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Photos by
Carmen Natale

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YouTube

Social media, sexual harassment liability, obesity as a disability and gender identity are employment issues that companies never dreamed they would be dealing with just a few short years ago. We've invited three noted practitioners in the practice of employment to discuss the changing legal landscape today and in the future. The moderator for this roundtable was Robert O'Hara, Director equal employment opportunities and employment counsel for United Technologies Corp. The participants are John McKelway, partner at McCarter & English in Boston; Gabriel Jiran, partner at Shipman & Goodwin in Hartford; and Michael Devlin, partner at Berchem, Moses & Devlin in Milford, Conn. This roundtable was transcribed by United Reporters and photographed by Carmen Natale.

New England Roundtable Series 2010

We Never Thought OF THAT

21st Century issues that make most employee handbooks obsolete

social networking

MODERATOR: Twitter, MySpace, Facebook, LinkedIn are examples of social media in the today's workplace. Let's talk about the different pitfalls that companies face with their employees and how it can become a social media minefield.

JOHN McKELWAY: There is a host of social networking technologies which are typically described as "social media" that are in use today: Facebook, MySpace, Twitter, blogs. Employers and businesses are all grappling with whether or not and to what extent those social media technologies should be used in the workplace.

Typically, the factors that go into these discussions include the obvious advantages: you can reach targeted markets with instantaneous effect. There are also features of these technologies that lead or contribute to problems in the workplace. Those would include the speed and ease of communication and how it can spur impulsive or ill-considered comments. It is not well suited to complex communications, and the use of these media often lacks privacy, despite what the users at the time may think. And, lastly, as we all know, if you practice litigation, when something appears on a digital record, it's very hard to remove it down the road.

Businesses are considering to what extent to allow their workers to utilize these technologies in the workplace and, likewise, how to regulate the conduct of employees who are using social media for personal reasons. The lines have become blurred between office and home, public and private.

There are privacy concerns of employees whose personal sites and communications may be monitored. For example, if an employer in this day and age wants to hire somebody, typically they will do a Google search of that individual's name and oftentimes view Facebook entries or other social media sites that the individual may have designed. Of course, when those sites were designed, they weren't created with an eye toward a prospective employer viewing the pictures from the Cancun vacation.

Confidential information belonging to a business is a very important issue, and with the touch of a keystroke, information and data can be instantaneously sent to a large audience outside the purview of a business, and that can pose obvious problems.

There are increasing troubles with stalking and bullying or harassment of employees using social media. If a supervisor attempts to "friend" a subordinate on Facebook, is that appropriate? And if the employee feels uncomfortable about that, does that raise some concerns or issues?

A brand can be destroyed in an instant with inappropriate dissemination of information using these technologies. One of the more recent examples of that involved a large pizza company where some employees had taken some what they thought to be humorous video shots of unsanitary conditions. Those were broadcast worldwide via YouTube in a matter of hours, and the next thing the company knew, they were enmeshed in a public relations disaster.

You also have issues when employees use these technologies on behalf of the employer, or purportedly on behalf of the employer, to say or do things that are going to ultimately inure to the business' detriment, either by using inappropriate language, making offensive comments, making representations or promises over blogs that the company can't keep, or even defaming a competitor.

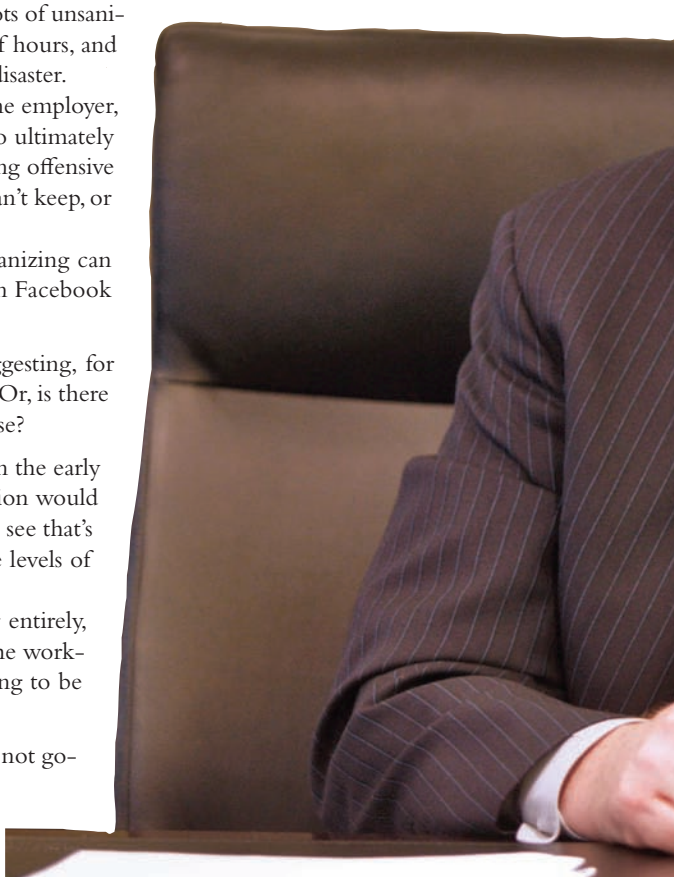
There are other questions; whether or not and to what extent union organizing can take place using social media and, lastly, employees who spend all their time on Facebook at work, when they should be working, that's a very practical problem.

