THE CONTEMPORARY LEGAL ENVIRONMENT AND EMPLOYMENT CLAIMS AGAINST LAW FIRMS

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I. INTRODUCTION

It is tempting to characterize law firms as a low risk setting for employment discrimination and harassment claims because the alleged offenders are likely lawyers, and thus their education, legal knowledge, and experience should deter their alleged misconduct. Unfortunately, that is not the case. In March 2009, for example, a global law firm was revealed to have offered a former associate $350,000 to settle her lawsuit against the firm for allegedly discriminating against her, firing her, and impairing her ability to obtain employment at other law firms.[1] The settlement came to light when the plaintiff moved to reopen her case on the basis that her former lawyers had "coerced her into settling against her will."[2] Her

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1. Zach Lowe, *What Did Clifford Chance Offer to Pay to Settle a Discrimination Case?*, AM LAW DAILY (Mar. 25, 2010), http://amlawdaily.typepad.com/amlawdaily/2010/03/ccdiscrimsuit.html.
2. *Id.*

original complaint alleged that the firm had discriminated against her because she is African-American.[3]

In December 2009, Julie Kamps, a senior associate in the New York office of a well-respected international law firm, sued the firm and several partners there—both men and women—for allegedly discriminating against her because she is a lesbian.[4] According to the complaint, a female partner sexually harassed Kamps for years.[5] Kamps graphically alleged the insults that the partners subjected her to and further described the harassing and retaliatory acts as creating a "living hell" for her at the firm.[6] When she complained about the harassment, Kamps alleged that the firm retaliated against her by reducing her billable assignments, denying her promotion to special counsel, and ultimately, terminating her employment.[7]

In October 2009, Alan Levy, an associate in the New York office of a national law firm sued the firm and one of its partners for violating the New York City Human Rights Law.[8] Levy alleged that the firm terminated his employment after he attempted to return to work following a medical leave.[9] Levy claimed that a crushing workload (four consecutive years of billing 3,000 hours) and repeated abuse by the partner for whom he principally worked resulted in an emotional and psychological breakdown—which ultimately necessitated the medical leave.[10]

Kamps's and Levy's complaints did not generate nearly the attention that Aaron Brett Charney, formerly an associate at a preeminent New York law firm, filed a couple of years earlier.[11] Charney, who is gay, alleged that several partners discriminated against him based on his sexual orientation.[12] Among other things, a partner allegedly threw a document at Charney's feet and then instructed him to "bend over and pick it up—I'm sure you'll like that"; other partners allegedly fabricated tales of Charney having a homosexual relationship with another associate; and two other partners

3. *Id.*

4. Complaint at 1, Kamps v. [International Law Firm] L.L.P., 1:09-cv-10392-RMB-KNF (S.D.N.Y. Dec. 20, 2009) (on file with the author). The descriptions of the allegations in this case, like several of the other cases described in the next few pages, are taken from the plaintiffs' pleadings. The plaintiffs' allegations may or may not be true. Accordingly, I have omitted the law firms' names from the case citations in an effort to avoid potential aggravation to the firms. Even a law firm's settlement with a plaintiff does not necessarily establish that the plaintiff's allegations were true because cases commonly settle for reasons unrelated to the strengths of plaintiffs' allegations.

5. *Id.* at 6-7.

6. *Id.* at 1-2.

7. *Id.* at 10-11.

8. Complaint at 1, Levy v. [National Law Firm] L.L.P., No. 09603300 (N.Y. Sup. Ct. Oct. 29, 2009) (on file with the author).

9. *Id.* at 4.

10. *Id.*

11. Verified Complaint at 1, Charney v. [Preeminent New York Law Firm] L.L.P., Index No. 07100625 (N.Y. Sup. Ct., County of N.Y. Jan. 16, 2007) [hereinafter Charney Complaint] (on file with the author).

12. *Id.* at 1-2.

allegedly fabricated an evaluation of Charney's work that falsely accused him of overbilling.[13] According to Charney, when he complained about his treatment, the firm conducted a sham investigation into his allegations.[14] The firm allegedly retaliated against him in various ways as well.[15] The litigation between Charney and the firm was hard fought and received considerable media attention.[16] According to rumor, the firm was particularly upset when Charney attached a copy of the partnership agreement to his complaint.[17] Charney ultimately settled his lawsuit for an undisclosed sum.[18]

There are a number of other timely examples of associates suing their current or former firms for employment-related wrongs.[19] But associates are not the only employees suing law firms of late; indeed, legal assistants, secretaries, clerical and administrative staff, staff attorneys, and temporary or contract lawyers are regular litigants.[20] For example, in May 2010,

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13. *Id.* at 1.

14. *Id.* at 6-7.

15. *Id.* at 8-21.

16. *See, e.g.*, Robert Kolker, *The Gay Flannel Suit*, N.Y. MAG. (Feb. 25, 2007), http://nymag.com/news/features/28515 (reporting on Charney's lawsuit and the events leading up to it).

17. *See* Charney Complaint, *supra* note 11, at 7 (referring to the partnership agreement). Charney attached the firm's partnership agreement ostensibly to support the assertion in his complaint that the agreement made it "effectively impossible" for the firm to terminate a partner who was guilty of unlawful discrimination. *Id.*

18. Anthony Lin, *Sullivan Settles with Former Associate Who Sued Firm for Discrimination*, LAW.COM (Oct. 26, 2007), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005558111 (reporting Charney's confidential settlement with his former law firm).

19. *See, e.g.*, Julie Kay, *Law Firm Former Associate Reach Settlement Over Pay Holdback Program*, LAW.COM (Apr. 14, 2010), http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=12024480276l3&slreturn=1&hbxlogin=1 (reporting the settlement of a case in which a former associate sued a law firm for failing to remit $2,000 in pay withheld as part of a cost-cutting program during a time that the firm was struggling financially); Anthony Lin, *Associate's Sex Discrimination Claims Proceed Against Law Firm*, LAW.COM (Aug. 5, 2008), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202423527719 (reporting on associate's sex discrimination suit against a law firm for allegedly "relegat[ing] women to non-partnership track support roles"); Vesselin Mitev, *Ex-Associate, Paralegal Win Damages from Former Firm*, LAW.COM (Aug. 22, 2008), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202423970420 (reporting that an associate and paralegal received $716,500 in damages from their former law firm for allegedly terminating them when they became pregnant); Natalie White, *Lawyer with Chronic Liver Disease Awarded $1.1 Million for Wrongful Termination*, LAW.USA, Aug. 28, 2006, at 8, *available at* http://lawyersusaonline.com/blog/2006/08/28/lawyer-with-chronic-liver-disease-awarded-11-million-for-wrongful-termination/ (reporting that an associate successfully sued his former law firm for wrongfully terminating him when he was forced to undergo extensive medical treatment).

