota law considers sex trafficking a type of promotion of prostitution and not a separate crime.

¹⁴ Minn. Stat. § 609.283 (2008).

¹⁵ Minn. Stat. §§ 609.284, 609.5315, subd. 5b, 299A.78-7955 (2008).

¹⁶ Minn. Stat. §§ 299A.79, 299A.7955 (2008).

¹⁷ Minn. Stat. § 299A.7957 (2008).

¹⁸ H.F. 4162, 84th Leg. Sess., Reg. Sess. § 4, subd. 4 (a)-(e) (Minn. 2006), available at <https://www.revisor.leg.state.mn.us/laws/?doctype=Chapter&year=2006&type=0&id=282> (last accessed June 17, 2009).

¹⁹ H.F. 1505, 86th Leg. Sess., Reg. Sess. (Minn. 2009), available at <https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1505.4.html&session=ls86> (last accessed July 13, 2009).

²⁰ H.F. 1505, 86th Leg. Sess. Reg. Sess. §§ 1, 4 (Minn. 2009), *available at* <https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1505.4.html&session=ls86> (last accessed July 13, 2009).

²¹ H.F. 1505, 86th Leg. Sess., Reg. Sess. § 7 (Minn. 2009), *available at* <https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1505.4.html&session=ls86> (last accessed July 13, 2009).

²² H.F. 1505, 86th Leg. Sess., Reg. Sess. § 8 (Minn. 2009), *available at* <https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1505.4.html&session=ls86> (last accessed July 13, 2009).

²³ H.F. 1505, 86th Leg. Sess., Reg. Sess. § 11 (Minn. 2009), *available at* <https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1505.4.html&session=ls86> (last accessed July 13, 2009).

²⁴ H.F. 1505, 86th Leg. Sess. Reg. Sess. § 1 (Minn. 2009), *available at* <https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1505.4.html&session=ls86> (last accessed July 13, 2009).

²⁵ Minnesota Sentencing Guidelines Comm'n, Minnesota Sentencing Guidelines and Commentary 62 (Aug. 1, 2008), *available at* <http://www.msgc.state.mn.us/msgc5/guidelines.htm>.

²⁶ Minnesota Sentencing Guidelines Comm'n, Minnesota Sentencing Guidelines Grid (2008), *available at* http://www.msgc.state.mn.us/guidelines/grids/grid_2008.pdf.

²⁷ The report does not specify where this incident occurred. Sex Workers Project, Kicking Down the Door: The Use of Raids to Fight Trafficking in Persons 8 (2009), <http://www.sexworkersproject.org/downloads/KickingDownTheDoor.pdf> (last accessed July 7, 2009).

Immigration Obstacles in Times of Economic Downturn

Sandra Feist

In reaction to the current economic turbulence, companies have been forced to take dramatic actions in order to minimize the impact on long-term financial viability. In recent months, businesses in all industries have announced salary cuts, layoffs, and acquisitions. These actions, taken with the bottom line in mind, can have a drastic impact on foreign national employees, as well as the company's ability to hire and retain foreign national employees in the future. This impact is often hidden and is rarely intuitive. This article aims to outline the main areas of immigration law and procedure that are impacted by the economic downturn.

H-1B Workers and Economic Woes

The H-1B visa category is reserved for "specialty occupations," which are defined as positions that require a Bachelor's Degree or equivalent.¹ Common examples of H-1B workers include computer professionals, university professors,

physicians, and management-level employees. The H-1B category is governed by a series of highly-restrictive Department of Labor regulations.² These regulations freeze the salary, hours worked, and the employer-employee relationship at the time of filing. Therefore, any material changes to the terms and conditions of employment made in an effort to save company revenue will violate the terms of the H-1B status. It is irrelevant that these changes were made on a company-wide, non-discriminatory basis.

