Labor & Employment Law News

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LAWYERS WHO SERVE

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Summer 2010 Edition

A Message from the New Chair

by Mary M. "Peggy" Brockington, *Strickland Brockington Lewis LLP*

Welcome to a new Labor & Employment Law Section year. It's a little daunting taking over as Chair, following such a long line of terrific Section Chairs. Rob Capobianco, last year's Chair, did such a great job leading our Section through a very busy and productive year, and managed to do so with great cheer, organization and enthusiasm, despite the gloomy economy. He set a great example for me of what a Chair should do—I will do my best to come close to what he accomplished. Whether you're a new member of the Section or a seasoned veteran, I hope you'll join me in what I would like to be another great year.

The Atlanta Bar Association's new President, Mike Terry, has announced his initiative for the coming year to reach out to unemployed lawyers. I hope our Section will support this initiative, in our own practices and in our Section activities. Our Board has agreed to offer a designated number of free seats at Section events to our unemployed colleagues, so they can remain involved and engaged in Section activities, while they network with their peers and keep up with ever-changing labor and employment law issues. We also plan to continue our focus on pro bono and community service. Our Section will continue to host luncheons in October and May, and we hope you will attend and invite your colleagues to join you. Along with the State Bar Labor and Employment Section, we will again co-sponsor a CLE seminar in December, and will offer the Advanced Employment Conference again next March.

We welcome your input, your ideas, and most of all your participation in Section activities. We want our Section to continue to be a leader in membership and in professional and social activities. Please call me at 678-347-2205 or email me at mmb@sbllaw.net if you have ideas, comments or just want to talk. I'm a good listener.

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A Message from the Immediate Past Chair

by Robert W. Capobianco, *Jackson Lewis, LLP*

As the 2009-2010 Bar year ends, I want to thank all of the people who helped make this a great year for the Labor & Employment Section. First, thanks to my fellow Board members: Peggy Brockington, Dan Klein, Maureen Sutton, Penn Payne, Lisa Chang, Julie Northup, Cory Barker, Jim Walters, Ian Smith, Michelle Shivers, Marcia Ganz, Debra Schwartz, and Michael Sullivan. All of us Board members know that we really could not accomplish anything if it was not for the amazing assistance we receive throughout the year from the Atlanta Bar staff: Mary Lynne Johnson, Tanya Windham, Michele Adams, Brantly Jackson, Stefanie Aponte, and Mariana Pannell. Thank you.

The Section hosted two fabulous "View from the Bench" lunches this year, and I want to thank our fantastic speakers: Magistrate Judge Alan J. Baverman and Magistrate Judge Walter E. Johnson. Additionally, I want to thank Board members, Michelle Shivers and Marcia Ganz,

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and Section member, Valerie Barney, who conducted CLEs in conjunction with the Pro Bono Partnership of Atlanta focusing on employment issues commonly encountered by non-profits. Thank you to all of the attorneys who volunteered to write articles for our Section's Newsletter, and thanks to Board member, Marcia Ganz, for coordinating the articles and sending the Newsletter to print. Finally, there was our annual Advanced Employment Law Conference and a special thank you to the following Section members who presented at the Conference: Anita Wallace Thomas, Ian Smith, Penn Payne, Dan Klein, Ed Buckley, Weyman Johnson, and Meg Kochuba.

Lastly, thank you to all of you Section members who attended our events. Despite tough economic conditions, all of our Section events maintained high attendance. It has been my pleasure to serve the Section and, in the process, meet more of you. The Section is in great hands with our incoming Chair, Peggy Brockington, and I look forward to seeing you at future events.

Profane, Sexually-Charged, Gender-Specific Language Can Give Rise to a Disparate Treatment Cause of Action

By Stephen W. Mooney, *Weinberg, Wheeler, Hudgins, Gunn & Dial**

In *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010), the 11th Circuit issued a unanimous en banc opinion holding that gender-specific profane words can give rise to a disparate treatment claim, even when the words are not explicitly directed toward the plaintiff.