20. *See, e.g.*, Jim Hammerand, *Law Firm Capistrant & Kelly Closes After Losing Suit*, MINNEAPOLIS ST. PAUL BUS. J. (Apr. 23, 2010), http://twincities.bizjournals.com/twincities/stories/2010/04/26/story8.html (reporting that a paralegal sued a small law firm for sex discrimination and obtained a $420,920 judgment, apparently forcing the firm to close); Jeff Jeffrey, *Discrimination Suit Against Ballard Spahr Gets New Life*, LAW.COM (July 1, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202463180898 (reporting on secretary's lawsuit against large Philadelphia law firm for allegedly terminating her in violation the Family and Medical Leave Act); Dan Margolies, *EEOC Suit Alleges Sexual Harassment at Law Firm*, K.C. STAR, Sept. 30, 2005, at C5 (reporting allegations that a large law firm's former chief information officer sexually harassed his administrative

Barbara Badakshanian, a former billing specialist at a large law firm headquartered in Chicago, sued the firm for allegedly terminating her employment based on her age.[21] After discharging her in February 2009, the firm allegedly hired younger employees to do the billing work she had been doing, but at a lower cost.[22]

In early 2009, African-American staff attorney Yolanda Young sued a large law firm headquartered in the District of Columbia and several of its current and former lawyers for race discrimination and retaliation.[23] Among her allegations of discriminatory behavior, Young claimed that a partner belittled her when the partner told her a story about a pet monkey that he had as a child to downplay another partner's use of a racially derogatory term.[24] Young alleged that the firm retaliated against her for complaining of her discriminatory treatment and, ultimately, fired her in retaliation for her complaints.[25] Oddly, one of the alleged acts of retaliation was the firm's allegation that Young was overbilling clients.[26] This was, of course, one of the retaliatory acts that Aaron Charney alleged in his lawsuit.[27]

In March 2009, a former secretary sued a large Seattle law firm after she was allegedly fired as a result of "suffering panic attacks brought on by unrealistic work demands following staff layoffs."[28] The secretary allegedly informed her supervisor several times that the increased workload caused her great stress, impacted her sleep, and forced her to make mistakes.[29] After her first panic attack, a human resources staffer allegedly told her that her workload would lighten, which of course did not happen.[30] When the secretary had a second panic attack, the firm allegedly fired her.[31]

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assistant); Mitev, *supra* note 19 (reporting paralegal's successful pregnancy discrimination lawsuit against her former firm); Martha Neil, *Lawyer Sues Firm for Overtime Pay, Seeks Class Action Status*, ABA J. LAW NEWS NOW (July 7, 2010), http://www.abajournal.com/news/article/lawyer_sues_firm_for_overtime_pay_seeks_class_action_status (reporting that a temporary lawyer sued a law firm for allegedly failing to pay him for overtime work); Karen Sloan, *Suit Revived Against Law Firm Over Partner's Alleged Rape of Receptionist*, LAW.COM (June 11, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202462618937 (reporting on a Louisiana case arising out of a bizarre law firm workplace environment characterized by members' alcohol consumption, partial nudity and sexual banter).

21. Zach Lowe, *McDermott Hit with Layoff-Related Age Bias Suit*, LAW.COM (May 19, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202458414112.

22. *Id.*

23. Complaint at 34, Young v. [District of Columbia Law Firm], L.L.P., No. 0001158-09 (D.C. Super. Ct. Feb. 24, 2009) (on file with the author).

24. *Id.* at 18-19.

25. *Id.* at 21-32.

26. *Id.* at 22-24.

27. Charney Complaint, *supra* note 11, at 1.

28. Karen Sloan, *Claiming Panic Attacks from Workload, Legal Secretary Sues Firm Over Firing*, LAW.COM (Mar. 25, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202446746028.

29. *Id.*

30. *Id.*

31. *Id.*

As interesting or salacious as some of these recent cases perhaps may be, employment discrimination and harassment suits against law firms by non-lawyer staff are in fact old-hat. *Weeks v. Baker & McKenzie*, which "sent shock waves through the legal community" when the verdict came down in 1994, remains one of the best-known cases on law firm employment practices and, conjunctively, law firm partners' failure to police one another.[32] In that case, a secretary in the law firm of Baker & McKenzie, Rena Weeks, recovered a multi-million dollar judgment against the firm and one of its partners, Martin Greenstein, for sexual harassment.[33] Greenstein had a long and well-documented history at the firm of sexually harassing associates and staff before Weeks complained.[34] Nonetheless, firm leaders did little more than scold him for his misconduct before finally requiring him to undergo sexual harassment counseling.[35] The firm did not investigate Weeks's allegations for more than a year after she filed an Equal Employment Opportunity Commission (EEOC) complaint.[36] The firm finally forced Greenstein to resign, not because of his sexual harassment of Weeks or the women who came before, but because in a deposition in Weeks's case, a paralegal who worked with Greenstein testified that Greenstein had backdated documents.[37]

Courts have recognized associates' discrimination claims as a material risk at least since Nancy Ezold alleged that the once prominent Philadelphia law firm of Wolf, Block, Schorr & Solis-Cohen discriminated against her on the basis of her gender when it refused to elevate her to partnership in early 1989.[38] Because so-called "failure to promote" claims were rare at the time, the case attracted significant national attention. Ezold won in the district court, but the Third Circuit reversed the judgment.[39] Nevertheless, the case powerfully illustrates the employment risks that law firms face, as well as the embarrassment and reputational injury that sometimes follow allegations of workplace improprieties and unfairness. Wolf Block saw its culture and internal workings laid bare before the public.[40] The litigation unquestionably gave Wolf Block a black eye.[41] The firm eventually

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32. Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510 (Cal. Ct. App. 1998); Martha Neil, *Hidden Harassment:Law Firms and Disciplinary Authorities Look For Ways to Fight Sexual Misconduct*, A.B.A. J., Mar. 2006, at 43, 43.

33. *Weeks*, 74 Cal. Rptr. 2d at 514.

34. *Id.* at 515-19.

35. *See id.* at 519 (discussing Greenstein's sexual harassment counseling).

36. *See id.* at 520.

37. *See id.*

38. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 512 (3d Cir. 1992).

39. *Id.* at 513-14.

40. *Id.* at 514-21.

41. Jason Fagone, *Wrongful Death*, PHILLYMAG.COM, http://www.phillymag.com/scripts/print/article.php?asset_idx=251969 (asserting that the litigation with Ezold "exposed the firm to a blaze of ridicule in the press").

dissolved in March 2009 in the face of various financial obstacles and a reported crisis of confidence among the partnership.[42]

Law firms sometimes become mired in damaging employment controversies short of litigation. Consider the deservedly harsh light in which Florida's Holland & Knight found itself when a number of junior lawyers complained that they had been sexually harassed by Douglas A. Wright, a powerful partner in the firm's Tampa office.[43] Despite firm investigators finding the women's allegations to be credible and recommending Wright's punishment, the firm's managing partner, Howell Melton, Jr., downplayed the allegations and promoted Wright to a senior leadership post in the firm.[44] Melton's arrogance and insensitivity almost prevailed over collective common sense. Wright surrendered his promotion only after someone leaked the investigators' report to local newspapers.[45]

Yet, while employment claims against law firms are not a new phenomenon, anecdotal reports and informal remarks by lawyers who are familiar with the subject suggest that they have been increasing in recent years. Employment claims by lawyers are certainly generating ample interest and publicity. Indeed, employment litigation against large law firms is apparently so stimulating that the National Institute for Trial Advocacy (NITA) offers a popular case file for teaching advocacy entitled, *Polisi v. Clark and Parker & Gould*.[46] The *Polisi* case file is built around the story of a female associate who is denied election to partnership after she ends an intimate relationship with a rainmaking partner at a prestigious law firm.[47] Stung by the firm's alleged discriminatory treatment of her, she sues the law firm and the partner.[48] Intra-firm sexual liaisons and gender-based partnership decisions have thus made their way into the NITA library next to more staid product liability and commercial litigation case files.