MODERATOR: When you are giving advice to clients, are you suggesting, for example, that companies ban access at the work site to these types of media? Or, is there some other guidance that you're giving because of all these issues that you raise?

McKELWAY: I think that it really depends on the individual business. In the early days of the Internet, some employers thought that the least risky course of action would be to ban the use of the Internet on the job. Now, some 15 years later, we can see that's not very practical and, likewise, with social media, you can certainly structure levels of use, depending upon the business' appetite for risk and what they want to do.

However, I think it's ultimately going to be fruitless to ban it outright or entirely, and there's another factor here to consider. There is a generational divide in the workforce in terms of the acceptance of social media and its uses. That fact is going to be difficult to overcome as the next generation enters the workplace.

GABRIEL JIRAN: On the issue of banning access — if the company is not go-



ing to ban access altogether then it should have very tight policies in place. The policies should outline the purposes that your system can be used for and what can be stated on any social networking sites, because everything is a balance between free expression and statements that can affect the company. If the company can be held liable for statements that are made on these social networking sites, then the company has a right to control the content to some degree. By using a tightly crafted policy, the employer at least has some ammunition to go to the employee and take some adverse action for inappropriate statements.

Of course, policies have to be based on a legitimate business need. When you talk about the concept of balancing, you may be talking about the private conduct of an employee and their personal life. How far the company wants to intrude into that personal life is going to be a question that the company needs to consider. The company should focus on going after any conduct that would affect the actual business, reputation or trade secrets.

MODERATOR: Are you finding any generational divide among decision makers who are trying to create these policies not really understanding the breadth or the pervasiveness of these technologies, or is there a recognition in your client base?

JIRAN: I see, for the most part, an understanding by all generations at this point. There are some notable exceptions, but in my practice I see that the managers, the executive directors, the CEOs are astute enough to know what is going on. Often it is because they have had to deal with an issue. So if they have not learned about it up to that point, they learn very quickly.

MICHAEL DEVLIN: I would say, as opposed to monitoring computer usage for pornography, for example, where you may be able to nip something in the bud from just seeing the sites visited, the difference with the social media is that you don't usually find out about the problem until it's become a full-blown situation. That's because you're not monitoring it for content on an ongoing basis.

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— JOHN McKELWAY
McCarter & English

McKELWAY: Also, I think you will often find a different perspective within the organization as to the use of these media. If you talk to a marketing person who is looking at what the competitors are doing, they're going to very actively promote the use of social media. They don't want to be perceived as not keeping up with the competition.

By the same token, if you're on the human resources side of the coin and see all the potential problems with increased use of these technologies, then you're going to be a little more cautious. I think it depends on the businesses as well.

Some businesses, like Dell Computer, actively promote the use of social media by their employees and take pride in identifying profits that they attribute to the use of these technologies.

Other organizations, law firms for example, who deal with very sensitive information, are going to be much more conservative about the use of social media. LinkedIn, for example, is viewed as

a very professional social networking site without a lot of risk. On the other hand, when you get into MySpace, Facebook and Twitter, it's much more difficult to control and risky.

MODERATOR: So it sounds like you are sort of espousing a time, place, and manner approach to these policies, not a one-size-fits-all type of policy?

Are your clients trying to wade through these issues as a result of a problem, or are they taking it on their own initiative to say we understand that there's a big wide world out there and we really have to develop some strategy in advance of that?