From July 2001 to March 2004, the plaintiff, Ms. Ingrid Reeves ("Reeves"), was employed as a transportation sales representative in the Birmingham, Alabama branch of the shipping company C.H. Robinson. Reeves was the only woman who worked on the sales floor along with six (6) male co-workers. The sales floor was an open area that was structured into an open "pod" of cubicles. As a result, Reeves could hear her male co-workers as they spoke over the phone or with each other.

Reeves was a former Merchant Marine and testified that she was "no stranger to coarse language." Still, Reeves claimed that the language used by her co-workers at C.H. Robinson was "unusually offensive." Much of the vulgar language, while generally offensive, was not gender-specific. Reeves frequently heard generally indiscriminate vulgar language and discussions of sexual topics. She claimed that her co-workers regularly used the "f-word," combined with various profanities and other obscene language. Additionally, her co-workers supposedly discussed sexual topics such as masturbation and bestiality.

Reeves also identified many instances where derogatory language aimed specifically at women as a group was used at C. H. Robinson. Although not speaking to Reeves directly, her male co-workers referred to individuals as "bitch," "f-ing bitch," "f-ing whore," "crack whore," and a crude word describing female genitalia. On one occasion, Reeves was told to speak with "that stupid bitch on line 4." Reeves also overheard her co-workers tell many lewd and offensive jokes, some with sexual references to sisters and mothers and other inappropriate "punch lines." In addition, each day Reeves' co-workers tuned the office radio to a crude morning show that featured regular discussions of women's anatomy, including graphic discussions of women's breasts. Further, one of Reeves' co-workers displayed a pornographic image of a fully naked woman with her legs spread on his computer screen.

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According to Reeves, this offensive conduct occurred "on a daily basis." She complained to her co-workers, and to upper management, but according to her, these complaints "proved futile." In particular, Reeves complained about both non-gender-specific vulgar conduct, as well as gender-specific offensive conduct.

Reeves resigned from C.H. Robinson in March 2004 and filed suit against the company in the United States District Court for the Northern District of Alabama in February 2006, alleging that she had been subjected to a hostile work environment in violation of Title VII. The District Court Judge granted C.H. Robinson's motion for summary judgment, holding "that the offensive conduct was not motivated by Reeves' sex, because the derogatory language in the office was not directed at her in particular."

Reeves appealed to the 11th Circuit which reversed the lower court's ruling. The 11th Circuit then granted C.H. Robinson's motion for an en banc hearing. The opinion began by explaining the framework of Title VII. The 11th Circuit noted that in order to prove hostile work environment under 42 U.S.C. § 2000e-2(a)(1), a plaintiff must show "that her employer discriminated because of her membership in a protected group, and that the offensive conduct was either severe or pervasive enough to alter the terms or conditions of employment."[1] The 11th Circuit held that a plaintiff could prove a hostile work environment by showing severe or pervasive discrimination directed against her protected group, even if she herself was not individually singled out in the offensive conduct.

In more detail, the 11th Circuit described the issue in the case as "whether the conduct alleged to have pervaded C.H. Robinson created a hostile work environment that 'exposed [Reeves] to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed.'" Thus, the 11th Circuit believed that Reeves' case was properly evaluated under the disparate treatment framework as opposed to the disparate impact framework. In a footnote, the opinion notes that the hostile work environment that Reeves described was not "facially neutral" because she alleged that the office environment was permeated with gender-based derogatory slurs and conduct. As a result, "[t]he crux of Reeves' actionable claim [was] that these gender-specific actions exposed her to humiliation and discrimination that none of her male co-workers faced. She presented evidence of 'specific incidents,' not 'statistical disparities.'"

The 11th Circuit acknowledged the "bedrock principle that not all objectionable conduct or language amounts to discrimination under Title VII." General vulgarity or references to sex that are indiscriminate in nature will not, standing alone, be actionable. However, the use of sexually offensive, gender-based profanity in the workplace, such as the words "bitch," "slut," and other sexually graphic language, could support a disparate treatment sexual harassment claim, even though the words are not explicitly directed toward the plaintiff. The 11th Circuit explained that "for purposes of establishing a claim of hostile work environment under Title VII, it is enough to hear co-workers on a daily basis refer to female colleagues as 'bitches,' and 'whores' …,' to understand that they view women negatively, and in a humiliating or degrading way; the harasser need not close the circle with reference to the plaintiff specifically, as in 'and you are a bitch, too.'"

