
ARTICLES

COGNIZING THE SECOND AGENDA: THE IMPORTANCE OF ACKNOWLEDGING PERSPECTIVE WHEN COUNSELING CLIENTS IN EMPLOYMENT LAW*

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with

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The law is rarely black and white, especially in the realm of employment law. In order to achieve fair outcomes in employment law, particularly in the area of wrongful discharge litigation, a variety of perspectives must be considered both by the parties before the court, and by the court itself. This Article highlights the importance of viewing the law, generally, and an employment benefits dispute, specifically, from a multitude of views. Attorneys who master the ability to view clients' problems from a compassionate perspective simultaneously inside and outside the realm of blackletter law—that is, attorneys who can serve as *counselors* equally as well as they serve as *lawyers*—will maximize both their clients' and their professional satisfaction.

* This Article originally appeared as part of the materials provided in the Pennsylvania Bar Institute's 14th Annual Northeast Regional Employment Law Institute in 2008. Due to the continuing need for attentiveness to clients in the legal profession, coupled with the recent tightening of market conditions, the authors, with the kind permission of the Pennsylvania Bar Institute, felt it necessary to seek a wider audience for their remarks herein.

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When negotiating settlements in employment disputes—particularly disputes regarding discrimination or wrongful discharge—the parties have much more at stake than the varying fiscal amounts being tossed back and forth. Although judicial orders that recognize and finalize settlement negotiations usually impose an obligation upon one party to pay the other party, or a duty on one party to perform some action or forbear from performing some action, no judicial order will ever communicate the full range of emotions and motives present between the parties in a settlement. The settlement negotiation process in an employment dispute can endure for hours, with the parties and their attorneys initially sitting in uncomfortable proximity with each other (perhaps for the first time since the litigation-causing event), later taking turns speaking with the presiding judge and informing each other when it is the other party's turn to go in and see the judge. The attorneys will frequently converse with their clients to cool down their emotions and explain, often to an upset or confused client, in shorthand the odds of winning each particular fact pattern if the case lingers on to a trial. These are the facts and the emotions that cannot be memorialized in the order or opinion of the presiding judge. Whereas judicial orders recognize the primary, patent terms of a settlement agreement, the emotions and motives of the parties comprise a “second agenda” that remains latent, but omnipresent, throughout any employment dispute.

Plaintiffs feel wronged. They may be disconnected from the familiarity of their long-term workplace and the friends and associates that correspond to that workplace. They may be anxious about the pending, typical life expenses that have, until recently, been routine but are now uncertain. They may be embarrassed about the circumstances of their dismissal or discharge and about the social stigma of being “unemployed.” They may be depressed or view themselves as failures before their families and friends.

Defendants tend to feel aggravated. They have a business to run—which encompasses its own set of pressures from shareholders, partners, competitors, regulators, upper-management, or remaining employees—and often feel that the decision that led to the event in settlement was justified and fair. They have obligations to suppliers and customers that should not be constrained by the actions of a single, upset former employee. In their world, if they cannot meet their customers' expectations, one of their competitors will instead, and unnecessary court proceedings cut into the bottom line while taking away time that could be better spent elsewhere.

Understandably, such juxtaposed parties have difficulty reaching an agreement as to the value of a “fair” settlement. Generally speaking, defendants do not want to pay anything, while plaintiffs are uncomfortable putting a price tag on the visceral, emotional damages they have suffered. One side is motivated by the rules of man-made business: increasing profit margin, maximizing revenue, cutting costs; the other by the rules of nature: providing for family, protecting one's self, meeting one's maximum individual potential. The law that concludes a settlement—a judicial order recognizing the agreement between the parties—or a jury verdict, overarches this continuous disagreement between the parties' conflicting second agendas. For this reason, the law can rarely be seen as purely blackletter and good employment attorneys must counsel their clients as to the ethereal equities and ambiguous nuances of the law.

To emphasize the importance of this equity-based, comprehensive approach to employment law, this Article will first illustrate the changing role of the workplace in society. It will then suggest some founding principles of social work as a potential

model for employment lawyers. Next, the Article will examine some recent court decisions in which judges acknowledge the importance of perspective in deriving equitable outcomes in employment disputes. Finally, it will end with some concluding remarks.

I. THE CHANGING SOCIAL ROLE OF THE WORKPLACE

With the relatively recent emergence of globalized economies, accompanied by an increased emphasis on the speed of business, the American workplace is undergoing a dynamic shift, particularly in the wake of the current global recession. As a result, the American worker finds himself or herself in somewhat of a corresponding identity crisis.¹ This change from tradition has heightened the adversarial nature of parties' second agendas. Attorneys and judges must appreciate this dynamic shift in the workplace in order to provide zealous advocacy for their clients and equitable results for the parties before the court.

Prior to this era of efficiency, downsizing, rightsizing, and cost cutting, hyperaccelerated by recession, the typical U.S. worker was comfortably inserted in an "internal labor market"² where "jobs were arranged into hierarchical ladders and each job provided the training for the job on the next rung up."³ In the traditional model, employees could depend on maintaining an employment relationship with a single employer.⁴ "[P]redictable patterns of promotion" along with "pay and benefit systems" were structured "so that wages and benefits rose as length of service increased."⁵

Whether for better or worse, the era of lifelong employment has lapsed. The modern workplace is typified by fluctuating employee retention rates, labor market pressures from a globalized work force, and an emphasis on the immediacy of results. In her 2002 article, *Employee Representation in the Boundaryless Workplace*, Cornell University law professor Katherine V.W. Stone describes the notion of a "psychological contract" between employer and employee, referring "to an individual's beliefs about the terms of his or her employment contract, and the employee's perceptions of the terms of a reciprocal exchange."⁶ The psychological contract between employer and employee in the traditional business model was one of paternal caretaking, whereas the modern psychological contract is tenuous and uncertain.⁷ Under the psychological contract, "[w]hen expectations are not met, an employee is disappointed; when . . . breached, the employee feels wronged."⁸ Unfortunately for the

1. See Sarah Kershaw, *Wall Street Exodus: Fear, Panic and Anger*, N.Y. TIMES, May 25, 2008, at BU1 (discussing changing psyche of American worker in face of employer layoffs).

2. Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 CHI.-KENT L. REV. 773, 775 (2002) (citing PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971)).