JIRAN: I see some employers taking a proactive approach, and it gets back to a fundamental concept with the use of technology in the workplace. Most employers say from the outset that their system shall only be used for business purposes. The idea of a business purpose has now expanded, and using Dell, for example, the business purpose could be to use these social networking sites to market their products. Therefore, I think each individual company or employer has to decide what is considered a business purpose for their operation and take an approach that best suits that purpose.

I think it is a good thing to say that one size does not fit all. The company must answer: what can we use these sites for? Why is it important to our business? The answers to these questions are going to differ and determine the type of policy to use. Some employers are being more restrictive than necessary, and not all have figured it out quite yet.

DEVLIN: I know of a situation where the former employer was able to enforce a noncompete because the former employee was writing on Facebook about their competitive activities and how they used prior information to go after customers.

MODERATOR: So on balance, the strategy would be let's develop something in anticipation of issues, hopefully not in response to issues.

LinkedIn is seen to be very professional. Have you ever had a situation where an individual has given a recommendation in LinkedIn and then that person is subsequently terminating the employee for bad behavior or bad performance?

McKELWAY: Absolutely. Anything that you can imagine, multiply that by 100. That's what we're seeing out there.

There are several parts to this problem that are important. The first is that the technology itself is evolving at a very rapid rate. Recently Google came out with their own version of a social networking site

One of the most basic steps that employers should take immediately is to realize that technology has expanded the workplace, so any policy that applies in your workplace should be altered to include electronic media where appropriate.

— GABRIEL JIRAN
Shipman & Goodwin LLP

called Buzz. It has gotten into some hot water because initially they allowed some personal information to be viewed by others, and that was viewed as a potential invasion of privacy. So they are now working to fix that.

As well, there are some social and psychological factors here that contribute to the problem. For example, it's a well-known phenomenon that people who sit in front of a computer screen or use a mobile device oftentimes create an identity that is very different than the reality, because they are shielded from anybody saying, "wait a minute, you're not the King of Belgium." And that, has contributed to some of the problems that we're seeing in the use of these technologies; the stalking, the bullying, the harassment,

representing yourself as someone you're not.

There are some practical aspects to policies that need to be considered as well, and many of the companies that have developed social media policies state, for example, that under no circumstances are you to make anonymous comments. You are, obviously, supposed to say things that are appropriate and within the purview of the business, but you're not supposed to be anonymous.

MODERATOR: Can you point to best practices that our readership could review as a starting place for developing a social media or social policy?

McKELWAY: http://socialmediagovernance.com/policies.php is a web site that has more than 100 published social media guidelines and policies.

There is a range of things that can be done in crafting a social media policy. Under no circumstances should confidential information be divulged, no use of offensive language, profanity, any sort of racial or other epithets. If you're making representations, make sure that they are identified as individual opinions and not statements that might bind a company. I don't think a one-size-fits-all approach will work for every business.

JIRAN: One of the most basic steps that employers should take immediately is to realize that technology has expanded the workplace, so any policy that applies in your workplace should be altered to include electronic media where appropriate.

As an example, Continental Airlines was sued for a chat room that employees used to talk about work-related issues. In that chat room, one employee was degrading and harassing to another employee. Continental Airlines was held to be responsible for that conduct because management knew of the existence of the chat room and did nothing to control the content.

MODERATOR: So what you are saying is that companies should be wary of informal groups out there that purport to be members of a company. Should they be monitoring those? Should they be monitoring cyberspace for their own protection?

McKELWAY: This is uncharted waters for the most part. If you have company sponsored blogs, typically about product issues or marketing issues, then those should be more tightly controlled. The company can decide to monitor outside business blogs and networking sites, but I think that's a losing battle because there's so much out there that you will never be able to catch it all. By taking on that responsibility you almost assume some liability.

DEVLIN: These sites can also be used to a company's advantage. LinkedIn is sometimes used by HR to check for resume fraud.

McKELWAY: That's another aspect or facet of this subject. Human resources departments, as part of their due diligence in hiring employees, will search social networking sites. And if they, for example, see information that might indicate a protected class and decide not to hire someone because of that, well, obviously, that can raise the specter of discrimination claims.

JIRAN: Forty-five percent of employers now screen applicants by going to social networking sites, and as everyone has pointed out, you can't undo what you know. There is a lot of information out there, and so it cuts both ways. Sometimes you find out valuable things, sometimes you find out things that can be used against you.

The decision makers need to be very careful about how they react to what they find out.

MODERATOR: How are the courts grappling with this? Are they struggling with the same types of questions that companies do?