According to the 11th Circuit, Reeves had identified more than enough actionable conduct that a jury reasonably could find contributed to office conditions that were humiliating and degrading to women on account of gender, and therefore may have created a discriminatorily abusive working environment. "The terms 'whore,' 'bitch,' and … the vulgar discussions of women's bodies and breasts, and the pornographic image of a woman in the office were each targeted at Reeves' gender."

Of interest, the 11th Circuit briskly rejected C.H. Robinson's argument that there was no proof of gender animus because Reeves' co-workers had used gender-specific epithets before she arrived in the workplace. The Court explained, "[t]hat argument is inconsistent with the central premise of Title VII." It further noted that "[a]t the end of the day, this is a question of intent" which, is difficult to discern. The Court, however, held that the employer's intent was a question for the jury to decide.

Finally, the 11th Circuit rejected C.H. Robinson's argument that words such as "bitch" and "whore" were not gender-specific because at C.H. Robinson they are used to refer to both men and women. Ms. Reeves specifically disputed this fact, stating that she had never heard any man call another man "bitch" in the office. Little, if any, credence was given to this factual dispute. Instead, the Court reasoned that calling men these words did not make them any less offensive to women. "Calling a man a 'bitch' belittles him precisely because it belittles women. It implies that the male object of ridicule is a lesser man and feminine, and may not belong in the workplace. Indeed, it insults the man by comparing him to a woman, and, thereby, could be taken as humiliating to women as a group as well."

In sum, the 11th Circuit decided that a jury reasonably could find that C.H. Robinson's workplace exposed Reeves to disadvantageous terms or conditions of employment to which members of the other sex were not exposed. Thus, the case was reversed and remanded for further proceedings.

***Stephen W. Mooney** is a partner at Weinberg, Wheeler, Hudgins, Gunn & Dial. His practice focuses on representation of employers in labor relations cases, including all aspects of equal employment law, National Labor Relations Board matters, development of employment policies and procedures, and executive compensation issues.

(Endnotes)

1 Under 11th Circuit law, in order to prove a hostile work environment, the plaintiff must show:

(1) that he or she belongs to a protected group;

(2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;

(3) that the harassment must have been based on the sex of the employee;

(4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and

(5) a basis for holding the employer liable.

LinkedIn® and Restrictive Covenants: Issues and Potential Pitfalls to Consider in the Age of Social Media

By Kenneth N. Winkler and Neal F. Weinrich*,
Berman Fink Van Horn P.C.

Albert Einstein once stated that "Technological progress is like an axe in the hands of a pathological criminal." Given the chance, Einstein may have enjoyed the opportunity to post a blog on relativity or to befriend Sigmund Freud on Facebook. But as stories of suicidal "cyber-bullying" and Tiger Woods' "sexting" headline daily tabloids, it appears that Einstein's cautionary observation is as applicable today as ever. Indeed, a recently filed lawsuit alleging unlawful solicitation through the use of social media highlights the dangers both employees and employers face through the use of social media in the workplace.

Litigation Involving LinkedIn®

In March 2010, TEKsystems Inc., a Maryland company engaged in the business of recruiting, employing and providing the services of technical, industrial and office personnel, filed a lawsuit in the United States District Court for the District of Minnesota against three former employees Brelyn Hammernick, Quinn VanGorden, Michael Hoolihan and their new employer, Horizontal Integration, Inc. At first blush, the lawsuit appears to be a "vanilla" unfair competition case alleging a sundry of claims including breach of contract, breach of duty of loyalty, misappropriation of trade secrets and tortious interference with contract. What is somewhat unusual, however, is that the complaint specifically alleges that one of the former employees violated a non-solicitation covenant by contacting TEKsystems' contract employees through her use of LinkedIn®. In particular, the Complaint alleges that Hammernick improperly communicated with at least twenty TEKsystems' contract employees and messaged an invitation to have them visit her new office and "hear about some of the stuff we are working on."