3. *Id.* at 776.

4. See *id.* at 775-76 (noting that internal job markets within companies used to ensure employees continuous tenure with same company).

5. *Id.* at 776.

6. *Id.* at 779 (emphasis omitted) (footnote omitted).

7. See Stone, *supra* note 2, at 779-80 (describing fundamental changes in psychological contract with corresponding changes in workplace and employer-employee relationship).

8. *Id.* at 779.

harmed employee, breach of a psychological contract, despite the possible existence of real resultant harm, is not actionable at law.⁹ Compounding this plight, the business model has necessarily changed faster than the labor force; that is, businesses have become streamlined and lean within the last decade, whereas employees trained with a more traditional skill set may remain in the workforce for several decades.¹⁰

As Professor Stone notes, even employment terminology has changed: “Employees are no longer ‘workers’ or even ‘employees’—they are professionals in a particular skill or line of work. Cafeteria workers are now termed ‘Members of the Culinary Service Team’”¹¹ People seek jobs differently with differently prepared resumes, recruiters use new tactics and approaches, businesses in the same industry find themselves in “talent wars,” compensation is linked to performance incentives, opportunities for continued education are more frequent, and employees change jobs more quickly.¹² “No longer do employees derive their identity from a formal employment relationship with a single firm; rather, their employment identity comes from attachment to an occupation, a skills cluster, or an industry.”¹³ In parallel with this burgeoning movement in the global business model, the American workforce is aging, particularly the generation that brought about the traditional business model as a result of America’s postwar prosperity: the baby boomers.¹⁴ In fact, the oldest baby boomers became eligible for Social Security in 2008.¹⁵

The breach of psychological contracts—that is, the break in the employment relationship as perceived by the long-term employee—will likely increase as a result of this change in the work environment, compounded by the aging of the baby-boomer generation. Correspondingly, employment disputes will almost certainly increase. This increase, coupled with the heightened second agendas on each side of the dispute, warrants an expansion of the skill set of employment attorneys to include compassion, perspective, and understanding. But where can attorneys obtain these skills?

9. Cf. Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63, 75–76 (2003) (arguing that lawyers should seek broader solutions to clients’ problems and not be bound solely by existing law).

10. See Stone, *supra* note 2, at 775–78 (discussing changes in employment relationship, decreased job tenure, and increased turnover in workforce).

11. *Id.* at 773.

12. See *id.* at 774–75 (describing changing work environment).

13. *Id.* at 775.

14. See Chris E. Anguelov & Christopher R. Tamborini, *Retiring in Debt? Differences Between the 1995 and 2004 Near-Retiree Cohorts*, 69 SOC. SEC. BULL. 13, 16 (2009) (noting that baby boomer generation is approaching Social Security eligibility, but that many baby boomers intend to keep working beyond earliest eligibility for benefits).

15. Barrett Sheridan, *Boomer Bears*, NEWSWEEK, June 29, 2009, at 18.

II. PRINCIPLES OF SOCIAL WORK AS A VEHICLE FOR COUNSELING PARTIES IN
EMPLOYMENT DISPUTES

A. *Developing a Skill Set*

When circumstances change, those affected must adapt. This truth is no different for counselors in employment law. In her article, Professor Stone emphasizes that in the new era of employer-employee relationships, a new “system of labor and employment law that can provide employee protection and social justice in the new workplace” must evolve.¹⁶ Attorneys should understand employment law from a variety of perspectives, particularly those of their clients.

At a fundamental level, the core principles of social work¹⁷ can assist employment attorneys at becoming better-rounded advocates for their clients while at the same time understanding their clients’ emotional, and consequently sometimes irrational, responses to employment disputes. Law, after all, is social work insofar as it is *work* that is *social*. As one of the core professions in American society, the legal profession is highly regarded by many people in American society for its ability to empower and problem solve. The profession is also widely publicized and is the root of the U.S. government system. Laws guide and shape society and establish a set of principles by which all members of society are bound. “[L]aw is more than a business or trade by which lawyers use their education, training, professional license to earn a comfortable living by pursuing and protecting the personal . . . interests of the clients who retain them”¹⁸ It is no accident that pop culture portrays the lawyer either as a “social hero who advocates for the marginalized and the disadvantaged”¹⁹ or as deceptive, ruthless, and cold-blooded. Both portrayals demonstrate the lawyer’s ability to, unlike any other profession, socially heal or socially harm. When society has a problem, it is predominantly the work of lawyers and the courts which achieves a solution.

“[S]ocial workers have adopted a broad, flexible, and multi-faceted professional role” that “not only focuses on the individual client, but also on the client’s family and community.”²⁰ With this multitasking role comes a unique skill set that, if translatable to attorneys, can facilitate client counseling. Attorneys armed with skills similar to those of a social worker will inevitably be more in tune with their clients, and, consequently, be better able to communicate confusing principles, settlement offers, and legal proceedings to their clients, who are often bewildered with the recent loss of steady income and disenchanted with a socio-legal system perceived as unjust. Recently, scholars have contributed to the expansive realm of law journals and legal research significant work regarding the interaction and skills overlap between the law

16. Stone, *supra* note 2, at 775.

17. See Allison D. Murdach, *Does American Social Work Have a Progressive Tradition?*, 55 SOCIAL WORK 82, 82–85 (2010) (noting that many strands of social work have their roots in progressive movements and thus focus on social problems like unemployment).

18. Aiken & Wizner, *supra* note 9, at 63.

19. *Id.* at 70.

20. *Id.* at 65.

and social work and focusing on a “therapeutic jurisprudence.”²¹ Generally, this body of scholarly work suggests that there is a similarity in the skill sets of social workers and lawyers, consisting largely of the ability to counsel clients with informed compassion.