McKELWAY: I think that right now the answer is yes. It's at a very early stage. What we're seeing are some lawsuits being brought on the various theories that we have been talking about here, but they haven't yet reached a level of appellate review where they're going to be many published decisions. By that time, the social media applications at issue might be obsolete, which is part of the problem.

MODERATOR: That opens up the question of discipline. In the absence of a social media policy at a company, how would you advise clients to issue discipline for different types of infractions, say, defamation or some sort of harassment claim?

JIRAN: I think you can fit in a lot of the activity that occurs on a social networking site into existing policies. For example, a common catch-all provision is a prohibition on conduct unbecoming an employee or unprofessional conduct.

I think the challenge is, again, this balance of is this off-duty conduct or is this really business conduct, and that becomes a blurry line. As I mentioned earlier, if you go back to the business purpose of any discipline, what are you trying to prevent? Can the company say that an employee acted inappropriately or has affected the business? I think that is where the struggle begins. I do not think that you get rid of that struggle by just having a typed policy, either. It helps to define what the policy applies to, but there is always going to be that struggle.

McKELWAY: Even if you have a policy, if it is too restrictive and not going to be observed anyway, you're probably better off not having a policy at all. As we all know, the failure to adhere to your own policies is probably the worst evidence in any type of a claim against the company.

MODERATOR: Any other closing thoughts on social media?

JIRAN: Stay tuned.

MODERATOR: Let's talk about the Second Circuit. *Faragher* and *Ellerth* and the developments there.

DEVLIN: Just by way of background, a little over ten years ago the courts were grappling with the issue of whether companies should be held strictly liable for actions of their supervisors in terms of sexual harassment. The Supreme Court said that they were strictly liable in the abstract, but that the employer had an affirmative defense available as an escape hatch. The employer could show that the employee unreasonably failed to take advantage of effective preventative and corrective mechanisms offered by the employer, such as a complaint procedure. *Faragher* and *Ellerth* gave rise to the more modern sophisticated sexual harassment complaint policies with multiple avenues of redress, anti-retaliation provisions and the like.

harassment

The latter is important because, even in a case that the employer ultimately loses, having at least an effective complaint mechanism has eliminated punitive damage liability on the part of the employer.

So, the Second Circuit decision that came down in January, *Gorzynski v JetBlue Airways*, is disappointing. The sexual harassment complaint policy was distributed to employees and had multiple reporting avenues. You didn't have to report to the harasser. You had several other avenues, including, of course, human resources, as well as the head of that facility.

Based on the fact that the employee reported the issue solely to the harasser and took no other avenues, the District Court granted summary judgment to the employer. The Second Circuit reversed. It held that the failure to report harassment to the multiple avenues bypassed does not, as a matter of law, constitute an unreasonable failure of the employee to take advantage of available avenues. So the employer could not satisfy the second prong of the affirmative defense we talked about, where the employee fails to utilize effective mechanisms.

MODERATOR: Were there special circumstances in this particular fact pattern which brought the Second Circuit to that conclusion?

DEVLIN: As we all know, bad facts often make bad law. The employee may have been treated and terminated unjustly from employment even though that was not particularly relevant to the complaints.

The supervisor had created a fairly pervasive atmosphere of harassment over a seven-month period. The so-called "complaint" by the employee was really an informal mention of a small portion of that conduct. The human resource department and other managers at the facility were not contacted at all.

From left to right, John McKelway, Gabriel Jiran, Robert O'Hara, and Michael P. Devlin.

The situation with the other available reporting avenues is somewhat interesting. One was simply deemed to have a managerial style that was not receptive to complaints. Another had apparently blown off an age discrimination complaint by the same employee.

The court excused the bypassing of the human resources reporting option, because another woman that had complained about harassment happened to be disciplined two weeks later. There was no evidence that there was retaliation in that case, but the court thought it was key that the plaintiff could have perceived that going to human resources was not an effective complaint mechanism.

MODERATOR: It sounds like the Second Circuit was really trying to find a path here in this case. What they have done is turned an affirmative defense on its head for everyone else. Is that a fair assessment?

DEVLIN: I think that's a fair assessment. There have been District Court cases in the Second Circuit and others where they found that the complaint mechanism was ineffective and, therefore, the employer couldn't satisfy the affirmative defense. But they were more egregious situations, such as the president of the company either committing the conduct, or threatening to retaliate against the employee for bringing any complaint to anyone.

MODERATOR: Based on this recent court decision, how are you counseling clients about their sexual harassment policies? Are you suggesting that they amend them in some way?