Whether such activity on LinkedIn® (or other business and personal social networking sites) would constitute a breach of a non-solicitation of employees covenant under Georgia law is uncertain. It is also uncertain whether similar activity directed at customers would constitute a breach of a non-solicitation of customers covenant. There do not appear to be any reported decisions considering whether evidence of such communications and messages on LinkedIn® constitutes solicitation.[1] The absence of such decisions results in large part from the nature of litigation involving restrictive covenants. As in many states, cases in Georgia involving restrictive covenants are often heavily litigated and largely decided at the injunctive relief stage. At this stage, based on Georgia's strict laws on restrictive covenants, the enforceability of the covenants is usually the determinative issue. While the former employer will undoubtedly present evidence in support of its request for injunctive relief that the employee has breached or intends to breach the restrictive covenants, nearly all Georgia appellate decisions reviewing the grant or denial of injunctive relief focus on the trial court's ruling on the enforceability of the covenants, rather than the validity of such evidence and whether a breach has occurred or is likely to occur.

Thus Georgia appellate courts have had rare occasion to specifically consider and address what evidence will or will not support a claim for breach of a non-solicitation covenant. In Roberts, Ltd. v. Parker, 215 Ga. App. 310 (1994), the Court of Appeals reversed a grant of a directed verdict for a former employee who brought suit on a note his former employer had executed to him as part of a severance package. The employee had entered into a non-competition agreement as part of that package. When the employer learned that the employee had joined a competitor, the employer ceased making payments on the note. In support of its defense that the employee's breach of the non-competition agreement terminated its obligations under the note, the employer introduced evidence that the employee had sent a series of letters to clients of the employer in which he offered his assistance. The trial court found that these letters were not efforts to solicit business and directed a verdict for the employee for the amount owed under the note. However, the Court of Appeals reversed and held that the factual determination of whether the letters were a "solicitation" must be made by the jury.

Georgia's body of appellate law thus does not provide much insight as to what conduct on LinkedIn® might constitute evidence of solicitation in a lawsuit regarding a former employee's restrictive covenants. Undoubtedly, if an employer is able to obtain evidence of LinkedIn® activity where the former employee is actively soliciting his or her old customers, such evidence can be used to support the employer's request for injunctive relief.

What Types of Activity May Constitute Unlawful Solicitation?

If courts are called upon to answer what kind of LinkedIn® activity will support a claim for breach of a non-solicitation covenant, such cases will likely be decided on their own specific facts and circumstances. As a general matter, courts will likely treat communications within LinkedIn® the same as they treat other forms of communication. For example, a message directed to a LinkedIn® contact offering to sell a product to the contact would obviously be deemed a solicitation. Other types of communications unique to LinkedIn®, however, raise interesting issues as to which it may not be as easy to predict the outcome:

- A sales representative bound by a non-solicitation of customers covenant resigns employment from Acme, Inc. to work for a competitor. He then sends a notice throughout his LinkedIn® network announcing that he is newly employed and goes on to explain his job duties and responsibilities and the products he is selling. Some of his LinkedIn® contacts are

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customers that he serviced while employed by Acme, Inc. and some are Acme, Inc. customers with whom he sold products to prior to joining Acme, Inc. Would his notice constitute an improper solicitation?

- Would the outcome change in the above scenario if the sales representative added certain key Acme, Inc. customer contacts to his LinkedIn® account immediately before he resigned from Acme, Inc. Would it matter if the sales representative created his LinkedIn® account and added his contacts after he knew he was resigning and just before he actually resigned?
- If the sales representative writes an article about "Effective Customer Service" and sends a message to all of his LinkedIn® contacts with a link to the article, would this activity constitute a solicitation?
- If the sales representative started a discussion about "Effective Customer Service," would this activity constitute a solicitation?

These scenarios suggest that the nature and degree of the LinkedIn® activity is likely to be an important factor in determining whether an individual has violated a non-solicitation covenant. As the law tries to catch up with technology, LinkedIn® usage will increasingly be the focus of discovery in litigation involving restrictive covenants.