The skill set of social workers includes “empathic interviewing, listening, and counseling; cross-cultural awareness and sensitivity; identification of the causes of clients’ problems; assisting clients to formulate goals and strategies for achieving them; crisis intervention; group work; and community organizing.”²² “[S]ocial workers consider family, community, and other social and economic forces that affect the client”²³ In their article, *Law as Social Work*, Professors Jane Aiken²⁴ and Stephen Wizner²⁵ note that law students “typically do not receive instruction in the skills of interacting with clients, particularly those from different economic, social, racial, ethnic, or religious backgrounds.”²⁶ Furthermore, Aiken and Wizner point out that “[t]he law school curriculum is designed to neutralize . . . passion by imposing a rigor of thought that divorces law students from their feelings and morality.”²⁷ Lawyers are trained to apply the case law, statute, or regulation uniformly, to find the point of differentiation in their clients’ fact patterns, and to zealously argue why the law, not emotion, dictates an outcome in favor of their client.²⁸

Social work, in contrast, requires cultural competence and is client-centric to the point of requiring “substantial hours in the field” with clients.²⁹ The National Association of Social Workers’ Code of Ethics outlines service, social justice, dignity and worth of the client, importance of human relationships, integrity, and competence as the key values of social work.³⁰ Social work reinforces client strengths, models positive relationships, advocates listening to client needs and viewpoints, and engenders the client to take positive action.³¹ Therapeutic jurisprudence combines the

21. Examples of recent scholarship discussing therapeutic jurisprudence include: Aiken & Wizner, *supra* note 9; Susan L. Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Education*, 17 ST. THOMAS L. REV. 513 (2005); Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL’Y 133 (2004); Robert G. Madden & Raymie H. Wayne, *Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model*, 18 TOURO L. REV. 487 (2002).

22. Aiken & Wizner, *supra* note 9, at 66.

23. *Id.*

24. Professor of Law, Georgetown University Law Center. Prior to joining the faculty at Georgetown and at the time of her article with Professor Wizner, Professor Aiken was the William M. Van Cleve Professor of Law at Washington University School of Law.

25. William O. Douglas Clinical Professor Emeritus of Law, Yale Law School.

26. Aiken & Wizner, *supra* note 9, at 66.

27. *Id.* at 73.

28. *See id.* (“The law student is taught to be a dispassionate evaluator of both the client’s case and the law governing it.”).

29. *Id.*

30. Madden & Wayne, *supra* note 21, at 495–96 (citing NAT’L ASS’N OF SOC. WORKERS, CODE OF ETHICS (1996)). An updated version of the NASW’s Code of Ethics, which still promotes these principles, is available at <http://www.socialworkers.org/pubs/code/code.asp>.

31. *See id.* at 497 (detailing practical approaches to social work).

realms of social work and law, using social work as a normalizing framework for the law.³² Therapeutic jurisprudence proposes “that the law should promote therapeutic outcomes for the individuals affected by it.”³³

Although this rather academic approach to the law may seem distant and inapplicable to the pragmatic practitioner, the tenets addressed by the concept squarely hit the practice of employment law. Employment attorneys must be cognizant of their clients’ “psycholegal soft spots,”³⁴ identify the issues of the client, and work with the client from the outside in to achieve positive solutions.³⁵ An inability to engage the client in the problem identification and solving process may lead to a result that is viewed as legally successful to the client’s attorney, but personally unfulfilling to the discharged client. Employment lawyers appreciative of a more holistic approach to the law, such as that proposed by therapeutic jurisprudence, realize that there are solutions beyond legal solutions.³⁶ Arguably the most significant damage done to a discharged employee—whether wrongfully or lawfully discharged—is emotional, yet the law generally disallows collection of damages for emotional distress in contract causes of action.³⁷ Thus, from the standpoint of a discharged employee, the available legal solutions fail to address a significant source of damages. Employees seeking remedies under a wrongful discharge or similar cause of action are often rather uninterested in legal solutions. They are concerned with providing for their families, planning for their retirement, making home and car payments, and meeting the costs associated with health care, children’s education, and other life expenses.

Especially under the new business model detailed above, employment attorneys must be hypersensitive to the viewpoint of the client.³⁸ Judges, in their role as mediators in settlement negotiations, must also be sensitive to the viewpoints, or second agendas, of the parties.

B. *The Employer Perspective*

Whether in state or federal court, the employee does not always win. Early studies of California wrongful discharge success rates in the 1980s reported plaintiff success rates between 46% and 78%.³⁹ A subsequent study of California employment law

32. See Brooks, *supra* note 21, at 513 (defining “therapeutic jurisprudence”).

33. *Id.* at 514.

34. *Id.* (quoting David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317, 320 (1998)) (internal quotation marks omitted).

35. See *id.* at 517 (detailing application of social work to legal work).

36. See Aiken & Wizner, *supra* note 9, at 76 (advocating that attorneys seek justice broadly like social work professionals rather than offer legal solutions constrained by existing law).

37. See 2 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.23, at 624 (4th ed. 2009) (outlining general inability to collect emotional damages in contract cause of action); Kershaw, *supra* note 1 (discussing emotional struggles faced by workers as result of layoffs during recession).

38. See John E. Osborn & Clare B. Connaughton, *Getting to the Finish Line: Effective Closing Techniques for Settling Disputes Through Mediation*, METROPOLITAN CORP. COUNS., Aug. 2007, at 14, 14 (noting that mediation can accommodate hidden agendas, emotions, and reputation concerns).

39. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 518 (2003).

verdicts from 1989 to 1999 revealed a 54% plaintiff success rate.⁴⁰ Similarly, in federal court, less than 10% of the cases filed actually make it to court,⁴¹ so in order for a case to even be before a federal judge, the specific application of the law to the facts must be closely contested.

In federal court, a plaintiff's chances statistically appear even slimmer, particularly if the action is brought on the grounds of employment discrimination. "A 2000 report by the U.S. Department of Justice found that between 1990 and 1998 a total of 8,466 civil rights employment cases were tried in the federal courts, ranging from 715 in 1990 to 1,083 in 1998."⁴² Interestingly, "[t]he plaintiff success rates [in those cases] varied from a low of 23.8% in 1990 to a high of 35.5% in 1998."⁴³ Thus, the majority of employment disputes that reach the courts are far from easy cases for seemingly wronged plaintiffs.

Although this Article may, at times, seem to "side" with employees, the pragmatic result both of the decisions that lead to termination disputes, and of the termination disputes themselves, is a business decision founded upon dollars and cents. Without profitability, there is no employer against which to bring a wrongful termination suit. Businesses, for a variety of motivations, inevitably must lay off, fire, terminate, downsize, or rightsize portions of their workforce. Such changes are part of the natural evolution of the marketplace. The law, itself a dynamic and changing social product, understands the need for flexibility and reactivity to changes in economics, society, and technology. Federal laws do not seek to prohibit businesses from implementing or adapting to changes; they merely seek to prohibit businesses from implementing or adapting to changes for unconstitutional reasons or in unconstitutional ways.