II. THE CHANGED LAW FIRM ENVIRONMENT

If law firm employment claims are increasing as some observers suggest, what factors are responsible for the rise? Alternatively, if reports of increases are inaccurate and employment claims against law firms are simply more unpleasant rather than more frequent, what is the source of that ugliness? Finally, if nothing about law firm employment claims has

42. *Id.*

43. Scott Barancik & Kris Hundley, *A Law Firm's Sexual Harassment Case: An Inside Story*, ST. PETERSBURG TIMES (Apr. 24, 2005), http://www.sptimes.com/2005/04/24/Business/A_law_firm_s_sexual_h.shtml.

44. *Id.*

45. *Id.*

46. ANTHONY J. BOCCHINO & DAVID A. SONENSHEIN, *POLISI V. CLARK* AND *PARKER & GOULD* ADVANCED CASE FILE (2d ed. 2001).

47. *Id.* at 1.

48. *See id.* at 4-6 (outlining the plaintiff's causes of action).

changed except for the attention they now receive, what is the reason for the increased interest in them? The answers to the first two questions are likely found in the changed law firm economic environment.[49] Economic or financial stresses or tensions in modern law practice cannot help but affect lawyers who practice in firms and the staff who assist them. The answer to the third question almost certainly lies in expanded media coverage of the legal profession. In particular, the growth of online media dedicated to comprehensive coverage of the legal profession has exposed firms to unrelenting scrutiny.

A. Law Firm Economics and the Recent Recession

In 2007, the nation's large law firms completed a five-year economic surge so prosperous that it was touted by the legal media as the "Law Firm Golden Age."[50] Although that prosperity was mostly reflected in increased profits per partner and revenue per lawyer, it was also marked by substantial escalations in associate compensation.[51] Starting associate salaries reached $160,000 at large law firms in major metropolitan areas and proportionate heights in many secondary cities.[52] Starting salary increases rippled upward through the associate ranks.[53] Although there was

49. Much of the following discussion of the law firm economic environment has to do with the effects of the recent recession on large law firms. It is reasonable to think, however, that the recession simply came at a time when large law firm economics were approaching a breaking point. If you assume as true that large law firms are obsessed with annually increasing profits per partner, that law firms effectively sell time, and that many lawyers in large firms were billing as many hours as could reasonably be expected, then the only way for firms to continue to increase their profitability was to increase their hourly rates and leverage. Indeed, the steady increase in law firm profitability in the years leading up to the recession was principally a product of annual hourly rate increases. *See* Aric Press & John O'Connor, *Lessons of the Am Law 100*, AM. LAW., May 2008, at 131 (noting that the "bountiful times" experienced by large law firms from 2003 through the end of 2007 were "fueled by surging demand for high-end legal services and unrelenting annual rate hikes"). In summary, the recession merely exposed large law firms' vulnerability on the rate and leverage fronts, and the forces of the recession intensified firms' adjustments.

50. *Id.*

51. *See* David Bario, *Fog Advisory*, AM. LAW., Dec. 2007, at 113-14 (asserting that associate salaries "skyrocket[ed]" during this period).

52. *See* Dan Slater, *At Law Firms, Reconsidering the Model for Associates' Pay*, N.Y. TIMES DEALBOOK BLOG (Mar. 31, 2010, 1:17 AM), http://www.nytimes.com/2010/04/01/business/01LEGAL.html? (noting that from 1997 to 2007, median starting associate salaries at the nation's largest law firms doubled from $80,000 to $160,000). At the nation's largest law firms, the run-up in starting associate salaries was at least in part a product of firms' hiring practices. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1870 (2008). Adhering to the so-called "Cravath system," these firms focused on hiring the best students from what they perceived to be the best law schools. *See id.* As the need for new associates increased, these firms hired lower-ranked associates from the same pool of elite law schools rather than broadening the number of law schools from which they hired, but even going lower in the elite schools' classes was insufficient and demand for new lawyers at these firms soon outstripped supply. *Id.* at 1903. The result, of course, was a competition for talent played or won with salary increases. *Id.*

53. *See* Galanter & Henderson, *supra* note 52, at 1903-04.

some salary compression among the more senior associate classes, associate compensation nonetheless grew across the board.[54] In addition, increased associate salaries were not in any way counter-balanced; law firms' associate bonus pools largely remained static or even increased.[55] None of this seemingly mattered so long as quality work was plentiful and corporate clients were accommodating. Law firms' annual increases in the hourly rates charged to clients amply fueled law firm profitability and, in turn, lawyer compensation.

Unfortunately, the recent recession affected large law firms just as it did other business segments.[56] Banks and other financial services firms that provided law firms with substantial business closed, merged out of existence, or substantially reduced their legal expenditures. Corporate deal-making ground to a near-halt, and many companies curtailed litigation.[57] Clients that had never before insisted on alternative fee structures or discounted hourly rates began requesting both.[58] Other clients froze outside counsels' hourly rates, began taking longer to pay legal bills, or stopped paying their legal bills in whole or part.[59]

In 2008, the nation's largest and most profitable law firms saw both profits per partner and revenue per lawyer dip for the first time since 1991.[60] Large law firms in New York, and national and international law firms, felt the downturn more acutely than small and medium-sized firms.[61] In any event, large law firms across the country began terminating

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54. *See id.* at 1903-05.

55. *See, e.g.*, Julie Triedman, *No Place for Excess*, AM. LAW., May 2008, at 141 (noting that at a large law firm, not only did associates receive a seven percent salary increase in 2007, but they also received "extra-large bonuses"); *see generally* Anthony Lin, *Firms Rethink the Value of Associate Bonuses*, LAW.COM (Nov. 18, 2008), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202426098505 (discussing history of associate bonuses in large law firms);.

56. Tamara Loomis, *Has the Recession Forever Changed Large Law Firms?*, LAW.COM (Oct. 6, 2009), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202434302753 (stating that in contrast to previous recessions in which law firms fared better than did other business sectors, this recession "hit law firms hard").

57. *See id.* (noting that corporate counsel became less willing to pursue litigation other than bet-the-company cases); Press & O'Connor, *supra* note 49, at 131 (writing in May 2008 that "[t]he sharp decrease in deal activity is well-known" and observing that litigation, typically a counter-cyclical practice area, was not performing as expected).

58. *See, e.g.*, Susan Beck, *Are Blue-Chip New York Firms Losing Their Balance*, AM. LAW., May 2009, at 134, 134 (quoting a law firm partner as saying that "big financial institutions are . . . all sending out letters demanding, not asking, for significant rate concessions"); Francesca Heintz, *How Full?*, AM. LAW., Dec. 2008, at 93, 95 (stating that 75% of law firm leaders who responded to a survey reported that their clients were requesting discounts).