Notably, the Georgia legislature recently passed a law reforming Georgia's law on restrictive covenants. If an amendment to the Georgia Constitution is approved by the voters in a ballot referendum this fall, this new law will go into effect. The new law will permit judges in Georgia to modify or "blue pencil" overly broad restrictive covenants. Judges thus may soon no longer be required to strike down overly broad covenants as unenforceable, as they must under current law. If this change occurs, litigation involving restrictive covenants will likely become less focused on the narrow question of whether a covenant is enforceable. Instead, the key battles in litigation over restrictive covenants will likely become more centered on the question of what restraints are reasonable and how far an overly broad covenant should be pared down. It is also possible that more cases will survive the injunctive relief stage and be litigated on the merits. Thus, both Georgia trial and appellate courts may have the opportunity to address the question of what conduct constitutes "solicitation," so as to support a claim for breach of a non-solicitation covenant. If they do, they will undoubtedly confront and potentially answer the questions raised by this article regarding LinkedIn® activity.

Proactive Steps to Combat Post Employment LinkedIn® Solicitation

Absent affirmative action and policies by a company concerning LinkedIn® profiles and activity, a company is likely to have difficulty asserting ownership and control over information, contacts and relationships which a departing employee has on his or her LinkedIn® account. This is true for several reasons. First, an employee's LinkedIn® account may pre-date the start of his or her employment. Like the business contacts in a Rolodex which were in an employee's possession prior to the start of employment and which the employee brings with him or her on the first day of his or her employment, pre-existing information and contacts on LinkedIn® do not automatically become the property of the new employer when the employee joins the company, absent agreements or policies otherwise. A company will thus have significant difficulty forcing an employee to "return" information or contacts found on his or her LinkedIn® page, or "shut down" a LinkedIn® account, when the account pre-dates the start of employment.

Second, while LinkedIn® has become the "business" version of the social media sites, many users may view LinkedIn® as less of a business tool and more of a personal way of "keeping in touch" that is an alternative to other sites such as Facebook and MySpace. Furthermore, a LinkedIn® profile page does not merely duplicate a biography page which might appear on a company website. Rather, it contains past job history and education information and is thus arguably somewhat akin to an online resume. These varied perspectives on LinkedIn® use may make it difficult for an employer to persuade a court that it owns information or contacts on a former employee's LinkedIn® account, if the employer does not have policies specifying as such.

Finally, information on LinkedIn®, including an employee's LinkedIn® contacts, is publicly available to anyone who is connected to the employee on LinkedIn®. This can have significant implications if an employer is seeking to protect that same information as trade secrets or confidential information which the employee has acquired in the course of his or her employment. As a threshold matter, if the information is publicly available and easily ascertainable, it may be challenging for an employer to demonstrate that it has taken reasonable steps to protect the secrecy of the information for which it is seeking protection. Similarly, an employer may be less concerned about information on LinkedIn® but may be alarmed because

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Save the Date

Advanced Employment Law

Thursday, March 17, 2011

at the W Midtown Atlanta Hotel

The Atlanta Bar Association Labor & Employment Law Section's premier event

Speakers, topics, CLE hours and other details to be announced. Check your emails for updates or visit www.atlantabar.org

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the employee intentionally took a tangible customer list when he or she left the company. The employee's "contacts" on LinkedIn® may make it difficult for an employer to claim that the list constitutes a trade secret. That is, if the employee could independently re-create the information contained on the list using the contacts in his or her LinkedIn® profile, the list may not be entitled to protection under many states' trade secrets laws. Furthermore, an employee's LinkedIn® contacts may not be the exclusive outlet from which the employee could potentially re-create a customer list, as the information which the employer is seeking to protect may be found in the employee's contact lists on other social media outlets, such as Facebook or MySpace.

Conclusion

In this day and age, employers are strongly advised to consider whether profile pages and accounts on social media outlets such as LinkedIn® may have information which employers may wish to protect as their own. Employees are similarly advised to be cognizant of the fact that their employers may increasingly exert control over information on social media through terms in employment agreements and through company policies. Employees should also be aware that post-employment activity on social media outlets such as LinkedIn® can potentially subject them to claims for breach of non-solicitation covenants in their employment agreements.