The most common problem we have seen is company-wide salary cuts. Employers must pay the "required wage" for each H-1B worker.³ This wage is governed by the prevailing wage for the position within the county and by the actual salary paid to individuals in the position within the company.⁴ If an employer wishes to cut an H-1B worker's salary below the salary listed on the H-1B petition, they must file an

amended petition.⁵ If they do not file an amended petition prior to the cut, then the H-1B worker has violated their status. Similarly, employers have shortened employee hours to cut the payroll on a more temporary basis. This too will generally violate an H-1B worker's status unless the worker's initial filing indicates that the position was part-time or includes a range of hours.⁶ In addition to the hassle of filing a completely new petition under these circumstances, the employer must pay the legal and filing fees associated with the petition.⁷ For a company that has been forced to cut the salaries of its workers, these additional expenses are particularly unwelcome.

Companies have also responded to the economic downturn by strategic corporate restructuring. Such restructuring can have a significant impact on approved H-1B petitions and creates additional and extensive obligations on the part of the employer to ensure that Department of Labor obligations are met in terms of notice to employees through the maintenance of a Public Access File.⁸ These Public Access Files are also available for an audit by the Department of Labor at any time to ensure compliance with the relevant regulations.⁹

Sponsorship of Workers for Permanent Residence

Employers often use sponsorship for permanent residence as a recruitment tool. This sponsorship has the added benefit of obligating the sponsored worker to remain with the employer for a period of time.¹⁰ The economic climate has affected the most commonly used process, called the PERM Labor Certification Application, in a number of ways.¹¹

The Department of Labor has recently begun to adjudicate the PERM applications with a harsh eye, increasing the scrutiny of individual cases and resulting in denials based upon

technical or perceived violations.¹² While this newly restrictive approach to the PERM process is an unstated response to the soaring unemployment levels in the United States, the goal of protecting the opportunities of U.S. workers might be better served by a global reshaping of the PERM program. From an employer standpoint, this rocky climate at the Department of Labor adds a new level of uncertainty as to the result and the timing of the PERM process that is problematic.

We have also seen an increase in the waiting period for permanent resident applicants to file for permanent residence, in particular for Indian and Chinese nationals.¹³ While these "immigrant visa backlogs" are said to be due to the numerical limitations per category and nationality, the timing of these prohibitive backlogs has the perceived impact of opening sponsored positions to out-of-work U.S. workers. As a result of these backlogs, Indian and Chinese nationals - even those with advanced degrees - are facing *nearly a decade* during which their job opportunities are frozen as they await the ability to file for permanent residence.¹⁴ From both an employer and employee standpoint, this inflexibility moots many of the benefits of sponsorship, although some employers may perceive this period of forced employment as a benefit.

Employers who have layoffs within six months prior to filing a PERM application face a heavy burden. In addition to the labor-intensive recruitment process, they must also contact individuals who (1) were laid off within six months of the PERM filing, (2) were employed in the area of intended employment, and (3) performed essentially the same job duties.¹⁵ These individuals must be considered for the foreign national's job opportunity and fairly disqualified. In addition to this potentially cumbersome process, there is a likelihood that indicating there has been a layoff within the past six

months on the PERM paperwork will result in an “audit,” which could subsequently add an additional year to the average processing times.

Immigration Compliance in an Enforcement-Minded Era

In response to the current economic climate, the government is concerned more than ever with protecting the jobs of U.S. workers through the enforcement of employer obligations under the immigration laws. These obligations arise in a number of contexts, including the I-9 verification of identity and employment authorization obligation that all employers share.¹⁶ Employers of foreign nationals have additional burdens depending on the immigration status of these employees.

In 2008, the Immigration and Customs Enforcement made 5,184 administrative arrests and 1,103 criminal arrests through worksite enforcement.¹⁷ These enforcement activities are increasingly aimed at management-level employees and owners where they previously targeted only the unlawful workforce.¹⁸ In a recent interview, the Secretary of the Department of Homeland Security Janet Napolitano stated, “one of the changes we have made is a reemphasis on actually going after and developing cases against the actual employers who profit from going intentionally into the illegal labor market.”¹⁹ In conjunction with immigration enforcement, the Department of Labor has announced its intention to add 250 new investigators to its Wage and Hour Division field offices to refocus the agency on worksite enforcement responsibilities.²⁰