DEVLIN: You have to make sure that managers involved are receptive to these kind of complaints and more knowledgeable about these types of complaints.

You may want to consider allowing employees to go to any supervisor or manager they feel comfortable with, or allowing employees to access a person that does not work at the location they do.

McKELWAY: Let me give you the perspective of an attorney who practices in Massachusetts. For the last 20 years, under a decision called *College-Town v. MCAD*, the law in the commonwealth is that there is strict liability for the sexual harassment of a subordinate by a superior. It doesn't matter whether the company has the best policies in the world, whether the employee followed procedures in the policy, or even where the employer was unaware of the alleged harassment — there is strict liability.

Nobody pleads a Title VII claim in Massachusetts because the plaintiff's claims would then be subject to the federal doctrines and defenses that we are discussing here today. So what can an employer do?

You can prepare good policies, but sexual harassment prevention training is your one avenue to prevent or minimize the damage from these types of claims. The whole idea here is to flesh out problems at the earliest level before they become more serious. Others involved may say, 'Well, let's not make a big deal of this and not raise a stink because it was probably an isolated incident." That, unfortunately, leads oftentimes to more serious problems in the future. It's broader training, not just at the supervisory level, that works best.

Americans with Disabilities Act

DEVLIN: There are state and local laws that don't recognize the affirmative defense at all. In New York City, where I also practice, the municipal agency is more active than others, and doesn't recognize the affirmative defense at all. It's simply strict liability regarding supervisors.

McKELWAY: I think it's really unfortunate for employers that have a good policy, when the individual chooses to ignore it. Of course, that raises credibility issues about the claim to begin with.

DEVLIN: I see a problem here of the employees using it as a preemptive strike.

MODERATOR: So a policy that actually lists a variety of avenues, places to go to report, in and of itself isn't sufficient after the result of this particular case?

DEVLIN: Correct, because in this case, all the people that were formally listed in the policy worked at the particular facility, and the employee could raise some objection to each one. That's why allowing the employee to go to any supervisor or manager that they feel comfortable with may help, as well as having an option to go outside the local facility.

JIRAN: I'm not sure the employer in this case could have done much else to help themselves. Arguing as a management lawyer, I would say bad facts, but the same law applies. When you look at the holding of the case, the court stated that the determining factor is whether it was an unreasonable failure of the employee to take advantage of these remedial measures. How do you determine reasonableness? A lot of times that will be a factual dispute. That is really what the case stands for, which is not any different from prior cases.

Now, unfortunately, because of the facts involved, I think a lot of employees are going to use this case to say they don't have to report harassment at all, or that they can go to anybody they want and that is going to be sufficient.

MODERATOR: Moving to another timely subject, obesity as a protected disability.

DEVLIN: One of the issues I think that is going to cause this to be a big problem is the fact that the fastest growing segment in this category of persons is the morbidly obese, which involves twice the number of people who are suffering from Alzheimer's. We're talking a body mass index of 40 or over and typically involves someone at least 100 pounds overweight.

The traditional case law under the Americans with Disabilities Act is that obesity, simple obesity, is not protected. There is no protected status and it doesn't even rise to an impairment.

MODERATOR: So this is the history from the original ADA?

DEVLIN: Yes. And the traditional law has been that it can be a protected situation if there's a physiological factor that caused obesity, such as a metabolic disorder, and in a few cases a genetic disorder.

The EEOC has pretty much always viewed morbid obesity as something that

could be a protected situation even without physiological causation. That postion has received somewhat of a mixed reception in court. Most courts in this general region — the first cases came out of Rhode Island and New Hampshire — generally supported the notion that morbid obesity should be treated as more protected than simple obesity. Only one circuit court, which was the Ninth Circuit, squarely held that morbid obesity in itself should be treated differently than simple obesity.

Many people think that the Americans with Disabilities Amendments Act is going to radically change the landscape in this area, even with simple obesity. In its proposed regulations the EEOC even took out from its textual material that simple obesity is generally not a disability.

MODERATOR: So they stripped that out in the regs? Those regs are still pending?

DEVLIN: Correct. The public comment period has ended, and it's going to OPM.

The very purpose of the ADA Amendments Act was to more liberally construe the definition of disability, and get away from the fact that the overwhelming majority of ADA cases were dismissed before trial on the grounds that the employee did not have a disability. Key sections of the Amendments Act centrally counter the defenses that were used in such cases. For example, the ability to take mitigating measures to reduce the impact of a physical limitation is no longer going to be a factor in assessing protected status, other than simple eyeglasses.