For employers, carefully developing social media policies[2], electronic usage policies and modifying employment agreements to adequately address these issues will give them the best chance of obtaining the protection they may undoubtedly want to have. For example, it may prudent to include specific references to LinkedIn®, Facebook, and Twitter and other social media in non-solicitation covenants so employees clearly understand that they cannot solicit customers and prospective customers using such media. Finally, employers should not overlook the importance of educating employees from orientation through separation about the company's policies regarding the protection of trade secrets and the employee's obligation to abide by the company's restrictive covenants where applicable.

***Kenneth N. Winkler** is a shareholder in Berman Fink Van Horn, P.C. Ken's practice is concentrated in the area of labor and employment law and litigation involving restrictive covenants and competition-related issues. **Neal F. Weinrich** is an associate at Berman Fink Van Horn, P.C. Neal's litigation practice frequently involves disputes concerning non-competition, non-solicitation, and non-disclosure agreements, as well as other competition-related issues.

(Endnotes)

1 There are some cases in other jurisdictions where use of LinkedIn® has been the focus of other types of claims and legal issues. *See, e.g., Krzyzanowski v. Orkin Exterminating Co., Inc.*, No. C 07-05362 SBA, 2009 WL 4050674 (N.D. Cal. Nov. 20, 2009) (LinkedIn® messages sent by class action plaintiffs' lawyer to former employees and one current employee of defendant the subject of a motion to disqualify plaintiffs' counsel); *Asanov v. Legeido*, No. 3:07-1288, 2008 WL 4814261 (M.D. Tenn. Oct. 31, 2008) (LinkedIn® postings do not support trademark infringement claim under circumstances of case).

2 Among other items, such a policy may require prior approval before a contact is added to a LinkedIn® or business networking account. The policy should advise employees that that all requests for references or recommendations, even those that are received through social networking, should be handled in accordance with the Company's standard policy for responding to such requests. Employees should also be prohibited from mentioning customers, business partners, or suppliers without prior approval.

Newly Appointed EEOC Commissioner Conducts Roundtable with Atlanta Attorneys

By Daniel M. Klein, *Buckley & Klein, LLP**

Recently-appointed EEOC Commissioner Chai Feldblum has been on a "whistle-stop" tour of EEOC offices around the nation. While most of her trip has been devoted to meetings with EEOC attorneys and staff, she expanded her itinerary in Atlanta to include a round-table discussion with some 20 attorneys in private practice. The discussion was held on May 21 at the Atlanta office of Paul, Hastings, Janofsky & Walker. Participants included attorneys customarily representing both employees and employers.

The discussion focused on ways in which the EEOC could best fulfill its administrative responsibilities and serve attorneys in private practice and their clients. Commissioner Feldblum also presented some of her own thoughts on potential advances, particularly in the form of enhanced use of technology. She expressed her interest in the EEOC's developing an online docketing system to make charge-related documents accessible to the parties via the Internet.

Commissioner Feldblum was sworn in on April 7, 2010. Prior to her appointment to the EEOC, she was a Professor of Law at the Georgetown University Law Center. She attended Harvard Law School and clerked for First Circuit Judge Frank Coffin and Supreme Court Justice Harry A. Blackmun. Much of her career has focused on focused on the development of federal disability rights legislation, as well as on issues of gay, lesbian, bisexual, and transgender rights.

***Daniel M. Klein** is a founding partner at Buckley & Klein, LLP. When serving as an advocate and advisor, Dan principally represents employees in a wide range of employment matters. About 40% of Dan's practice is devoted to work as a mediator or arbitrator.