III. CASES VIEWING EMPLOYMENT DISPUTES FROM MULTIPLE PERSPECTIVES

Viewing the law from a variety of perspectives facilitates client satisfaction and results in fair outcomes. Much of the equity that judges enlist in their decision making does not show up in court reporters or on electronic search venues like Westlaw or LexisNexis. Alternative dispute resolution, mediation, and settlement conferences offer a judge, and the parties before the judge, an opportunity to create equitable outcomes that will rarely, if ever, be of public record. Nonetheless, there are many instances where a court will enlist a variety of perspectives when making a determination in an employment dispute. The following is a selection of case law in which various judges have acknowledged—although perhaps not in so many words—the "second agenda" that is perpetually present in labor and employment disputes. We present these examples in no particular order of relevance, but instead organize them both by jurisdiction and recency.

40. *Id.* at 521.

41. *See id.* at 513 (detailing low percentages of cases that go to trial).

42. *Id.* at 523 (footnote omitted) (citing MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-98 (2000), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=558>).

43. *Id.*

A. Scanlon v. Jeanes Hospital, *Eastern District of Pennsylvania* (2008)

In *Scanlon v. Jeanes Hospital*,⁴⁴ Judge Norma L. Shapiro of the U.S. District Court for the Eastern District of Pennsylvania extensively considered the testimony of twelve witnesses in ruling on the defendant's posttrial motions in a case brought under the Age Discrimination in Employment Act.⁴⁵ Judge Shapiro's opinion begins with a factual background that details the plaintiff's work experience with the defendant-employer: a thirty-seven-year history which included the plaintiff's completion of a nursing degree.⁴⁶ The following sixteen pages of Judge Shapiro's opinion are dedicated to summarizing the testimony and discussing the credibility of the twelve witnesses, each of whom represent a unique perspective of the profession, generally, and the event that led to the dispute before the court, specifically.⁴⁷ It is not until the nineteenth page of the opinion that legal standards are discussed—a testament to the strong human element inherent in any such employment dispute.⁴⁸

In addressing the issues of law raised by the defendants in their motion for judgment as a matter of law, Judge Shapiro's systematic opinion, juxtaposed against the contemplative testimonial summaries and background, reads like a checklist. Each issue raised is considered and dismissed in summary fashion, at times as abruptly as the statement "[t]his argument is without merit" sealing a paragraph from further discussion.⁴⁹ This approach to the law is not to suggest that the court inadequately reviewed the case; in fact, just the opposite: in cases involving termination of employment, particularly those cases tried before a jury, equitable concepts of law, as well as the facts and circumstances behind each particular case, can be as determinative of a case's outcome as blackletter law.

44. No. 06-2424, 2008 WL 191169 (E.D. Pa. Jan. 23, 2008), *aff'd*, 319 F. App'x 151 (3d Cir. 2009).

45. See *Scanlon*, slip op. at 3–19, 2008 WL 191169, at *1–10 (denying motions for judgment as matter of law and for new trial). The twelve perspectives considered were those of: (1) the plaintiff, a labor and delivery nurse, (2) the interim supervisor of labor and delivery, (3) the clinical director of nursing, (4) the chief nursing officer, (5) the chairman of the obstetrics and gynecology department, (6) the chief of human resources, (7) the coordinating nurse supervisor, (8) the maternal child health department manager, (9) an obstetrics technician, (10) the personal physician of the patient whose injury led to the dismissal of the plaintiff, (11) a medical doctor who was moonlighting at the hospital on the evening of the incident that led to the plaintiff's dismissal, and (12) a human resources generalist. *Id.* at 3–18, 2008 WL 191169, at *1–9.

46. See *id.* at 2, 2008 WL 191169, at *1 (detailing plaintiff's work history).

47. *Id.* at 3–19, 2008 WL 191169, at *1–10.

48. *Id.* at 19, 2008 WL 191169, at *10. See also *supra* Part II.A for a discussion of the human component in employment disputes.

49. *Scanlon*, slip op. at 20, 2008 WL 191169, at *11 ("Defendants also contend that Scanlon necessarily must have shown that similarly situated persons were treated more favorably at Jeanes in order to prove her case. This argument is without merit."); see also *id.* at 22, 2008 WL 191169, at *12 ("The jury disbelieved Jeanes' explanation that it sincerely believed Scanlon had committed misconduct and therefore could reasonably have found that Jeanes fired Scanlon as a result of her age."); *id.*, 2008 WL 191169, at *12 ("The jury's verdict was reasonable in light of the evidence presented and no miscarriage of justice will result without a new trial."); *id.* at 23, 2008 WL 191169, at *12 ("Defendants' arguments are without merit."); *id.* at 27, 2008 WL 191169, at *15 ("There is no reasonable probability that counsel's remarks improperly influenced the verdict.").

B. *Helfrich v. Lehigh Valley Hospital, Eastern District of Pennsylvania (2005)*

In *Helfrich v. Lehigh Valley Hospital*,⁵⁰ Judge Gene E.K. Pratter of the U.S. District Court for the Eastern District of Pennsylvania considered unemployment compensation from the perspective of the employer when ruling on the plaintiff's motion to reconsider a grant of summary judgment in favor of the defendant.⁵¹ The plaintiff in *Helfrich* alleged "violations of the Age Discrimination in Employment Act of 1967 ('ADEA'), the Americans with Disabilities Act ('ADA') and the Family and Medical Leave Act of 1993 ('FMLA')" against Lehigh Valley Hospital.⁵² Responding to the plaintiff's assertion that an unemployment compensation referee's finding in his favor created a genuine issue of material fact, the *Helfrich* court evaluated the differences between unemployment compensation proceedings and court proceedings.⁵³ The *Helfrich* court noted that unemployment compensation proceedings are designed to quickly get benefits in the hands of the deserving while costing employers relatively little.⁵⁴ In contrast, the court noted that

[i]n light of such minimal risk, the employer often has little incentive to litigate vigorously, or even to retain counsel and/or attend a hearing. This is in stark contrast to a subsequent civil action, which, as this case exemplifies, may subject the employer to liability for amounts tens of thousands of times greater than those at stake in the proceedings before the Referee.⁵⁵