So, the defense of "this is not an immutable characteristic because you can do something about the fact that you're overweight" is not going to be well received.

MODERATOR: So the ADAA flips everything around.

DEVLIN: Yes.

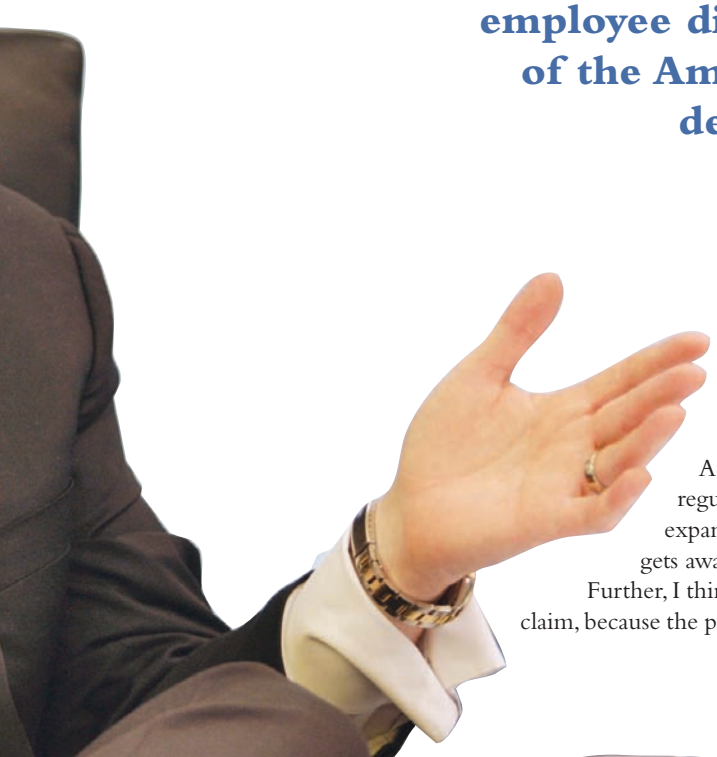
MODERATOR: With respect to the disability filtering that is done on the front end.

DEVLIN: The primary stated purpose of it was to counter the courts taking a narrow and, in reality, accurate view of what constitutes a disability.

MODERATOR: And I know at one point during the negotiations, because this was a negotiated agreement between business and disability groups, if you have eyeglasses you were disabled.

The very purpose of the ADA Amendments Act was to more liberally construe the definition of disability, and get away from the fact that the overwhelming majority of ADA cases were dismissed before trial on the grounds that the employee did not have a disability. Key sections of the Amendments Act centrally counter the defenses that were used in such cases.

— MICHAEL P. DEVLIN
Berchem, Moses & Devlin, P.C.,



So how do you see the obesity question playing out now in the courts? Let's focus on morbid obesity first. It sounds like it's going to be easier to bring that claim.

DEVLIN: It's going to be easier, and as part of the ADA Amendments Act, it reduces the degree of severity by which a condition has to affect your regular life activities to be covered. So, essentially, the groundwork is laid to expand the definition of what impacts your life activities. To a large degree it gets away from the concept that it has to be an immutable characteristic.

Further, I think that the Amendments Act also makes it easier to make the "regarded as" claim, because the plaintiff will no longer have to prove that the employer regarded the person

as having an actual disability, as was the case before.

So, I think that not only will the concept of morbid obesity become further embedded in the law, but simple obesity will likely give an avenue for plaintiff's lawyers as well. And, obviously, we're then getting into the situation of accommodating obesity, whether it's configuration of work areas, bending, stooping, space limitations, etc., regardless of whether there is a physiological cause for the condition.

One avenue of likely litigation is going to be a situation where employers consider appearance and public image as important to their business. Does someone consider the morbidly obese in a public contact role to be adversely impacting that image?

McKELWAY: There are some states, the District of Columbia for example, which do prohibit discrimination based on appearance. There are some trends in that area, both locally and nationally.

There are some conflicting trends as well dealing with health in the workplace. Employers are struggling now to try to reduce their health care costs. Some have even come up with policies that state, 'We will not hire smokers merely because of the costs.' Few drugs are more addictive than nicotine, yet tobacco use was written out of the Americans with Disabilities Act as a protected condition. Health issues are a major compelling force that workers have to deal with. So, it will be interesting to see how this all plays out.

gender identity

JIRAN: Use the analogy to smoking. I can see if you're a smoker and you have some condition such as emphysema, which obviously is a disability and may require accommodation. When you analogize that to obesity and the employee has health problems as a result of it, that could be a disability and should be accommodated. What I have a problem with is saying that you are obese or a smoker and are therefore disabled. There should be some resulting condition out of the status of either being obese or a smoker that would qualify as a disability. I'm worried that the Amendments Act goes beyond that concept and would extend the law to an otherwise healthy person who is obese. That is a scary concept.