Judge Johnson Provides Practical Advice to the L&E Section

By Lisa B. Golan, *Attorney at Law,* and Julie S. Northup, *Barrett & Farahany, LLP**

United States Magistrate Judge Walter E. Johnson was the featured speaker at the May 12 luncheon of the Labor & Employment Section. A former partner in Kilpatrick Stockton's Labor and Employment practice group, Judge Johnson provided practical advice to attorneys litigating before the federal bench. The following is a summary of his practical pointers:

Consent to the Jurisdiction of Magistrate Judges

Judge Johnson encouraged those present to consent to trying their cases before a magistrate judge. Because magistrate judges do not try felony criminal cases, the parties will not have to wait as long to get a case tried and have the benefit of having a specially-set trial. In contrast, the Northern District has four vacancies, adding to its already-crowded docket, which includes felony criminal cases.

Mediate Your Case Before a Magistrate Judge

Judge Johnson reminded the group that magistrate judges are available to act as mediators free of charge. Magistrate Judge Gerrilyn Brill is in charge of scheduling mediations. Judges are assigned by rotation, but parties can request a particular judge.

Streamline Your Summary Judgment Fact Statements

Judge Johnson pointed that parties moving for summary judgment may be in danger of violating the spirit, if not the letter, of Local Rule 56.1 if they file lengthy statements of "undisputed material facts." He emphasized that the facts listed must only be "material," and should concisely state the fact to facilitate the court's evaluation. Language should be neutral; using argumentative language in a statement of fact only makes it easier for the opposing party to dispute. And stick to the record: Judge Johnson does check record cites for accuracy.

Judge Johnson also encouraged respondents to exercise their right to file a statement of facts in dispute of the other party's fact statement. If a movant's fact statement cites to the record and the response to that statement does not contain a record citation or the citation inaccurate, the statement will be deemed admitted. If the moving party wants to show that a factual dispute raised by the nonmovant is not material, it should so demonstrate in its response to the non-moving party's fact statement. Responses should correspond in order and numbering to the fact statement to which they are responding. Rule 56(f) requires an affidavit to avoid summary judgment if a party asserts that it lacks knowledge to respond to a particular fact; otherwise, the fact will be deemed admitted.

Keep Twombly/Iqbal in Mind When a Complaint Is Filed

Judge Johnson described the two-step approach to pleadings that the Supreme Court adopted in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009): a court evaluating a motion to dismiss now should eliminate conclusory allegations from consideration, and then assess the plausibility of the remaining allegations. Judge Johnson noted that his own experience contrasts with some statistics showing that the two decisions have not made a difference in the filing of motions to dismiss.

The Eleventh Circuit has not yet addressed the relationship between *Iqbal/Twombley* and former Supreme Court precedent, in particular *Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). Judge Johnson noted the contrasting outcomes in the applications of Iqbal/Twombley in Edwards v. Prime, 602 F.3d 1276 (11th Cir. 2010)* (white plaintiff's pleadings did not support discrimination on basis of race, only retaliation for complaining about undocumented workers) and *Harrison v. Benchmark Electronics*, 593 F.3d 1206 (11th Cir. 2010) (Americans with Disabilities Act privacy cause of action was sufficiently pleaded; factual allegations need only be sufficient to raise a claim for relief above speculative level under liberal pleadings rules).

Judge Johnson noted that Congress or the Rules Committee on Practice and Procedure may ultimately address *Iqbal/Twombly* through legislation or modifications to Rule 8, but stated that he did not expect that to happen in the short term. Judge Johnson noted that when granting an *Iqbal/Twombly* motion to dismiss, he would sometimes permit repleading, but was less likely to do so if the plaintiff had already had an opportunity to amend the complaint.

General Comments

Judge Johnson observed that the Northern District has seen fewer employment discrimination cases of late, but more collective actions under the Fair Labor Standards Act, involving initial certification, discovery and decertification motions. He concluded by urging parties to deal with discovery issues up front through conferences in order to resolve them without having to go through briefings.

***Lisa B. Golan**, a sole practitioner in Norcross, and **Julie S. Northup** is a partner at the Midtown firm of Barrett & Farahany, LLP, represent plaintiffs in employment matters. Golan is the President of the Georgia Affiliate of the National Employment Lawyers Association (NELA-GA) and a former member of the board of the Atlanta Bar's Labor & Employment Law Section. Northup is an at-large member of the NELA-GA board and is a former chair and member of the Board of the Atlanta Bar's Labor & Employment Law Section.