Without significantly detailing the circumstances that led up to the case, the court dismissed *Helfrich*'s motion in its entirety.⁵⁶ In noting the differences between the procedures—unemployment compensation and civil action—the court, as the interpreter of the law, communicated the perspective of the defendant-employer to the plaintiff-employee.⁵⁷ From the perspective of the plaintiff, *Helfrich*, he was harmed and his harm was recognized at the level of the unemployment compensation hearing when the referee ruled in his favor.⁵⁸ Nevertheless, the defendant proceeded to trial, where the court overturned the plaintiff's prior victory and ruled against the plaintiff.⁵⁹

From the perspective of the plaintiff, this is unjust and unfair; thus, an employment attorney representing a client in a similar matter must counsel the client as to the variance in procedures, the differences between different levels of benefit appeals, and the possible outcomes at each level. If the plaintiff's attorney is a sensitive counselor, the plaintiff will hear the varying perspectives before the court's communication.

50. No. 03-CV-05793, 2005 WL 1715689 (E.D. Pa. July 21, 2005).

51. See *Helfrich*, 2005 WL 1715689, at *19 (noting that amount in controversy in typical unemployment compensation proceeding is minimal when viewed from employer's perspective).

52. *Id.* at *1.

53. See *id.* at *16–20 (comparing unemployment compensation proceedings with court proceedings).

54. See *id.* at *19 (discussing nature of unemployment compensation proceedings).

55. *Id.*

56. See *Helfrich*, 2005 WL 1715689, at *23.

57. See *id.* at *17 n.24 (suggesting that *Helfrich* does not understand difference between roles of unemployment compensation referee and of district court).

58. See *id.* at *16 (recognizing *Helfrich*'s contention that court should have considered referee's decision).

59. See *id.* at *23 (denying plaintiff's motion to reconsider summary judgment in its entirety).

C. *Kress v. Birchwood Landscaping, Middle District of Pennsylvania (2007)*

In the 2007 case of *Kress v. Birchwood Landscaping*⁶⁰ from the U.S. District Court for the Middle District of Pennsylvania, the court adopted the Report and Recommendation of Magistrate Judge Malachy E. Mannion in a sexual harassment and wrongful discharge case.⁶¹ The district court, taking the recommendation of the magistrate judge, granted the defendant's motion for summary judgment on certain claims while denying it with respect to other claims.⁶² In *Kress*, Magistrate Judge Mannion compiled a painstaking review of the underlying factual background, detailing numerous alleged events that occurred in the employer-employee context and surveying the claim from a variety of perspectives.⁶³ Magistrate Judge Mannion considered the events from the viewpoint of the plaintiff, who was a female high school graduate with a young daughter and was working for a landscaping and gardening business.⁶⁴ The Report and Recommendation detailed the uncomfortable position of the plaintiff—trapped in an employment relationship that included sexually suggestive remarks on a seemingly daily basis, implicitly unable to escape because of limited education and the financial strains of a child.⁶⁵ The court admitted in a footnote that many details “of the voluminous list of incidents to which the plaintiff swears” are omitted from the report because “[t]he incidents recited here are representative of the corpus of alleged harassing acts.”⁶⁶

Demonstrating the complexity of any employment dispute, particularly those with a sexual harassment component, Magistrate Judge Mannion interestingly turns the table in the Report and Recommendation. After portraying the plaintiff's point of view, Magistrate Judge Mannion summarizes the admissions of the employer, presents the sworn testimony of the employer's bookkeeper and attorney (a female), and lists the testimony of another landscape designer (a male) and four additional employees (two males and two females).⁶⁷

The result of the opinion, which lends credence to a wide variety of perspectives, is a clear understanding from the reader that nothing in the matter is clear or understandable. Unlike the handwritten note allegedly given to the plaintiff by the employer-defendant—“I feel as if you are an Angel sent to help me”⁶⁸—nobody in the dispute is an angel. Viewing the case from a variety of perspectives allows the court to convey that complexity; correspondingly, good employment lawyers understand the emotive and entangled nature of such disagreements.

60. No. 3:05-CV-566, 2007 WL 800996 (M.D. Pa. Mar. 14, 2007).

61. *Kress*, 2007 WL 800996, at *4.

62. *Id.* at *2–4.

63. *Id.* at *6–13.

64. *See id.* at *6–7 (detailing facts).

65. *See id.* at *7–9 (outlining alleged sexual advances by employer).

66. *Kress*, 2007 WL 800996, at *8 n.6.

67. *See id.* at *8–10 (summarizing testimonial evidence of variety of witnesses).

68. *Id.* at *7 (internal quotation marks omitted).

D. *Dumann v. Equitable Resources, Inc., Western District of Pennsylvania (2006)*

The 2006 case out of the U.S. District Court for the Western District of Pennsylvania, *Dumann v. Equitable Resources, Inc.*,⁶⁹ perfectly illustrates the juxtaposition of the new business model, the traditional employment relationship, and the resulting discord between employer and employee, termed a breached “psychological contract,” as discussed above.⁷⁰ In *Dumann*, the plaintiff, Linda Dumann, brought a claim of age discrimination under the ADEA against her employer, Equitable Resources, Inc., “an integrated energy company, with an emphasis on natural gas supply activities.”⁷¹ Before the court was Equitable’s motion for summary judgment.

The court emphasized Equitable’s 1990s transition from a highly regulated, noncompetitive market to an unregulated, competitive market, and the corresponding ascendancy of Murry Gerber as chief executive officer in 1998.⁷² Under Gerber’s leadership, Equitable underwent significant changes. In its elaborate summary of Equitable’s changing internal and external business environments, the court noted that Gerber testified, “[T]he processes and procedures by which work was done in the company were old. They were flawed, not up to the standard of what a modern successful company’s processes should be.”⁷³

In considering Gerber’s impact on Equitable’s corporate culture, the court looked to the testimony of Equitable’s corporate vice president of human resources, who testified “that Gerber ‘was trying to take an organization from an employee cultural perspective [that] had an entitlement mentality and move it towards a high performing organization where performance was differentiated and rewarded.’”⁷⁴ In summarizing the entitlement mentality of some Equitable employees, the vice president of human resources stated, “We had a number of employees who believed or perceived that when they came to work for Equitable Resources, their obligation to the company was to show up for work most of the time and that they were then guaranteed a job for life until they decided to leave”⁷⁵

As a result of this seemingly prevalent entitlement mentality, Equitable adopted a performance review system for all of its employees.⁷⁶ The plaintiff, Linda Dumann, whom the court introduces after several pages dedicated to Equitable’s corporate strategy and executive testimony, worked in Equitable’s customer service department.⁷⁷ In 2001, she was made supervisor of Billing and Audit, “where she supervised a total

69. No. 05-1113, 2006 WL 2794551 (W.D. Pa. Sept. 27, 2006), *aff’d*, 2007 WL 4268950 (3d Cir. Dec. 6, 2007).

70. *See Dumann*, 2006 WL 2794551, at *17–18 (ruling on ADEA claim). See also *supra* notes 6–10 and accompanying text for a discussion of the psychological breach of contract theory.