59. *See, e.g.*, Barbara Anderson, *Recession Drives More California Lawyers to Cheat, Steal*, FRESNO BEE (Jan. 25, 2010), http://www.mcclatchydc.com/2010/01/24/v-print/82930/recession-drives-more-california.html (referencing a California lawyer as saying that in this recession, unlike past economic downturns, clients are no longer putting a priority on paying their legal bills). There are no publicly available data or statistics demonstrating either the seriousness or breadth of these practices, but anecdotal reports of corporate clients doing these things are widespread. *See id.*

60. Aric Press & John O'Connor, *Lessons of the Am Law 100*, AM. LAW., May 2009, at 107, 107.

61. *Id.*

associates and staff in droves. The terminations that began in 2008 continued throughout 2009, and lawyers and staff were still being discharged for economic reasons in 2010.[62] As of April 2010, law firms

62. *See* Julie Kay, *Ruden Lays Off 16 Employees*, DAILY BUS. REV. (Dec. 2, 2010), http://www.Dailybusinessreview.com/PubArticleFriendlyDBR.jsp?id=1202475643560 (reporting staff terminations at a respected Florida law firm); Leigh Jones, *Vanishing Act: Year II*, NAT'L L.J., Nov. 8, 2010, at S4 (reporting that the nation's largest law firms have terminated at least 1400 lawyers in 2010); Brian Baxter, *New Round of Layoffs Hits Husch Blackwell*, LAW.COM (Oct. 8, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202472927623 (reporting the termination of "nearly 20 underperforming lawyers" at a large Missouri law firm); Eric Young, *Townsend Has Second Round of Layoffs*, SAN FRANCISCO BUS. TIMES (Aug. 18, 2010), http://www.bizjournals.com/sanfrancisco/stories/2010/08/16/daily42.html?t=printable (reporting lawyer and staff terminations at an intellectual property law boutique following a failed merger with a national general practice firm); Martha Neil, *Brinks Hofer Cuts 7 Lawyers & 19 Staff, May Reduce Associate Pay Next Year*, ABA J. LAW NEWS NOW (Aug. 11, 2010), http://www.abajournal.com/news/article/brinks_hofer_cuts_7_lawyers_19_staff_may_reduce_associate_pay_next_year/ (reporting associate and staff cuts at Chicago intellectual property law boutique); Tom Huddleston Jr., *Legal Sector Lost 3,900 Jobs in June*, LAW.COM (July 6, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202463264613 (stating that the legal sector saw a 3,900 drop in jobs in June 2010); Ross Todd, *Legal Sector Loses 1,100 Jobs in April*, LAW.COM (May 10, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202457881301 (reporting law firm job losses in April 2010); Nate Raymond, *Mayer Brown Lays Off 75, Including 28 Attorneys*, LAW.COM (Apr. 9, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202447789587 (reporting associate and staff terminations at Chicago-based international law firm that had previously terminated many lawyers and staff members); Martha Neil, *3 Ruden McClosky Partners in Miami to Form Own Firm After 20 Staff Layoffs*, ABA J. LAW NEWS NOW (Mar. 28, 2010), http://www.abajournal.com/news/article/3_partners_to_depart_ruden_mcclosky_following_20_staff_layoffs/ (reporting staff terminations at a large Florida law firm); Brian Baxter, *Howrey Axes 29 Associates, 65 Staffers*, AM. LAW Daily (Feb. 3, 2010), http://amlawdaily.typepad.com/amlawdaily/2010/02/howreycuts.html (reporting associate and staff terminations at a struggling large law firm); Dimitra Kessenides, *Seyfarth Cuts 20 Lawyers, 20 Staff Members Nationwide*, AM LAW DAILY (Jan. 14, 2010), http://amlawdaily.typepad.com/amlawdaily/2010/01/seyfarth.html (reporting yet more lawyer and staff terminations at a struggling Chicago-based law firm); Leigh Jones, *So Long, Farewell*, NAT'L L.J., Nov. 9, 2009, at S4 (discussing reduced lawyer headcount at large law firms); *Drop Zone*, NAT'L L.J., Nov. 9, 2009, at S6, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202435221601 (discussing lawyer terminations at specific law firms around the country); Nate Raymond, *Less Than Zero*, AM. LAW., Nov. 2009, at 57 (noting associate layoffs at large law firm touted for its good financial management); Gina Passarella, *Drinker Biddle Makes Second Round of Associate Layoffs, Moves to Merit System*, LAW.COM (Nov. 2, 2009), http://www.law.com/jsp/article.jsp?id=1202435098324 [hereinafter Passarella, *Drinker Makes Second Round of Associate Layoffs*] (reporting on associate layoffs at venerable Philadelphia-based law firm); Richard Lloyd, *The Great Game*, AM. LAW., Oct. 2009, at 134 (reporting significant layoffs at international law firms); Jeff Jeffrey, *Arent Cuts Associates*, LEGAL TIMES, Sept. 28, 2009, at 21 (reporting associate layoffs at large Washington, D.C. firm); Lynne Marek, *Sonnenschein Cuts 30, Including Partners*, NAT'L L.J., Sept. 14, 2009, at 8 (reporting that national law firm terminated thirty lawyers, including ten non-equity partners); Ross Todd, *Fading Away*, AM. LAW., Aug. 2009, at 64 (reporting that a large law firm headquartered in Philadelphia terminated fifty-five lawyers and 161 staff members); Gina Passarella, *After Brief Respite, More Layoffs at Dechert*, LEGAL INTELLIGENCER (July 24, 2009), http://www.law.com/jsp/article.jsp?id=1202432485931 (reporting that prominent Philadelphia firm laid off at least twenty-five associates, plus more staff and paralegals); Heather Cole, *Not Quite Stealth Layoffs at Husch*, MO. LAW. WKLY., July 17, 2009, at 2 (reporting additional layoffs of partners, associates, and staff at large Missouri law firm); Ameet Sachdev, *Congratulations, Class of 2008: More Law Firm Layoffs*, CHI. TRIB., June 5, 2009, at 21 (discussing recent large law firm associate and staff layoffs); Francesca Heintz, *Hunton & Williams Cuts 23 Attorneys, 64 Staff Members*, AM LAW DAILY (May 14, 2009), http://www.law.com/jsp/article.jsp?id=1202430698663; Douglas S. Malan, *Day Pitney Lays Off 20 Attorneys*, LAW.COM (May 14, 2009), http://www.law.com/jsp/article.jsp?id=1202430685315 (reporting that East Coast firm

