The Hofstra Labor & Employment Law Journal is pleased to consider unsolicited manuscripts for publication. Manuscripts should be addressed to: Managing Editor of Articles, Hofstra Labor & Employment Law Journal, Hofstra University School of Law, 121 Hofstra University, Hempstead, New York 11549 or sent via e-mail to laborlaw@hofstra.edu. All manuscripts should be double-spaced. Citations should follow the form prescribed in A Uniform System of Citation (17th ed. 2000).

Published bi-annually by the Hofstra Labor & Employment Law Journal. The current subscription rate is fifteen dollars per volume. Subscription renewals will be automatic unless notice to the contrary is received. All communications should be addressed to: Business Administrator, Hofstra Labor & Employment Law Journal, Hofstra University School of Law, 121 Hofstra University, Hempstead, New York 11549. All back issues can be ordered by contacting William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209, 800-828-7571. Back issues are also available in PDF format through HeinOnline (http://heinonline.org).

© Copyright 2005 by the Hofstra Labor & Employment Law Journal. All rights reserved.
HOFSTRA UNIVERSITY SCHOOL OF LAW

Administrators and Faculty
May 2005

Administrative Officers

ALAN N. RESNICK, B.A., J.D., LL.M., Interim Dean
MARRIOTT E. TRACHT, B.A., J.D./M.B.A., Vice Dean and Professor of Law
MIRIAM R. ALBERT, B.A., J.D., M.B.A., LL.M., Director of Law School Admissions
GERARD ANDERSON, B.A., M.A., Director of Financial Aid
NELL ATASHPOUR, B.A., M.B.A., Student Computer Coordinator
YVONNE V. ATKINSON, A.A., Office Manager/Paralegal, Law School Clinical Program
LISA BERMANN, B.A., Coordinator for the Center for Children, Families and the Law
C. PETER CHAO, B.A., M.A., M.L.S., Catalog Librarian
LAUREN CHITE, B.A., M.S., J.D., Director of Student Affairs
MARIORIE M. DANIELS, B.A., Assistant Dean for Academic Records and Registrar
ELIOT DAWES, B.A., J.D., Director of Multicultural Affairs
PATTI M. DESROCHERS, B.A., External Relations Officer
DOMINICK J. GRILLO, B.A., M.S.L.S., J.D., Assistant Director for Technology
JOANNA L. GROSSMAN, B.A., J.D., Associate Dean for Faculty Development and Professor of Law

PATRICIA ANN KASTING, A.B., M.L.S., J.D., Reference/Government Documents Librarian
MAUREEN C. KESSLER, B.A., J.D., M. Div., Director of Part-Time Programs and Graduate Admissions

CINDIE LEIGH, B.A., J.D., Reference Librarian
CAROLINE LEVY, B.A., J.D., Senior Assistant Dean for Career Services
ROU-CHIA LIN, B.A., M.L.S., Acquisitions/Serials Librarian
DEBORAH MARTIN, B.A., Assistant Dean for Enrollment Management
DAWN M. MARZELLA, B.A., M.S., Director of Special Projects and Supervisor of Support Staff

GARY MOORE, B.S., Assistant Dean for Law School Information Systems
JOANNE RAMIREZ, B.A.A., Administrative Assistant to the Dean
FAY ROSENFIELD, B.A., J.D., Senior Assistant Dean for Student Affairs and Executive Director of International and Comparative Law Programs

NANCY RUDOLPH, B.S., M.S., Director of Law School Alumni Relations
LINDA RUSSO, B.A., M.L.S., Assistant Director for Technical Services, Law Library
DIANE SCHWARTZBERG, Director of Career Services
MARGARET SIROT, B.A., M.S., Assistant Dean for External Affairs
LISA A. SPAR, B.A., M.S., J.D., Assistant Director for Reference and Instructional Services, Law Library

TAMARA STEPHEN, B.S., J.D., Director of Public Sector Career Services
JENNIFER WAGNER, B.S., J.D., M.L.S., Reference Librarian
MICHELLE WU, B.A., J.D., M.L.S. Director, Deane Law Library