71. *Dumann*, 2006 WL 2794551, at *1.

72. *See id.* at *2 (describing changing business environment).

73. *Id.* (alteration in original).

74. *Id.* at *3.

75. *Id.* at *4.

76. *See Dumann*, 2006 WL 2794551, at *5 (noting implementation of employee review system).

77. *See id.* at *5–6 (detailing plaintiff’s positions with company).

of 16 people.”⁷⁸ In her 2001 performance review, the plaintiff received an overall rating that placed her in the lowest ten percent of the company’s employees.⁷⁹ Four months after Ms. Dumann was informed of her poor evaluation, she was discharged.⁸⁰ Following a dispute with upper management over the implementation and results of the performance review, Dumann’s immediate supervisor, Jan Cumberledge, resigned on the same day.⁸¹ Dumann had been with the company for twenty-eight years.⁸²

In reviewing the plaintiff’s strongest evidence—Cumberledge’s testimony—the court overtly suggests its likely taint:

Cumberledge’s above testimony is particularly revealing in light of the undisputed fact that Cumberledge and Dumann were very good friends who went on week-long vacations together every year for about seven years, went away together for weekends at least twice while Cumberledge was Dumann’s supervisor, and went out to dinner together, with other female colleagues, about four times a year.⁸³

The court further dismisses plaintiff’s evidence—that she had been employed for twenty-eight years and only recently had a “sudden drop in performance” according to upper management’s employee review program—in a light that paints Dumann unfavorably:

Moreover, as discussed at length above, there is undisputed evidence in the record that Defendant perceived, and Plaintiff was experiencing, difficulties in her employment at Equitable Gas. Additional evidence of this difficulty can be found in the following deposition testimony of Plaintiff’s colleague . . . :

. . . .

Q. What did you learn from that conversation with her?

A. Well, that things were extremely difficult, but you didn’t have to talk to Linda to see that.

Q. Could you explain?

A. Well, her emotions from time to time, we were all concerned about Linda because there were periods where you could see where she was visibly shaken.⁸⁴

After reviewing all of the plaintiff’s evidence, the magistrate judge recommended that the defendant’s motion for summary judgment be granted.⁸⁵ Judge Terrence F.

78. *Id.* at *6.

79. *See id.* (finding that plaintiff received ratings in bottom ten percent for two of eight categories and overall performance evaluation).

80. *See id.* at *6, *8 (noting dates of performance review reporting and discharge).

81. *See Dumann*, 2006 WL 2794551, at *7–8 (noting resignation of plaintiff’s supervisor).

82. *See id.* at *9 (finding performance evaluation citing drastic decline in performance after lengthy tenure with company as plaintiff’s evidence in opposition to defendant’s motion for summary judgment).

83. *Id.* at *13.

84. *Id.* at *17.

85. *See id.* at *18 (listing recommendation for district court).

McVerry of the District Court for the Western District of Pennsylvania then ordered that the Report and Recommendation be “adopted as the Opinion of the Court.”⁸⁶

Throughout its opinion in *Dumann*, the court considered the testimony of multiple perspectives: employees and managers, co-workers close to the plaintiff and more distant supervisors, and relatively new officers and long-term employees.⁸⁷ In all, more than ten viewpoints were considered and incorporated into the opinion either through direct testimony or paraphrasing by the court.⁸⁸ Magistrate Judge Lisa Pupo Lenihan’s Report and Recommendation was thorough, fair, and comprehensive. Yet three elements of the result should be noted by any practitioner of employment law: (1) the court seemed to give Equitable some leeway because of its marketplace transition;⁸⁹ (2) *Dumann*’s friendship with her immediate supervisor, a natural result of many long-term employment situations, ultimately worked against her;⁹⁰ and (3) *Dumann*’s emotional state in the wake of a poor performance review and the company’s transition—a very human reaction to such circumstances—was used as fodder for her dismissal.⁹¹

Without firm legal ground, a court of law cannot be expected to enjoin the ceaseless evolution of the marketplace at the request of one or a small group of seemingly wronged employees. Indeed, the court in *Dumann* likely derived the correct result. Unfortunately for Linda *Dumann*, the court cannot remedy breaches of psychological contracts; good employment law practitioners, aware of their clients’ fragile and confused states, must counsel their clients as to this inevitable fact.

E. *Bellas v. CBS, Inc., Third Circuit (2000)*

In the Third Circuit case *Bellas v. CBS, Inc.*,⁹² Judge Milton I. Shadur⁹³ wrote in a concurring opinion:

[F]rom an employee’s perspective the occasion for his or her being fired is irrelevant—in Gertrude Stein terms, “a firing is a firing is a firing.” But from an employer’s point of view, a plant shutdown is a major economic event (as an individual’s layoff, or even a number of individual layoffs, need not be). And of course every employer is well aware of its employee turnover rates, so that although the prospect or timing of any individual employee’s termination cannot be predicted, the inevitability of a reasonably anticipatable number of employee terminations can be. And that situation contrasts sharply with an entire plant shutdown, which is almost always an

86. *Id.* at *1.

87. *See id.* at *2–8, *11–14, *17 (recounting various employees’ testimony).

88. *Id.*

89. *See id.* at *2 (detailing company’s overall poor performance due to market deregulation).

90. *See id.* at *13 (reasoning that supervisor’s testimony regarding employer’s agenda in evaluating and dismissing plaintiff-employee was not particularly credible due to plaintiff’s close friendship with supervisor).