laid off an additional twenty attorneys that month); *Schnader, Harrison Trims Some Partners, Staff*, NAT'L L.J., Apr. 27, 2009, at 3 (reporting on layoffs at a prominent Philadelphia law firm); *More Law Firm Layoffs, Along With Cuts in Salary*, NAT'L L.J., Apr. 20, 2009, at 3 (noting associate and staff layoffs at Seattle-based Perkins Coie); *Firms Continue to Move Ahead With Layoffs*, NAT'L L.J., Apr. 13, 2009, at 4 (reporting on a number of law firms cutting lawyers and staff); Liz McKenzie, *Townsend Lays Off 61; Vedder Price Cuts 9*, LAW360 (Apr. 9, 2009), http://www. law360.com/articles/96278 (reporting lawyer and staff terminations at two law firms); Vivian Chen, *And the Winner Is . . .*, AM. LAW., April 2009, at 24 (keeping a scorecard of law firm layoffs); *Several Firms Cut Staff and Attorneys*, NAT'L L.J., Mar. 30, 2009, at 3 (describing staff and lawyer layoffs at several law firms); *Katten Muchin, Jenner Make Personnel Cuts*, NAT'L L.J., Mar. 23, 2009, at 3 (noting that two Chicago law firms laid off twenty-three lawyers and eighty staff members between them); Ameet Sachdev, *Law Firms Cutting Staff, Pay; Katten Muchin, Jenner & Block React to Drop in Business*, CHI. TRIB., Mar. 20, 2009, at 32 (reporting on associate and non-equity partner terminations at large Chicago-based law firm); Karen Sloan, *Another Week, Another Round of Firm Layoffs*, NAT'L L.J., Mar. 16, 2009 (reporting on layoffs at several large law firms and asserting that the legal sector lost 5,500 jobs in the first two months of 2009); Heather Cole, *Husch Blackwell Lets Go 17 Attorneys, 45 Staff*, MO. LAW. WKLY., Mar. 16, 2009, at 3 (involving a law firm managing partner who initially and implausibly denied that associate and staff layoffs were economically-driven before changing his tune and admitting that they were); Ameet Sachdev, *Sidley Austin Lays Off Dozens*, CHI. TRIB., Mar. 13, 2009, at 50 (reporting mass associate and staff layoffs at Sidley Austin); Leigh Jones, *At Sea*, NAT'L L.J., Mar. 9, 2009, at 1 (discussing massive law firm layoffs and effect on young lawyers who have been dismissed); Karen Sloan, *Law Firms Continue to Trim Attorneys and Staff*, NAT'L L.J., Mar. 9, 2009, at 10 (reporting on continuing law firm layoffs); Karen Sloan, *Latham Layoffs Cap Dire Month for Firms*, NAT'L L.J., Mar. 2, 2009, at 4 (discussing widespread law firm layoffs in February 2009); Richard Lloyd, *Latham to Cut 190 Associates, 250 Staff*, AM LAW DAILY (Feb. 27, 2009), http://www.amlawdaily.typepad.com/amlaw daily/2009/02/official-latham-to-cut-190-associates-250-staff-.html (reporting associate and staff terminations at leading law firm); Ameet Sachdev, *Smaller Firms Cut Back Attorneys and Salaries: Economic Decisions Help Illustrate the Hardships Faced by Midsize Companies*, CHI. TRIB., Feb. 24, 2009, at 19 (discussing lawyer terminations at Chicago law firms); Karen Sloan, *How Should Firms Carry Out Layoffs? Carefully*, NAT'L L.J., Feb. 23, 2009, at 6 (discussing key aspects of recent law firm layoffs); Lynne Marek, *Lessons Learned in Life After Layoffs*, NAT'L L.J., Feb. 16, 2009, at 1 (discussing mass associate layoffs); Karen Sloan, *What Happened on 'Black Thursday'?*, NAT'L L.J., Feb. 16, 2009, at 4 (describing massive layoffs of over 700 lawyers and staff on Feb. 12, 2009); *80 Lawyers, 100 Staffers Losing Jobs at DLA Piper*, CHI. TRIB., Feb. 13, 2009, at 31 (noting associate layoffs at global behemoth DLA Piper); Leigh Jones, *Just How Much Do Law Firm Layoffs Save? A Lot*, NAT'L L.J., Feb. 9, 2009, at 1 ("Attorney layoffs have become industry standard in recent months, with at least 50 of the nation's top law firms ushering practitioners out their doors and into a torpid job market."); *McDermott Cuts 60 Lawyers, 89 Staff*, NAT'L L.J., Feb. 9, 2009, at 3 (reporting associate layoffs at large Chicago-based firm attributable to recession); Sheri Qualters, *Hodgson Russ Cuts Five Lawyers*, NAT'L L.J., Feb. 9, 2009, at 12 (reporting layoffs at large New York firm caused by slow economy); Zusha Elinson, *Another San Francisco Firm Makes Cuts*, LEGAL TIMES, Feb. 2, 2009, at 20 (describing massive associate layoff at Morrison & Foerster and mentioning layoffs at other large law firms); Karen Sloan, *Wilson Sonsini Lays Off Associates and Staff*, NAT'L L.J., Feb. 2, 2009 (reporting associate layoffs at prominent Silicon Valley firm); Ashby Jones, *Some Top Law Firms Tap Partners for Cash*, WALL ST. J., Jan. 29, 2009, at B1 (discussing layoffs at top law firms caused by recession); Zusha Elinson, *Cooley, Akin Gump Slash Head Count*, LEGAL TIMES, Jan. 26, 2009, at 11 (reporting on associate layoffs at two large law firms); Lynne Marek, *Kirkland Looks to Trim Several Senior Associates, Income Partners*, NAT'L L.J., Jan. 9, 2009, at 3 (reporting layoffs of senior associates and non-equity partners); Susan Beck, *Past the Tipping Point*, AM. LAW., Jan. 2009, at 16 (noting associate layoffs at highly-leveraged law firms); Heather Cole, *St. Louis Law Firm,* The *Stolar Partnership, Confirms Some Layoffs of Attorneys*, MO. LAW. WKLY., Dec. 8, 2008, at 3 (confirming associate layoffs at St. Louis law firm); Amanda Bronstad, *How They Cope*, NAT'L L.J., Nov. 24, 2008, at 1 (discussing associate layoffs); Karen Sloan, *A Long Week of Layoffs, Layoffs and More Layoffs*, NAT'L L.J., Nov. 25, 2008, at 10 (reporting widespread layoffs of associates, of counsel, and law firm staff); Brian Katkin, *'Tis the (Layoff) Season*, LEGAL TIMES, Nov. 24, 2008, at 4 (noting associate layoffs at two large law firms); Jeff Jeffrey & Marisa McQuilken, *Cutting Back*, LEGAL TIMES, Nov. 17, 2008, at 4 (discussing had terminated no fewer than 14,696 lawyers and staff since January 2008, and actual numbers are actually much greater because (1) most reports do not include job losses attributable to law firm dissolutions, and (2) many additional terminations have been accomplished through ostensible performance reviews or escaped public attention.[63] Generally speaking, terminations for economic reasons that occurred in small numbers did not attract the media attention that mass terminations did.[64] In other instances, firms denied that the economy drove mass terminations of associates and staff, but have offered instead that mass departures reflect "right-sizing" or other efficiency-driven personnel adjustments.[65] News coverage of law firm job losses has also diminished, meaning that some more recent lawyer and staff terminations have likely gone unreported.

Although most media accounts and law firm press releases have referred to associate and staff "layoffs," the recent law firm job losses are nothing of the kind. The term layoff is in this context an obvious misnomer; firms will not be calling back the associates and staff they have released once the economy improves as manufacturers might recall idled assembly-line workers when product demand returns. If terminated lawyers and staff are able to find jobs in the legal sector, it will be with different firms or organizations. For some lawyers, this may mean accepting non-