Faculty

ROBERT ABRAMS, B.A., J.D., Special Professor of Law
KENNETH A. ADAMS, B.A., J.D., Special Professor of Law
M. PATRICIA ADAMS, B.A., J.D., Adolph J. and Dorothy R. Eckhardt Distinguished Professor of Corporate Law
MIRIAM R. ALBERT, B.A., J.D., M.B.A., LL.M., Special Professor of Law
BURTON C. AGATA, A.B., J.D., LL.M., Professor Emeritus of Law
LYNN ANDERS, B.A., J.D., Clinical Instructor
THE HONORABLE LEONARD B. AUSTIN, B.A., J.D., Special Professor of Law
BARBARA S. BARRON, B.A., M.A., J.D., Legal Writing Instructor
KATHLEEN M. BECKETT, B.A., J.D., Legal Writing Instructor
ROBERT BLANCHETTA, B.A., M.P.S., J.D., Special Professor of Law
MATTHEW BODIE, A.B., J.D., Associate Professor of Law
RICHARD BOCK, B.A., J.D., Special Professor of Law
NANCY A. BROWN, B.A., J.D., Legal Writing Instructor
ALAFAIR S. BURKE, B.A., J.D., Associate Professor of Law
THE HONORABLE EDWARD W. MCCARTY III, B.S., J.D., Special Professor of Law
LINDA C. McClaIN, A.B., A.M., J.D., LL.M., Riskin, Radler Distinguished Professor of Law
PATRICK L. McCLUSKEY, B.A., J.D., Special Professor of Law
HOWARD McCORMACK, A.B., LL.B., LL.M., Special Professor of Law
MICHAEL E. McDERMOTT, B.S., J.D., Special Professor of Law
RICHARD S. MissAN, B.A., LL.B., Special Professor of Law
MARK L. MoYSESIAN, A.B., J.D., Professor of Law
RICHARD K. NeUMANN, JR., B.A., J.D., LL.M., Professor of Law
ROGER K. Newman, B.A., M.A., M.A., Special Professor of Law
NEAL R. PLATT, B.S., J.D., LL.M., Special Professor of Law
STUART RABINowitz, B.A., J.D., President, Hofstra University and Andrew M. Boas and
Mark L. Cluster Distinguished Professor of Civil Procedure
THE HONORABLE C. RAYMOND RADIGAN, B.A., J.D., Special Professor of Law
RICHARD REICHLER, B.A., J.D., Special Professor of Law
ALAN N. REsNICK, B.S., J.D., LL.M., Interim Dean and Benjamin Weintraub Distinguished
Professor of Bankruptcy Law
BEN B. RUBINowitz, B.A., J.D., Special Professor of Law
SYLVAN J. SCHAFFER, B.A., B.S., J.D., Ph.D., Special Professor of Law
ANDREW SCHEPARD, B.A., M.A., J.D., Professor of Law and Director of the Center for
Children, Families and the Law
JEFFERY SCHLOSSBERG, B.S., J.D., LL.M., Special Professor of Law
ERIC J. SCHMERTZ, B.A., J.D., LL.D., Professor Emeritus of Law
RONALD SCHOENBERG, B.B.A., J.D., LL.M., Special Professor of Law
HENRY T. SCHWAEBER, B.S., J.D., CPA, Special Professor of Law
JEFFREY L. SELTZER, B.S., J.D., Special Professor of Law
THE HONORABLE EUGENE SHIFRIN, B.A., J.D., Special Professor of Law
MICHAEL SIEBECKER, B.A., J.D., LL.M., M. Phil. Associate Professor of Law
NORMAN I. SILBER, B.A., M.A., Ph.D., J.D., Professor of Law
JEFFREY SILBERFELD, B.A., J.D., Special Professor of Law
MARK A. SILBERMAN, B.A., J.D., Special Professor of Law
RONALD H. SILVERMAN, B.A., J.D., Peter S. Kalikow Distinguished Professor of Real Estate
Law
ROY D. SIMON, JR., B.A., J.D., Howard Lichtenstein Distinguished Professor of Legal Ethics
JOSEPH R. SIMONE, B.A., J.D., LL.M., Special Professor of Law
WILLIAM M. SKEHAN, B.A., M.B.A., J.D., Special Professor of Law
THE HONORABLE PETER B. SKELOS, B.A., J.D., Special Professor of Law
LISA SPar, B.A., M.S., J.D., Special Professor of Law
AMY R. STEIN, B.A., J.D., Legal Writing Instructor
DANIEL M. SULLIVAN, B.A., J.D., Special Professor of Law
REED W. SUPER, B.A., J.D., M.B.A., Special Professor of Law
PETER J. TOREN, B.A., M.I.A., J.D., Special Professor of Law
MARSHALL E. TRACHT, B.A., J.D., M.B.A., Vice Dean and Professor of Law
VERN R. WALKER, B.A., M.A., Ph.D., J.D., Professor of Law
BENNETT J. WASSERMAN, B.A., M.A., J.D., Special Professor of Law
ERIC G. WAXMAN, B.A., J.D., M.B.A., Special Professor of Law
PETER WEINSTEIN, B.S., J.D., Special Professor of Law
JOEL WEINTRAUB, A.B., M.D., J.D., Special Professor of Law
TINA STARK WEISENFELD, B.A., J.D., Special Professor of Law
MICHELLE Wu, B.A., J.D., M. Libr., Director, Deane Law Library, Associate Professor of
Law
DAVID N. YELLEN, B.A., J.D., Max Schmertz Distinguished Professor of Law
ROBERT M. ZINMAN, A.B., J.D., LL.M., Special Professor of Law
AUTHOR INDEX OF CONTRIBUTED ARTICLES

Richard N. Appel, Alison L. Gray & Nilufer Loy,
Affirmative Action in the Workplace:
Forty Years Later........................................................549

Thomas H. Barnard & Adrienne L. Rapp,
Are We There Yet? Forty Years After the
Passage of the Civil Rights Act: Revolution in the Workforce
and the Unfulfilled Promises that Remain.......................627

Robert Belton,
Title VII at Forty: A Brief Look at the Birth,
Death, and Resurrection of the Disparate Impact Theory
of Discrimination.......................................................431