91. *See Dumann*, 2006 WL 2794551, at *13–14 (relying on testimony that plaintiff was distraught after receiving poor performance review as example of poor job performance).

92. 221 F.3d 517 (3d Cir. 2000).

93. The Honorable Milton I. Shadur, Senior Judge of the U.S. District Court for the Northern District of Illinois, sat by designation in this case.

unusual and unpredictable event (at least far in advance) in a company's economic life.⁹⁴

Thus, Judge Shadur overtly considered the difference between the psychological impact of a plant shutdown on an employee and an employer. Interestingly, however, Judge Shadur appears to attribute the emotive aspects of a plant shutdown to an *employer*, not an employee or the group of employees affected. Even the term “economic life,” used in conjunction with the phrase “an unusual and unpredictable event,” has personified undertones, while the reactions of the workers affected by a plant shutdown are addressed rather indifferently. Ironically, however, Judge Shadur breathes emotive life into the workforce with this seemingly otherwise summary: his concurring opinion addressed the majority's glossed-over acceptance of the defendant's characterization of the plaintiff's dismissal.⁹⁵ Judge Shadur added:

Most importantly for present purposes, that acceptance of appellants' mischaracterization in the opinion has given them (and the amicus in the case) substantially more than their due, and has thus made the reaching of our panel's conclusions—though clearly correct—needlessly more difficult in terms of analysis. And that has in turn occasioned this separate concurrence.

For appellants to attach the “shutdown” label to Bellas' termination of employment, and then to attempt to use that label as a springboard for a flawed analysis, does more than violate the home truth contained in one of the aphorisms ascribed to Abraham Lincoln:

If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't *make* it a leg.⁹⁶

Thus, by parodying the employer's position—displaying the factory as humanlike and a shutdown as an unexpected event—Judge Shadur actually illustrates the perspective of the employee, whom both the employer-defendant and the majority of the court have discursively characterized not as “fired” but as “shutdown” along with the factory.⁹⁷ Judge Shadur's concurrence thus demonstrates the dichotomy of viewpoints inherent in any employment dispute and teaches, somewhat critically, the importance of being consciously aware of perspective.

F. Barrett v. Otis Elevator Co., *Supreme Court of Pennsylvania* (1968)

As any litigator knows, not all judges approach the law with identical methodologies. For some judges, fairness and justice are perpetuated by consistent and predictable interpretation of the blackletter law of statutes and regulations; for others, it is a balancing of the equities and concern for the scope beyond the parties affected.⁹⁸ Such an ideological dichotomy is frequently played out in the various opinions of any

94. *Bellas*, 221 F.3d at 540–41 (Shadur, J., concurring) (footnote omitted).

95. *See id.* at 540 (“[P]lant shutdown’ . . . is the bizarre mischaracterization that appellants have attached to Bellas' layoff (his firing), and that has been referred to in the majority opinion at n.4 and then employed throughout the opinion. What or who was ‘shut down’? Bellas? Surely not.”).

96. *Id.*

97. *See id.* at 517–39 (referring repeatedly to employees' “shutdown benefits” and avoiding terms such as “fired,” “firing,” or “discharged”).

98. *See generally* RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

case before the U.S. Supreme Court. Interestingly, a similar division is often outlined in the realm of business between stockholder versus stakeholder theorists: narrow, consistent interpretation of those parties most closely affected in the short term, versus long-term concern for a wider array of entities.⁹⁹

A 1968 opinion from the Supreme Court of Pennsylvania illustrates this judicial differentiation.¹⁰⁰ In that case, *Barrett v. Otis Elevator Co.*,¹⁰¹ the court elaborated on a previous decision¹⁰² that addressed the placement of the burden of proof on the availability of light work in workmen's compensation disputes: whether the employer or the employee should be burdened.¹⁰³ The majority opinion in *Barrett* placed the burden on the employer, arguing that a consistent application of the burden on one party would make for judicial economy and predictability of results, but also that employers, with the burden of proof shifted to them, would make more equitable and "attractive agreements [with] employees who suffer temporary total disability."¹⁰⁴ Concerned with the fairness to employees hurt on the job, the *Barrett* majority summarily held that "once the claimant has discharged his burden of proving that, because of his injury, he is unable to do the type of work he was engaged in when injured, the employer has the burden of proving that other work is available to the claimant which he is capable of obtaining."¹⁰⁵

The result of the majority opinion in *Barrett* was a more equitable resolution outside of court for employees hurt on the job. In his dissenting opinion, however, Chief Justice John Cromwell Bell Jr.¹⁰⁶ vociferously chastised the majority for straying from the blackletter law:

Notwithstanding the interesting ramblings by the majority in the field which used to be the legal field of Workmen's Compensation, but has now been changed by it to the field of human emotions and equities, it still ought to be the law in Workmen's Compensation cases, as it is in the field of

99. See generally ROBERT PHILLIPS, *STAKEHOLDER THEORY AND ORGANIZATIONAL ETHICS* (2003).

100. See *Barrett v. Otis Elevator Co.*, 246 A.2d 668, 671-74 (Pa. 1968) (addressing burdens of proof in workmen's compensation proceedings).

101. 246 A.2d 668 (Pa. 1968).

102. See *Petrone v. Moffat Coal Co.*, 233 A.2d 891, 893-95 (Pa. 1967) (holding that employer has burden to prove availability of light work when claimant can only perform such light work).

103. See *Barrett*, 246 A.2d at 671 (identifying main issue as whether court should extend *Petrone* to place burden on employer to prove availability of any type of work to injured employee).

104. *Id.* at 674.