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associate layoffs at large firms attributable to economic crisis); *In Brief, Orrick, White & Case Lay Off Lawyers, Staff*, NAT'L L.J., Nov. 17, 2008, at 3 (describing associate layoffs at two large international law firms); *In Brief, Small Construction Firm Cuts Third of Its Associates*, NAT'L L.J., Nov. 17, 2008, at 3 (reporting layoffs at Chicago construction law boutique); Karen Sloan, *McKee Nelson Lays Off 17 Associates, 15 Staff Members*, NAT'L L.J., Nov. 4, 2008, at 3 (describing layoffs attributable to slowdown in structured finance practice); *Chicago's Bell, Boyd Lays Off Ten Associates*, NAT'L L.J., Nov. 3, 2008, at 3 (reporting associate layoffs at several large Chicago-based law firms); Amanda Bronstad, *O'Melveny Moves Ahead With Cost-Cutting Measures*, NAT'L L.J., Oct. 27, 2008, at 3 (reporting associate layoffs by large law firm headquartered in Los Angeles); Karen Sloan, *With '01 in Mind, Law Firms Alter Layoff Strategy*, NAT'L L.J., Oct. 29, 2008, at 10 (discussing associate layoffs at several law firms); Ameet Sachdev, *Chicago Law Firms Cut Jobs As Economy Flails*, CHI. TRIB., Oct. 17, 2008, at 39 (reporting mass associate layoffs at Katten Muchin Rosenman and Sonnenschein Nath & Rosenthal); Scott Lauck, *Polsinelli 'Reluctantly' Lays Off Nine Lawyers*, MO. LAW. WKLY., Aug. 25, 2008, at 3 (reporting layoffs of associates and of counsel at large Kansas City-based law firm); Dan Slater, *Cadwalader Sheds 96 Lawyers*, WALL ST. J., July 31, 2008, at C3 (reporting on mass layoff of associates and counsel at large New York-based law firm); *Job Fears for Large Firm Associates Are Growing*, NAT'L L.J., June 30, 2008, at 3 (reporting associate layoffs and related fears); Amanda Bronstad, *Thacher Sees Exodus of Partners, Associates*, NAT'L L.J., June 16, 2008, at 10 (slumping law firm "cut at least 60 associates" while other large law firms "have laid off dozens of associates"); *Citing a Soft Economy, Sonnenschein Cuts 37*, NAT'L L.J., June 2, 2008, at 3 (reporting lawyer terminations by large law firm; thirty-one of the lawyers were associates and six were partners); Daphne Eviatar, *Thelen's Return*, AM. LAW., May 2008, at 137 (noting that a large law firm struggling economically laid off twenty-six associates).

63. *Layoff Tracker*, LAW SHUCKS BLOG (Sept. 7, 2010), http://lawshucks.com/layoff-tracker.

64. *See supra* note 62.

65. *See, e.g.*, Debra Cassens Weiss, *Jones Day Lays Off Staffers in Dallas and LA as "Last-Resort Alternative,"* ABA J. LAW NEWS NOW (June 16, 2010), http://www.abajournal.com/news/article/jones_day_lays_off_staffers_in_dallas_and_la_as_last-resort_alternative (attributing staff terminations to rightsizing in search of efficiency).

partnership-track positions as lower-paid contract lawyers and staff attorneys.

The recession affected law firms' decisions to terminate associates in ways beyond urgent reductions driven by lower revenues. As one firm leader explained:

> [F]ewer associates are leaving firms these days unless they're pushed out. So as firms add new first-year classes, they're still carrying senior associates who, in better times, would have departed for other jobs. The drop in attrition rates is why firms have had to become more aggressive about weeding out unproductive lawyers.[66]

Understandably, the terminations of the past two-plus years have been extraordinarily stressful for the lawyers and staff affected by them.[67] In addition to or because of the related economic hardships, many lawyers and staff who lost their jobs because of the recession have reportedly experienced depression and other emotional disturbances. Pointedly, a senior lawyer in the Washington, D.C. office of a respected national law firm committed suicide after the firm notified him of his employment termination.[68] Thus, while it is seemingly easy for law firm consultants and observers to discuss associate and staff terminations dispassionately, and to advocate for yet more terminations as a means of enhancing or restoring firm profitability, it should not be. No matter the alleged managerial soundness of lawyer and staff terminations for economic reasons, these actions cause great personal hardship and loss, and should be viewed as unfortunate or worse by everyone who is a part of or connected with the legal profession.

Without tying associate and staff terminations to specific law firms, and keeping in mind the associated personal misfortune, some early 2010 reports suggested that the terminations over the past two years apparently had the desired effect on large law firms' profitability. One survey in March 2010 indicated that firms in the Am Law 100 experienced a mere 0.8% decrease in profits per partner in 2009, while firms in the second hundred actually increased their profits per partner.[69] A survey of the Am Law 100 firms published in May 2010 reported that firms in that group experienced a mere 3.4% decrease in gross revenue in 2009, while profits

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66. Heintz, *supra* note 58, at 94.

67. *See, e.g.*, Allison Retka, *More Than Just a Statistic*, MO. LAW. WKLY., May 9, 2010, at 1 (reporting on the hardships suffered by several law firm staff members).

68. Richard B. Schmitt, *A Death In the Office*, ABA J., Nov. 2009, at 30-31 (discussing the death of Mark Levy, a top-flight appellate lawyer who shot himself just days after learning that the law firm where he worked was terminating his employment "in a round of cost-cutting driven by the unraveling economy").

69. *See* Zeughauser Group LLC, *Summary 2009 Financial Results of 67 Top Firms Reporting as of March 1, 2010*, ZG ALERT, Mar. 2010, *available at* http://zeughausergroup.com/assets/Uploads/ZGAlert-2009FinancialResultsThroughMarch1.pdf (on file with the author).

per equity partner actually increased by 0.3% to $1.26 million.[70] A reduction in equity partners in the firms studied and the firms' aggressive expense reductions attributed to an increase in profits per partner during a depressed year.[71] The reason for the reduction in equity partner numbers is probably attributable to a range of factors and almost certainly varies by firm. Clearly, the aggressive reduction in expenses was achieved in substantial part through associate and staff terminations.[72] This is to be expected because lawyer and staff compensation accounts for an overwhelming percentage of a firm's expenses.[73]

There are, as one might expect, disparate perceptions of the fairness and wisdom of law firms' termination of lawyers and staff in difficult economic times. As a general rule, law firm partners see things quite differently than do associates and staff. From partners' perspectives, they own their firms. Their incomes come from firm profits. Within the confines of their firms, they expect to feel the effects of a recession last and least. That is their prerogative as owners of their firms, and that is generally true for all business owners, regardless of industry or profession. No one should doubt that relative financial security is a benefit of ownership. Employees commonly feel economic downturns first, whether through benefit or compensation reductions or through job losses. Thus, staff and associates ought to expect that they will lose their jobs or experience compensation reductions before partners do likewise.

Furthermore, in terms of work environment, it is an unhealthy practice for a firm to have a number of lawyers working at substantially less than full capacity. Lawyers who are billing far fewer hours than expected can contribute to a dispiriting work environment and, if they succumb to internal pressures to inflate their hours to make themselves look better in superiors' eyes, their presence will potentially harm clients. Therefore, some associate terminations were the result of firms believing, for reasons unrelated to profitability, that having fewer lawyers fully-occupied was preferable to having a full contingent of lawyers billing, say, 1,100 or 1,200 hours annually.

Finally, many law firms today rely on lateral partner hiring to build and enhance key practices.[74] Lateral partner candidates often consider law firm profitability when considering where to relocate professionally. To

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70. Aric Press & Greg Mulligan, *Lessons of the Am Law 100*, AM. LAW., May 2010, at 93, 93.

71. *See id.*

72. *See* D.M. Levine, *Holy Nonequity Partners!*, AM. LAW., May 2010, at 113, 113 ("Last year, as law firms struggled with the brutal realities of the recession, many managing partners took the tried-and-true approach to cutting costs—layoffs.").