DEVLIN: I think that will happen. Actually, fairly liberal groups like the American Medical Association are actually opposed to obesity discrimination being recognized without a physiological component, as well as the American Obesity Association itself, because they feel it's somewhat enabling

MODERATOR: So, we are talking about accommodation in the workplace, which is really where the rubber hits the road for the employers. The ADAA has made it almost impossible to disqualify a disability, so the analysis moves then to how do you deal with it in the workplace?

Let's assume for purposes of discussion that obesity, whether morbid or simple, will be protected. How do you counsel clients with workforces that are large and expanding to deal with the accommodation requests? How do you counsel them through the process?

DEVLIN: Well, the accommodations are going to be fairly similar to those that might have arisen for other physical conditions. For example, the bending and stooping accommodation might wind up the same as that with somebody who just has a bad back problem. Stamina, depending upon the job, could be an issue. Configuration of work area is an issue that may come up. I think the challenge for employers is going to be to recognize that there's a disability potential to begin with, and then look at the accommodations. The accommodations themselves may not be radically different, but normally the employer would say you're not disabled to start with, and therefore are not entitled to one. Then, of course, it's going to be a matter of degree. How overweight do you have to be?

MODERATOR: Right. So we're back to a training approach here.

DEVLIN: Yes, and I think what will be a battleground is the appearance and public image issue.

JIRAN: I think that employers would serve their interests if they can better define the essential functions of the job as well so they can point to specific things in the job description or requirements of the position. The employer needs to be able to say to the employee that we cannot accommodate your obesity to do that essential function.

MODERATOR: That's easier said than done in large organizations. For example, in our company we have 800 common job descriptions; we used to have 10,000. And so, when you went from 10,000 to 800, you got generic descriptions. So coming back full circle, we now have to make them more particular with respect to the essential functions.

And with these ADAA overlays; bending, stooping, standing, looking…; how does an HR organization contend with all of this? Should we just throw them all out and start over or try to modify as necessary when we're confronted with a problem?

JIRAN: I think you run a risk if you're doing it on an ad hoc basis in reaction to a particular employee or group of employees, because then it is going to start to look like you are targeting a particular person.

One approach may be at the outset to utilize pre-employment physicals that are job related.

McKELWAY: The real trouble spot here may not be in the accommodations area, but when an employee is disciplined or terminated. There may be stray or isolated comments about weight that are unrelated to the decision-making process, but are used as evidence of discriminatory intent.

At some point, mixed in with harassment training, there will need to be some focus on obesity that sensitizes workers to such issues.

DEVLIN: The bottom line is there's going to be more litigation.

McKELWAY: This is sort of like a theory of evolution — where one avenue is foreclosed, a clever plaintiff's attorney will evolve to find a new theory.

JIRAN: It is a weird dichotomy for employers where you have wellness programs on the rise, and now you have this to deal with this issue as well.

MODERATOR: And then you have the potential interaction with GINA, the Genetic Information Nondiscrimination Act, requirements and prohibitions on different types of things. There are all of these areas that companies have to navigate.

Wellness is a good thing , but if you ask too much and might have information that can be used against you.

MODERATOR: Let's talk about gender identity and expression as a protected class.

JIRAN: Let's start with the definitions involved. Gender identity has been defined as the gender that a person perceives himself or herself to be, and it may not be what their physical gender is. Gender expression is a very broad category of self-expression, conduct, actions etc., as they relate to gender roles in society; for example, if somebody acts masculine or feminine. The broadest term of all is transgendered. This is just a very broad term for individuals who do not fit within a strict gender category. The first question is: Is it a protected status? Under federal law, no, it is not explicitly protected.

MODERATOR: At the moment.

JIRAN: Right. There is a pending bill, the Employment Nondiscrimination Act of 2009 that was proposed by U.S. Rep. Barney Frank. It would add sexual orientation and gender identity to protected classes on the federal level. Interestingly enough, the federal Office of Personnel Management has added gender identity to its EEO policies for federal employees, so there is some movement on the federal level outside of the proposed legislation. On the state level, 13 states and the District of Columbia have laws that include transgendered categories in the nondiscrimination laws. For our region, of particular note are Maine, New Jersey, Rhode Island, and Vermont. But when you take it down one step further on the local level, 122 cities and municipalities across the country have added this category, either through a regulation or some local ordinance.