All employers are obligated to complete the I-9 form for new employers within three business days of hire.²¹ The penalties for non-compliance were formerly small fines that did little to deter employers from retaining an unlawful workforce. The new approach to

enforcement uses the I-9 verification process to charge employers with a broad spectrum of criminal acts for violations and willful or negligent errors on the I-9 records. For example, employers have been charged with Social Security fraud for the use of fake social security numbers on the I-9 form, as well as fraud, money laundering, and tax evasion charges.²²

In an effort to enhance the effectiveness of the I-9 process, the government has begun to encourage employers to voluntarily participate in the E-Verify program.²³ This program, operated by the Department of Homeland Security in partnership with the Social Security Administration, allows employers to verify the employment authorization of a new hire. On September 8, 2009, E-Verify may become mandatory for federal contractors and subcontractors, with some variations on procedures and obligations.²⁴ Enrollment in this program demonstrates a good faith attempt to comply with immigration laws, but also opens an employer up to more invasive governmental searches of employee records and additional obligations that can be cumbersome unless an employer is organized and motivated to integrate the system seamlessly into its process for new hires.²⁵

In addition to the obligations by all employers to maintain a lawful workforce, there are additional requirements for employers of foreign nationals – in particular of H-1B workers – that are expected to be the focus of increased scrutiny by the Department of Labor over the coming year.

Conclusion

The economic downturn has significantly impacted the immigration processes, both for temporary and permanent foreign workers, as well as the immigration obligations that all

employers face. This impact can be seen in a number of ways, including a restriction on eligibility for nonimmigrant and immigrant benefits, extensive and impractical delays in all processes, and an ever-increasing scrutiny on worksite enforcement with the goal of protecting the jobs of U.S. workers. It is more important now than ever to keep immigration implications in mind when advising corporate clients on ways to weather the economic storm.

Sandra Feist is an Associate Attorney with Aronson & Associates, P.A. in Minneapolis where she specializes in employment-based immigration law. She advises employers on all matters pertaining to hiring and maintaining a legal workforce. Sandra has been employed in the field of immigration law for over eight years and is a 2007 graduate of William Mitchell College of Law. She can be reached at 612-455-1176 or sfeist@aronsonimmigration.com.



Notes

¹ Immigration and Nationality Act (INA) § 214(i).

² 20 C.F.R. § 655.700 – 20 C.F.R. § 655.855.

³ 20 C.F.R. § 655.731(a).

⁴ *Id.*

⁵ 20 C.F.R. § 655.731. There are limited circumstances where wages need not be paid during voluntary nonproductive status. 20 C.F.R. § 655.731(c)(7)(ii).

⁶ 20 C.F.R. § 655.731(c)(7)(i). If the employer indicated a range of hours in the H-1B petition, then the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H-1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment. Note that at all times, the H-1B worker must be paid the required wage for all

hours performing work within meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et. seq.*

⁷ 20 C.F.R. § 655.731(c)(10). Employers are not allowed to deduct “business expenses,” such as legal fees, from an H-1B worker’s wage if the deduction will take them below the “required wage,” which is almost always the case. 20 C.F.R. § 655.731(c)(9)(i). Any unauthorized deduction taken from wages is considered by the Department of Labor to be non-payment of the required wages and the penalty can include liability for back wages, fines, and even disqualification from participation in the H-1B and other immigration programs, if willful. 20 C.F.R. § 655.731(c)(11).

⁸ 20 C.F.R. § 655.730(e).

⁹ 20 C.F.R. § 655.760. Extensive fines and even imprisonment can result from failure to comply with the H-1B regulations. 20 C.F.R. § 655.805.

¹⁰ This period of time varies depending on the level of education required for the position and the nationality of the worker. Department of State Visa Bulletin, available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4512.html. For certain Indian and Chinese nationals, the obligation could, astoundingly, last close to a decade.

¹¹ This process requires the employer demonstrate that it could not find a minimally-qualified, interested U.S. worker for the position and that the foreign national will therefore not be usurping a U.S. worker’s job opportunity. 20 C.F.R. § 656.1(a).

¹² For example, the regulations at 20 C.F.R. § 656.17 provide a list of recruitment measures and methods in which these measures “may” be documented. If these measures are documented differently, the Department of Labor has been denying these applications as in violation of the permissive regulations.