73. *See, e.g.*, *Expenses: Where Does the Money Go?*, NAT'L L.J., Aug. 30, 2010, at 13, *available at* http://pdfserver.amlaw.com/nlj/SLFE_graphics.pdf (indicating attorney and staff compensation combined accounts for 79% of small and mid-size firms' expenses, with 61% attributable to lawyers and 18% attributable to staff).

74. *See* Dan DiPietro, *Priced to Sell*, AM. LAW., May 2010, at 117, 118.

maintain desirable profits per partner figures, firms are sometimes forced to focus on the expense side of the profitability equation. That necessarily translates into periodic associate and staff terminations.

The essential contrary viewpoint held by many associates is that partners are earning generous six- and seven-figure incomes and are thus well-positioned to weather economic turbulence. Although partners may have to accept slightly lower compensation in difficult economic times, their claimed sacrifice pales in comparison to the hardship experienced by junior lawyers who lose their jobs even as they are supporting young families, making house payments, and attempting to retire student loan debt. Cannot partners sacrifice a little income so that associates and staff can keep their jobs?[75] After all, the large law firms that recently saw their profits per partner dip for the first time since 1991 did not exactly suffer. In 2008, law firm profits per partner at Am Law 100 firms, where many of the lawyer and staff terminations occurred, dipped only 4.3%, leaving average profits per partner at these firms at a robust $1.26 million.[76] Is that such a hardship that subordinates' jobs could not be spared? Besides, just as partners enjoy the substantial economic advantage that comes with sharing in firm profits, they are also supposed to share the risk of firm losses.

As for profits per partner as a lateral hiring factor, profits per partner statistics are but one profitability measure. Moreover, profits per partner reflect averages; not every partner in a law firm earns the figure published or stated—some earn more, others less. As a practical matter, to the extent that lateral partners' decisions to relocate are financially-motivated, what counts is the amount that the lateral partner and his or her entourage stand to earn—or at least what they will earn as compared to lawyers whom they consider peers—rather than the incomes of other partners to whom comparison is inapt.

Associates' base perspective was vividly captured in a 2009 post on the online tabloid *Above the Law*. When the executive committee of a large Chicago-based law firm announced associate and staff terminations and substantial salary reductions for associates and non-equity partners, it also projected that the firm's profits for the year would decline only 5 to 7%—a nugget of hope among the bad news apparently offered with the intent to assure associates that the firm itself was not in peril.[77] And, apparently to suggest that the equity partners felt empathy for the affected associates and staff, the firm's leaders assured associates that this reduction in profits

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75. *See* Rachel Breitman, *A Year to Forget*, AM. LAW., Aug. 2009, at 61, 61 [hereinafter Breitman, *A Year to Forget*] (reporting high associate satisfaction at one large law firm that froze legal fees without freezing associate pay and that terminated no associates even though its partners experienced a 4.5% drop in their profits).

76. Press & O'Connor, *supra* note 49, at 107.

77. *Nationwide Layoff Watch: Seyfarth Shaw Cuts 50, Cuts Salaries, Cuts Back On Summer Program*, ABOVE THE LAW (May 1, 2009, 5:57 PM), http://abovethelaw.com/.

would "have an impact on [the firm's] equity partners."[78] This spurred a commenter to write:

> So associates lose their jobs or between 5% and 20% of their pay, and they are supposed to be comforted because partner profits will be down 5% to 7%. This is starting to get incredibly insulting. Partners cry because they may take home less than $1 million. Meanwhile associates lose their jobs and 10% to 20% of their pay.
> Fuck them. Fuck collegiality. It's all about [profits per partner] now. Their [sic] is no honor.[79]

Other observers were also bothered by large law firms' decisions to jettison associates and staff in lieu of partners making economic sacrifices. As an *American Lawyer* reader observed in response to an article:

> Unfortunate, but big law (like much of big business) has forgotten the meaning of "equity." When a business is profitable, the owners should profit, and no one ha[s] the right to complain about the record sums made by the inner tier of the big firms in the glory days. On the other hand, when any business falls in the tank, the role of equity is to "invest"—either by coming out-of-pocket or at least leaving money on the table to keep the ship afloat. Like their cohorts in the ranks of CEOs and traders, the power elites in the big firms have protected their wealth at the expense of those who deliver the end product to their customers—not because it is morally right or even economically sound—just because they have the power to do it.[80]

In addition to terminating associates and staff, law firms implemented other employment-related measures designed to help them weather the recession. For example, a few large law firms offered associates the opportunity to take one-year sabbaticals with the understanding that they would be protected against termination while away.[81] Associates who accepted sabbatical offers typically received some percentage of their salaries during their time away.[82] The chief alternative to terminations, however, was the deferral of new associates' starting dates well past the traditional September or October start in the year of their law school graduation.[83] With respect to associates in the class of 2009, for example,

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78. *Id.*

79. *Id.*

80. *Join the Conversation*, AM. LAW., Apr. 2010, at 11, 11 (quoting an anonymous poster responding to an article written by Patricia Gillette).

81. Eadaoin Waller, *Letting Lawyers Go: The Legal and Practical Aspects of Law Firm Layoffs*, PRAC. LAW., Oct. 2009, at 43, 45.

82. *See id.* (reporting that associates at a well-known international law firm received one-third of their regular salaries while on sabbatical).

83. Drew Combs, *The Change Agenda: Testing the Waters*, AM. LAW., Dec. 2009, at 61, 63 (discussing the prevalence of deferrals in 2009 and firms' plans to defer associates in 2010).

some large firms deferred their starting dates until sometime in 2010 and, in a few cases, until as late as October 2011.[84] At least half of the 2009 graduating classes at elite law schools saw their starting dates deferred until sometime after December 1, 2009.[85] Although the better firms offered deferred associates livable stipends until they could begin their employment, encouraged them to devote their deferral periods to serving public interest groups in an effort to develop their skills, and deferrals were reluctantly regarded as preferable to mass associate terminations or the widespread revocation of job offers, it was inevitable that trouble would surface once the deferral dates arrived and firms realized that they did not need all of their deferred associates.[86] Indeed, some firms have now rescinded employment offers to associates that they originally deferred.[87] At least one deferred associate whose offer was rescinded sued her former law firm for deciding to rescind her offer for allegedly discriminatory reasons.[88] A few large firms continue to defer new associates' starting dates, with some 2010 graduates now slated to begin their law firm careers sometime after January 2011, while others will have to wait until 2012.[89]

Observers have predicted that the recent law firm terminations will lead to a surge in employment-related claims against firms.[90] Even if that is not the case, or if any increase is not so significant to qualify as a surge, it

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84. *See* Leigh Jones, *With Deferrals, A Class Collision*, NAT'L L.J., May 11, 2009, at 1, 1 (reporting a January 2011 start date for some deferred associates); Nate Raymond, *Shearman Delays Start Date for Deferred Associates*, N.Y. L.J., July 6, 2010, at 1 (reporting that a large law firm had informed members of its 2009 associate class that their start dates would be deferred until "no later than October 2011"); Petra Pasternak, *Howard Delays Some Associate Starts*, RECORDER SAN FRANCISCO, July 1, 2008, at 1, *available at* 2007 WLNR 27145307 (stating that a San Francisco law firm deferred associates' start dates from 2009 to 2010).