Miriam A. Cherry,
How to Succeed in Business Without Really Trying (Cases):
Gender Stereotypes and Sexual Harassment Since
the Passage of Title VII...........................................533

Beth Ann Faragher,
Faragher v. City of Boca Raton:
A Personal Account of a Sexual Discrimination Plaintiff........417

Michael L. Foreman, Kristin M. Dadey & Audrey J. Wiggins,
The Continuing Relevance of Race-Conscious Remedies
and Programs in Integrating the Nation’s Workforce..........81
Ruth Bader Ginsburg,
Introduction........................................................................353

Christopher Ho & Jennifer C. Chang,
Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB:
Strategies for Protecting Undocumented Workers in the
Title VII Context and Beyond..................................................473

Ann C. Hodges,
The Limits of Multiple Rights and Remedies:
A Call for Revisiting the Law of the Workplace..................601

Ann Hopkins,
Price Waterhouse v. Hopkins:
A Personal Account of a Sexual Discrimination Plaintiff........357

Philip McGough,
Same-Sex Harassment: Do Either Price Waterhouse or Oncale
Support the Ninth Circuit’s Holding in Nichols v. Azteca Restaurant
Enterprises, Inc. that Same-Sex Harassment Based on Failure to
Conform to Gender Stereotypes is Actionable?......................206

Christine Neylon O’Brien,
Facially Neutral No-Rehire Rules and the Americans with
Disabilities Act......................................................................114

Anne Noel Occhialino & Daniel Vail,
Why the EEOC (Still) Matters................................................671

Jamie Darin Prenkert,
Liberty, Diversity, Academic Freedom, and Survival:
Preferential Hiring Among Religiously-Affiliated Institutions of
Higher Education.................................................................1

Lawrence D. Rosenthal,
Association Discrimination Under the Americans with
Disabilities Act: Another Uphill Battle
for Potential ADA Plaintiffs...............................................132
Neal S. Schelberg & Carrie L. Mitnick,
   Same-Sex Marriage:  
   The Evolving Landscape for Employee Benefits 65

Ronald Turner,
   Making Title VII Law and Policy:  
   The Supreme Court’s Sexual Harassment Jurisprudence 575

TITLE INDEX OF CONTRIBUTED ARTICLES

Affirmative Action in the Workplace: Forty Years Later,
   Richard N. Appel, Alison L. Gray & Nilufer Loy 549

Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises that Remain,
   Thomas H. Barnard & Adrienne L. Rapp 627

Association Discrimination Under the Americans with Disabilities Act: Another Uphill Battle for Potential ADA Plaintiffs,
   Lawrence D. Rosenthal 132

Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond,
   Christopher Ho & Jennifer C. Chang 473

Facially Neutral No-Rehire Rules and the Americans with Disabilities Act,
   Christine Neylon O’Brien 114

Faragher v. City of Boca Raton:  
   A Personal Account of a Sexual Discrimination Plaintiff,
   Beth Ann Faragher 417

How to Succeed in Business Without Really Trying (Cases):  
   Gender Stereotypes and Sexual Harassment Since the Passage of Title VII,
   Miriam A. Cherry 533
Introduction,
Ruth Bader Ginsburg.........................................................353

Liberty, Diversity, Academic Freedom, and Survival:
Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education,
Jamie Darin Prenkert......................................................1

Making Title VII Law and Policy:
The Supreme Court’s Sexual Harassment Jurisprudence,
Ronald Turner............................................................575

Price Waterhouse v. Hopkins:
A Personal Account of a Sexual Discrimination Plaintiff,
Ann Hopkins..............................................................357

Same-Sex Harassment: Do Either Price Waterhouse or Oncale Support the Ninth Circuit’s Holding in Nichols v. Azteca Restaurant Enterprises, Inc. that Same-Sex Harassment Based on Failure to Conform to Gender Stereotypes is Actionable?,
Philip McGough..........................................................206

Same-Sex Marriage: The Evolving Landscape for Employee Benefits,
Neal S. Schelberg & Carrie L. Mitnick.............................65

The Continuing Relevance of Race-Conscious Remedies and Programs in Integrating the Nation’s Workforce,
Michael L. Foreman, Kristin M. Dadey & Audrey J. Wiggins. . . 81

The Limits of Multiple Rights and Remedies:
A Call for Revisiting the Law of the Workplace,
Ann C. Hodges..........................................................601

Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination,
Robert Belton...........................................................431

Why the EEOC (Still) Matters,
Anne Noel Occhialino & Daniel Vail..................................671
NOTES


When Harry Met Larry and Larry Got Sick: Why Same-Sex Families Should be Entitled to Benefits Under the Family and Medical Leave Act, Alana M. Bell & Tamar Miller..............................................276


The Argument for Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil, Olivia P. Dirig & Mahra Sarofsky.............................................709

The Argument for a Hybrid Retaliation Law: A Comparative Law Study to Define Retaliation Under Title VII by Comparing the United Kingdom, Including the European Union, Australia, and Canada, Dana K. Scalere & Corinne D. Sorisi...........................................751