105. *Id.*

106. Chief Justice Bell had an interesting and storied career as a Philadelphia lawyer and politician. See Pennsylvania Historical & Museum Commission, *Governors of Pennsylvania*, http://www.portal.state.pa.us/portal/server.pt/community/1879-1951/4284/john_c_bell_jr_/469237 (last visited Jan. 11, 2010) (providing biography). He served on the Supreme Court of Pennsylvania from 1950 until 1972, becoming chief justice in 1961. *Id.* His father was a Philadelphia district attorney and Pennsylvania attorney general. *Id.* After graduating from the University of Pennsylvania Law School in 1917, he "became a senior partner of the law firm Bell, Murdoch, Paxson and Dilworth," was elected lieutenant governor, and "became the first constitutional governor in Pennsylvania history who was not elected to the office" when he served for nineteen days, "the shortest period in Pennsylvania history," due to Governor Edward Martin's election to the U.S. Congress. *Id.* Chief Justice Bell's younger brother, Bert Bell, was the commissioner of the National Football League for thirteen years and "was responsible for pioneering the way professional teams draft players, league television policies, and player anti-gambling measures, as well as building the image of the NFL." *Id.*

trespass and in other fields of *the law*, that the person who has the burden of proof to sustain his claim has to produce competent and adequate evidence to sustain his claim. This has been and should continue to be the law, even though the opposite party is in a better position to possess or acquire the essential facts or the necessary knowledge. I would cast upon the claimant the burden of proving his claim to total or partial disability, and if the latter, further proof that employment for a person with *his kind* of partial disability is *not available to him*. Any other standard or requirement or burden is founded upon emotion and not law, and makes a travesty of the law.¹⁰⁷

Comparing the critical dissent of Chief Justice Bell with the majority opinion clearly outlines contrasting approaches to employment law, but also, perhaps, the early markings of a shift in the U.S. marketplace. Interestingly, parallel to the more equitable, emotive approach to the law, as employed by the majority in *Barrett*, is an equally opposite, yet similar, movement in the employer-employee relationship—away from rigid tradition and preconceived notions of life-long employment and toward a more flexible business model that counts employees as a malleable resource instead of a fixed, limiting factor.¹⁰⁸ Thus, it would appear that both the law and the workplace have moved toward more ethereal rules, although perhaps in opposite directions.

G. *Romein v. General Motors Corp., Supreme Court of Michigan (1990)*

Although outside Pennsylvania, the 1990 case *Romein v. General Motors Corp.*¹⁰⁹ from the Supreme Court of Michigan provides some brief insight into the rationality of the judicial mind. In dissenting from the majority's holding that retroactive coordination of workers' compensation benefits was constitutional,¹¹⁰ Chief Justice Dorothy Comstock Riley remarked, "While it is understandable that emotions may run in favor of an injured employee and against a large corporation, this Court 'can but construe the statute in question as it reads, and not as equitable consideration might impel us to do.'"¹¹¹ Chief Justice Riley's remarks in her dissenting opinion exemplify adherence to a rigid construction of both statutory law and the judiciary's role in interpreting, not creating, the law. Such an approach by the judiciary avoids overlap of roles with the legislature and, presumably, increases the predictability of outcomes. Nevertheless, because the judiciary is the final determinant of the law, failure to consider the equities of a case could effectively deny a plaintiff a remedy. Such a result, although perhaps required by a statute's language, may not have been the intent of the legislators who enacted the statute.

107. *Barrett*, 246 A.2d at 675 (Bell, C.J., dissenting).

108. See *supra* notes 2–5, 11–13, and accompanying text for a discussion of the changed employer-employee relationship in recent decades.

109. 462 N.W.2d 555 (Mich. 1990), *aff'd*, 503 U.S. 181 (1992).

110. *Romein*, 462 N.W.2d at 567.

111. *Id.* at 578 (Riley, C.J., dissenting) (quoting *Bankers' Trust Co. of Detroit v. Russell*, 249 N.W. 27, 30 (Mich. 1933)).

IV. CONCLUSION

So what does all this mean? Certainly not all lawyers are expected to enroll in a social work masters program. Indeed, neither the legal profession nor the field of social work would be pleased with that development. Nonetheless, labor and employment lawyers can learn valuable skills from social workers: empathy, listening, sensitivity, awareness, problem identification, intervention, and strategizing. In the changing modern workplace and global economy, these skills are of increasing importance because of a growing disconnect between employees and employers—a disconnect viewed by employees as a psychological breach of an unspoken contract.

Companies, particularly large corporations, are dynamic entities that employ a vast expanse of professionals, managers, manufacturers, service workers, specialists, generalists, experts, and consultants. These employees are of all different ages, races, and religions, with differing experiences and perspectives. And whenever any such employee feels wronged by his or her employer, that particular employee will have a particular reaction, often highly emotive and perhaps even irrational, to the particular event of his or her firing.

Courts necessarily consider the specific circumstances surrounding each such dispute, particularly in jury trials or during settlement negotiations. No employment lawyer who limits his or her expertise to the blackletter law will serve as a zealous advocate and counselor for his or her client, regardless of how skilled the lawyer may be in distinguishing court precedent or in parsing statutory language. As seen in *Scanlon* and *Kress*, any event that leads to an employment dispute will be viewed from a variety of perspectives. The *Helfrich* court demonstrated the incomprehensibility of a different final decision to an employee-plaintiff who was successful at an earlier hearing. In *Dumann*, the court delineated the modern business mentality in contrast with traditional notions of the employment relationship. In *Bellas*, Judge Shadur cleverly criticized the majority's cursory assumption of employment termination. The *Barrett* court boldly demonstrated the differing jurisprudence of equity and blackletter law, as similarly addressed, though not as starkly, by the *Romein* court. Collectively, these cases tell us that there is more to each employment dispute than the words of the final opinion. The facts and circumstances of each case are like fingerprints—similar, but always with subtle permutations and differences. The emotions of adverse parties will morph and flare in unpredictable ways. The ideological approach of the particular judge or arbitrator will vary. Employment lawyers must be ready for any and all of these variations.

More so than any other area of the law, aside from perhaps family law, employment law is intrinsically human. In our modern society, it is the workplace that defines us, provides us with the ability to provide for ourselves and our families, supplies us with a role in society, and gives us the ability to plan for our futures and to meet the unexpected occurrences of the present. Our work defines us; indeed, at nearly any social event that requires introductions, the question most frequently following "What is your name?" is "What do you do?"

No other area of legal practice allows for such instant empathy between attorney and client. Whereas not all lawyers have personally dealt with divorce or child custody disputes, fewer lawyers have dealt with wills or estates, and still fewer lawyers have

been directly faced with criminal proceedings, *all* lawyers are employed. And, in employment termination disputes, their employer may very well be the plaintiff-employee, freshly injured by a prior employment relationship. Skilled employment lawyers recognize the second agendas present in any employment dispute and relate to and counsel clients in this amorphous realm of human commonality embodied in the courts as the law of equity, which exists, by and large, outside of the blackletter law.