¹³ Department of State Visa Bulletin, available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4512.html.

¹⁴ *Id.* In addition, the Department of State indicated in a recent meeting with the American Immigration Lawyers Association (AILA) that the agency expects immigrant visa backlogs for citizens worldwide in the category reserved for advanced degreed professionals, and for Indian and Chinese nationals who have risen to the level of extraordinary ability. This category formerly enabled the world’s “best and the brightest” to bypass the line for permanent residence. AILA InfoNet at Doc. No. 09061032 (*posted* Jun. 10, 2009).

¹⁵ 20 C.F.R. § 656.17(k).

¹⁶ 8 C.F.R. § 274a.2.

¹⁷ U.S. Immigration and Customs Enforcement (ICE) Worksite Enforcement News Summary (Nov. 25, 2008), available at www.ice.gov/pi/news/factsheets/worksite.htm.

¹⁸ *Id.* The individuals who were charged with criminal violations included 135 owners, managers, supervisors and human resource employees.

¹⁹ Walter Shapiro, *Janet Napolitano on Immigration Reform, Enforcement and 'Killer Pumpkins,'* Politics Daily, June 22, 2009, available at <http://www.politicsdaily.com/2009/06/22/janet-napolitano-on-immigration-reform-enforcement-and-attack/>.

²⁰ Press Release, Employment Standards Administration (ESA), Statement of U.S. Secretary of Labor Hilda L. Solis on GAO Investigation Regarding Past Wage and Hour Division Enforcement (Mar. 25, 2009), available at <http://www.dol.gov/opa/media/press/esa/esa20090324.htm>.

²¹ The best practical guide for I-9 compliance is available on-line through the Handbook for Employers, Instructions for Completing Form I-9, available at <http://www.uscis.gov/files/nativedocuments/m-274.pdf>.

²² See Sandra Feist, *The Expanding Legal Sphere of Immigration Enforcement*, Hearsay (Winter 2008),

available at <http://www2.mnbar.org/sections/new-lawYERS/Winter2008-09.pdf>.

²³ The E-Verify program is outlined in detail on the Department of Homeland Security website at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD>.

²⁴ See 74 Fed. Reg. 5621 (Jan. 30, 2009). The implementation of the rule has been opposed and delayed four separate times, most recently in order to allow the new administration time to complete its review of the rule.

²⁵ Pending legislation is also currently stalling the implementation of new rules regarding the receipt of “No Match Letters.” These new obligations could create complex and cumbersome procedures for employers who receive indication that the Social Security Number provided by a foreign national does not match the records of the Social Security Administration.

Evidence in a Bench Trial: Encouraging Judicial Doublethink

Andy Mergendahl

When facing the prospect of a trial, an attorney might consider whether a bench trial might improve the chances of success, or at least greatly simplify the attorney’s task. While certain courts do not offer jury trials,¹ civil and criminal trials do, and the rules governing waiver of a jury are straightforward.²

The attractions of the bench trial are easy to understand. One might want to avoid the risk of opposing counsel successfully portraying one’s client as a bad or evil person, and a jury of laypersons then concluding that the client deserves punishment, never mind the law. Further, much time can be saved by waiving the right to trial by jury. Jury selection is time-consuming and difficult, with no way to

see the results of one’s labor until the verdict is in. The continual need to move jurors in and out of the courtroom so as to argue motions and objections out of the jury’s presence is eliminated by a bench trial, as are the steps needed to ensure that a jury does not see that a defendant is in custody, or learn that the defendant is represented by a public defender.

It is also easier to be lawyerly in a bench trial. There is no need to tell the client’s story to a group of laypersons, as in a bench trial one advocates only to a legal expert. This can further shorten the trial and allow one to use a more technical approach without confusing or irritating the fact-finder. When considering whether to waive a jury trial, one might turn

to statistics and learn, for example, that research has suggested that federal judges acquit criminal defendants more often than juries do.³

Down the Rabbit Hole?

A brief look at the rules of evidence quickly reveals complex questions that both attorneys and judges face in a bench trial. A bench trial can require a change in one's approach to evidence, as the judge may find herself required to engage in something resembling doublethink⁴ while serving potentially contradictory functions as both controller of the trial and fact-finder. Looking at two Minnesota evidence rules, 403 and 609(a), is helpful in understanding these potential problems.