The most notable in our area are Boston and New York City. So, we're seeing a potential trend developing here. The trend may continue through the federal level, or it may just come through more local government action.

The real debate here is if there is no law that specifically states that gender identity is a protected status, is there an argument there is protection through some other law? On the federal law, I say that the conclusion is uncertain. Most of the arguments stem from a case by the name of *Price Waterhouse v. Hopkins*, a Supreme Court case from 1998. This was not a transgendered case, but a case that said that sex stereotyping could be sex discrimination. That has been the cornerstone for the arguments for many individuals to say that if you are treating me differently because I'm transgendered, that is sex stereotyping and I'm protected under existing federal and/or state law. In Connecticut, the Connecticut Commission on Human Rights and Opportunities has said that Connecticut law protects transgendered individuals, and that was a 2000 decision.

Is it a reasonable interpretation of the law to say that sex stereotyping would apply to transgendered individuals, or, if you have a sexual orientation provision in your nondiscrimination laws, is that another avenue to use to say that this is really about sexual orientation rather than physical appearance or conduct?

MODERATOR: The history of NDA is fascinating. It goes back many, many years, and it's been introduced in every Congress for the past decade or more. Wouldn't that actually just clarify things if the Congress made gender identity or expression a protected class at the federal level?

McKELWAY: I would agree with that. What I have seen, which is fascinating, is the disparity in how these issues are treated from state to state and on the federal level. It makes no sense. It's not consistent. It's not even rational; the distinctions that have been made as to what is or isn't a protected category.

So, in advising clients in this area, my general course of advice is to make sure that employees are treated with respect. That may not calculate precisely who is or isn't in a protected category, but I think it would make it easier if everyone knew what the boundaries were. It would make it easier to express this in the workplace; to state, 'this is the law and we're going to follow it and make sure our employees adhere to it.'

JIRAN: I think the broader question is if a law is passed that identifies it as a protected class, or if your company has a policy on it, what does that mean for your business? For example, we talked about appearances in the obesity discussion. Can you say to a male employee, you can't wear a dress and go on sales calls because we're concerned about the perception that will create?

DEVLIN: Again, it gets partially back to the extent to which an employer has the right to project an image that the employer wants or needs to protect.

MODERATOR: This poses additional problems for multistate employers at our company we have included gender identity and expression in our nondiscrimination policy. We did this for several reasons, but one of them was because we wanted to avoid the patchwork quilt of regulations in 50 states.

But the big question is what do you do in the workplace? How individuals are treated and what kinds of claims can arise if you don't treat people correctly.

McKELWAY: In fact, this is another area that sensitivity training can be helpful. When our clients have these situations on the job, most of the negative reaction comes from an ignorance of what is going on. A sensitivity trainer can help coworkers look at the individual like anybody else, as a human being.

JIRAN: I have had the same experience with clients who have had employees go through the transition from one gender to another. It involved a discussion with the employee at issue to say, look, we accept this from you, how do you want us to handle this with your coworkers? Obviously, there will be talk, and we want to make sure that we discuss this with you first. The approach was one of fairness, of compassion and acceptance, and that goes a long way, not just with this issue, but with others as well.

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MICHAEL P. DEVLIN is the Chair of the Labor & Employment Law Department. Since graduating from Columbia, his experience has ranged from practicing at one of the larger New York City law firms, to Chief Labor Counsel of a Fortune 250 corporation, to his current role. His practice spans the country, representing large nationally based companies and international conglomerates, as well as regional and local entities of all sizes. He practices in the public sector realm as well. Upon request, Mr. Devlin has written on behalf of national legal and human resources publications on topical issues, and speaks on such matters as well. In an effort to help law students hone their skills, he judges Moot Court competitions at Yale and Columbia Law Schools.

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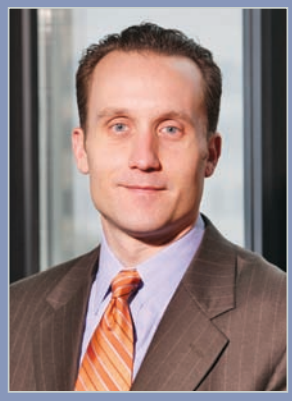

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