Many rules of evidence are designed to filter out evidence that a jury should not hear. Much of pre-trial evidentiary motion work is a battle to try to get one's evidence admitted, while keeping the opponent's evidence out. The most compelling battles often relate to evidence that would prejudice the jury.⁵ This area of concern is rooted in the belief that the layperson, while presumably good at making factual determinations by weighing the credibility of witnesses and exhibits, is bad at not getting emotionally inflamed and losing impartiality. The judge determines which evidence would be too inflammatory.

But what if the judge is also the fact-finder? This is where we perhaps go down the rabbit hole.⁶ Does it make any sense to argue via Rule 403 that the judge should exclude certain evidence from a bench trial because its probative value is substantially outweighed by the danger of unfair prejudice? To rule on the motion, the judge will have to first see this evidence, or at least have it described in detail, thus creating the risk of exactly the prejudice the rule seeks to

prevent. Should a motion via Rule 609(a) to impeach the credibility of a witness by bringing into evidence crimes the witness has committed provide a list of those crimes? One might feel in either instance that the genie is already out of the bottle. Denying the motion will not erase the court's knowledge of the evidence or the crimes. A Colorado district court judge put these kinds of motions on his tongue-in-cheek list of "Ways to Lose a Bench Trial."⁷ However, a judge I spoke to recently expressed no concern about such a motion. The law presumes that judges can engage in this kind of doublethink, first being exposed to evidence, then considering whether a jury ought to see or hear it. The judge rules on the motion, and if not admitting the evidence, mentally screens off that evidence or forgets about it. It is reasonable to suggest that the more inflammatory and therefore prejudicial the evidence, the more difficult it might be for a judge to not be affected by exposure to it. One might analogize this problem with the problem of inadmissibly prejudicial evidence being mistakenly heard by a jury, and the judge being forced to issue a curative instruction. Opinions no doubt differ on the effectiveness of such an instruction.

The appellate courts allow more latitude with respect to the admission of evidence in a bench trial than in a jury trial.⁸ Even if an appellate court finds that the trial court erred in admitting a piece of evidence, the error is considered non-prejudicial as long as the court did not rely on that evidence in its written order.⁹ I've found judges for the most part to be quite confident of their ability to hear evidence and make a decision based only on the admissible evidence, or to at least carefully weigh the value of evidence. I asked a judge after a bench trial about her decision to admit evidence that, in my view, should have been excluded as hearsay. Smiling, she replied, "because I wanted to hear it." This

captures what I think is the common self-perception among judges. I mean this in no way as a criticism of judges in general but merely to suggest that it is wise for attorneys to be aware that such a mindset may exist. This should figure into one's decision to waive a jury trial, as well as one's strategy and tactics regarding evidence.

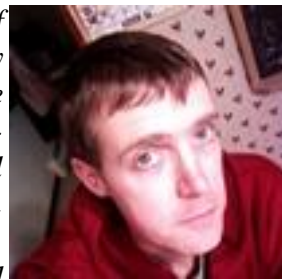
Just Another Judgment Call

As for advice for attorneys on making this choice, all I suggest is that attorneys pay very close attention to the unique facts of the case. Clients may have faith in a jury of laypersons who, at least in the aggregate, are presumably ordinary people, able to see things from the client's perspective. This is as opposed to a judge, who may be viewed as less sympathetic. This perspective underpins the power of the idea of a jury of one's peers. One should be careful to explain to a client that a jury might in fact be *less* likely than a judge to be sympathetic to a client's tale of woe.

The technical complexity of your legal argument should of course be carefully considered. Finally, one should carefully consider one's past work before the judge, learn as much as one can about the judge's reputation, and discuss the idea of a bench trial with attorneys who have tried cases before that judge, while taking into account the reputation and style of the attorneys giving you the feedback. An attorney who is struggling with a decision on choosing bench versus jury trial should probably choose a jury trial. If nothing else, this ensures that the client will know that the matter will be decided in the atmosphere of tradition and *gravitas* that only a jury trial can provide.

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Notes

¹ The following Minnesota courts feature only bench trials: Family, Child Protection, Domestic Abuse/Harassment, Juvenile Delinquency, Housing, Mental Health, Conciliation (Small Claims), and Traffic.

² "The defendant, with the approval of the court, may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel." Minn. R. Crim P. 26.01, subd. 1 (2). "In actions for the recovery of real money only, or of specific real or personal property, the issues of fact shall be tried by a jury, unless a jury trial is waived or a reference is ordered." Minn. R. Civ. P. 38.01.

³ Linda Seebach, *Federal Judges, Not Juries, More Likely to Acquit*, Rocky Mountain News, July 22, 2006, at 11C.

⁴ George Orwell, *Nineteen Eighty-Four* 220 (1949) ("The power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.").

⁵ *Black's Law Dictionary* 1343 (4th ed. 1968) ("A forejudgment; bias; preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of justice.").

⁶ Lewis Carroll, *Alice's Adventures in Wonderland* 1 (1898).

⁷ National Institute for Trial Advocacy, Blog, <http://thenitablog.blogspot.com/2008/04/best-practices-in-winning-bench-trial.html>.

⁸ *State v. Caulfield*, 722 N.W.2d 304, 317 (Minn. 2006).

⁹ 75B Am. Jur. 2d Trial § 1671. This section also provides a practice tip: "[t]he mere fact that a case is tried without a jury is not the basis for the admission of wholly incompetent evidence... which is otherwise inadmissible..." *Id.*

The New ADA Amendments: What New (Employment) Lawyers Need to Know

Laurel J. Pugh

Right now is a very interesting time to practice employment law. It seems that at every turn, state and federal legislators are coming up with new laws that affect both employers and employees. The Americans with Disabilities Act Amendments Act (“ADAAA”) is one of those laws.

The ADAAA became effective on January 1, 2009, setting off a wave of very good questions from employers, attorneys, and courts alike. The ADAAA offers some of the broadest and most sweeping changes to any federal employment law. What follows are some highlights of the broadest changes to the ADA.

The Americans with Disabilities Act (“ADA”) still defines a disability as: (1) a physical or mental impairment that substantially limits one or more major life activities of such individual, (2) a record of such an impairment, or (3) being regarded as having such an impairment. The ADAAA expands on that definition by actually identifying activities that fall into this category. We now know that “major life activities” include but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. In addition, major bodily functions are included in this definition and include but are not limited to: functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory,

circulatory, endocrine, and reproductive functions.

The ADAAA broadens the ADA in many other ways as well. Previously, an employee would not be considered disabled (and thus able to seek protections under the ADA) if that employee’s medical condition was episodic or in remission. Now, however, an employee claiming disability discrimination need only show that his or her physical or mental impairment substantially limits one or more of the foregoing “major life activities,” *even if the impairment is in remission or episodic.*

Another change is that employers may not consider any mitigating measures that a person uses to control a disability in the determination of whether an employee meets the Act’s definition of “disabled.” Before the amendments took effect, an employee with a mental or physical impairment who used a device or medication to control that impairment may not actually have been disabled as long as no major life activities were limited with the use of the device. The ADAAA changes that, and courts and administrative agencies will soon be applying this new rule in practice. The only exception in this category includes the mitigating effects of glasses or contact lenses on a person’s sight.

Perhaps the most sweeping change is in the “regarded as” category. In the past, an employee who claimed he was being discriminated against based on being

regarded as disabled still had to prove that he was in fact disabled. Now, under the ADAAA, a person claiming disability discrimination in the “regarded as” category must prove only that he was subjected to an adverse employment action because he was regarded as disabled, not that he actually is disabled.

Since nearly every client is either an employee or an employer in one capacity or another, these recent amendments are relevant in many respects. Perhaps the greatest impact is in the realm of an employer’s obligation to provide a reasonable accommodation for disabled employees. Employees who may have previously been denied a reasonable accommodation, or who never asked in the first place, may now be eligible for a reasonable accommodation.

Likewise, employers that had previously denied reasonable accommodation requests may now need to reexamine whether they need to implement reasonable accommodations for certain employees.

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