85. *See* Jack Crittenden, *The End of Elitism at BigLaw?*, NAT'L JURIST, Mar. 2010, at 7, 7; Ameet Sachdev, *Careers On Hold, Lawyers Do Good*, CHI. TRIB., Apr. 4, 2010, § 2, at 1 (reporting the experiences of young lawyers whose start dates were deferred and who worked for public interest groups in the interim);.

86. Jones, *supra* note 84, at 8 (reporting the opinion of a consultant).

87. *See, e.g.*, Nate Raymond, *Baker & McKenzie Rescinds Offers to 11 Deferred N.Y. Associates*, LAW.COM (June 24, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202462956120 (reporting that large international law firm rescinded job offers to 2009 law school graduates whose 2009 start dates had previously been deferred to late 2010 or early 2011); Nate Raymond, *Chadbourne Rescinds Job Offers to 11 Deferred Associates*, LAW.COM (Mar. 18, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202446404748 (rescinding job offers to 2009 law school graduates whose start dates had been indefinitely deferred past January 2010).

88. Kate Moser, *Howard Rice Sued for Deferring, Then Dumping, New Hire*, S.F. RECORDER, Aug. 19, 2010, at 18, *available at* 2010 WLNR 16857871 (reporting suit by young lawyer against a large San Francisco law firm).

89. *See* Abigail Rubenstein, *Wilkie Farr Pushes Associate Start Date to 2011*, LAW360 (Apr. 9, 2010), http://law360.com/articles/161063 (reporting associate deferrals at New York's Wilkie Farr & Gallagher); Julie Zeveloff, *Start Dates Stalled for Some DLA Piper 1st-Years*, LAW360 (Aug. 18, 2010), http://legalindustry.law360/articles/188082 (reporting associate deferrals at international law firm DLA Piper); *Bryan Cave Delays Some Start Dates*, MO. LAW. WKLY., June 7, 2010, at 4 (reporting that Bryan Cave L.L.P. deferred half of its St. Louis associates' starting dates from 2010 to January 2012).

90. *See, e.g.*, Rachel Breitman, *Termination Litigation*, AM. LAW., Apr. 2009, at 19.

remains true that the recent lawyer and staff terminations have probably increased the likelihood of employment litigation against firms. In the past, lawyers and staff members who thought they were victims of discrimination or harassment often did not sue their firms for fear that a lawsuit would jeopardize their ability to obtain positions at other firms in the community.[91] It takes no special insight to recognize that the present lack of alternative employment opportunities has likely reduced that inhibition.[92] Any saving sense of loyalty to their current or former firms that associates or staff might once have felt likely no longer exists due to firms' termination-driven approach to preserving or restoring profitability. Aggrieved lawyers and staff may now feel as though they have nothing to lose by suing their former firms because firms' widespread downsizing attributable to the recession has eliminated many alternative employment opportunities. That perspective is unlikely to change, as law firm consultants and lenders relentlessly urge large law firms to terminate yet more associates and staff.[93]

Furthermore, potential employment law consequences of associates' and staff members' involuntary departures are not limited to claims by the departed. It is surely true that associate and staff terminations negatively affect those who remain and increase the likelihood that they might someday be potential plaintiffs. Quite simply, associates and staff who see colleagues discharged for economic reasons often come to fear for their own jobs. If they perceive that former colleagues' terminations were unfair, they may well believe that they will be treated unfairly in the future. Regardless, their loyalty to their firms is likely diminished. And, as with departed lawyers and staff, current employees' diminished loyalty and gloomy prospects for employment elsewhere may overcome any potential reluctance to vindicate their perceived employment rights through litigation.

B. Performance Reviews as Termination Tools

Some law firms that have needed to shed associates for economic reasons have eschewed straight terminations and instead used their annual performance review processes to terminate associates.[94] Associates who previously received satisfactory performance reviews have been graded as

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91. *See* Joel Berg, *Legal Risks in-Depth Series (Part 3): The New Fight Club*, RISK & INS. ONLINE, Aug. 1, 2010, http://www.riskandinsurance.com/printstory.jsp?storyId=487730127 (quoting a consultant discussing this issue as saying that "the idea that you can't work in this town again if you bring the lawsuit, which [once] may have been true, is absolutely not true.").

92. *Id.*

93. *See, e.g.*, Dan DiPietro, *Recession and Repair*, AM. LAW., May 2009, at 139, 141 ("To [managing partners] and others at top New York firms I say: 'Think layoffs.'").

94. Gina Passarella, *Performance Reviews Get More Stringent During Recession*, LEGAL INTELLIGENCER (Apr. 20, 2009), http://www.law.com/jsp/law/careercenter/CareerCenterArticleFriendly.jsp?id=1202430002.

falling below expectations and terminated or transitioned out of their firms. As one law firm consultant observed: "There is a 'huge lack of will' to deal with underperformers when times are good, but firms are starting to now enforce those performance standards that were sometimes ignored when practices were booming."[95] For example, in 2009, one large law firm used negative performance reviews as a means of severing its relationship with approximately 125 associates.[96] To its credit, the firm gave the affected associates a generous severance and provided outplacement services, but the fact remains that a large number of associates became classified as inferior lawyers based not on their lack of skills or diligence but on the economy.

Again, there is more than one way to look at performance-based job reductions during a recession. Law firm leaders understandably argue that any time employees must be let go for economic reasons, it is sensible to first terminate relatively inferior performers. Employee performance is judged through evaluation processes. Thus, during an economic slowdown, any performance review system will naturally produce a reduction in force. Most firms will also likely concede that they do not evaluate associates as rigorously when times are good, but while that practice is not ideal from a management perspective, it is humane and materially benefits the under-achieving associates whom the firm carries so long as it is able.

Associates, on the other hand, often contend that firms have reasonable performance standards when times are flush and impose unfairly rigorous ones when they are not. Work that was adequate one day is grounds for termination the next. This duplicitous behavior hurts affected associates by branding them as incompetent when they are not. Meanwhile, the firm avoids any perception that its business has declined, which, by the way, is the fault of the partnership because partners are principally responsible for business development. Moreover, cynical associates add that firms are neither apologizing to clients on whose matters the purportedly inferior associates worked before their termination nor are they refunding to those clients any portion of the fees they paid for the necessarily inferior services they received from the departed lawyers. Should not firms do one or both of those things if departed associates truly were under-serving clients? Is not the proper approach, in a profession that supposedly values honesty and trust, for the firm to simply acknowledge that the departures are economically-driven and rely on clients to recognize that the terminations reflect an unhappy but prudent business decision?

95. *Id.* (quoting consultant Thomas Clay); *see also* David Bario & Drew Combs, *Calculus of the Damned*, AM. LAW., May 2009, at 22, 23 (making the same point).

96. Confidentiality obligations prevent me from identifying the law firm.

C. Changes in Associate Compensation

The timeless maxim that one should never waste a good crisis also applies in the law firm employment environment. In short, as leaders of large law firms saw the effect that the recession might have on their firms' profitability, they also recognized an opportunity to reduce associate compensation, which many of them understandably believed was out of control. In some cases, firms reduced associate compensation across-the-board.[97] Other firms abandoned traditional lockstep compensation in favor of merit-based compensation systems.[98] In doing so, firms often announced that salary reductions were necessary to align their interests with clients' interests, or that clients were demanding adjustments to associate compensation. Everyone knowledgeable about law practice saw through those claims. Although cost-conscious clients have long wanted to pay less for legal services, they have never cared how firms arrived at lower numbers. Clients would be content if firms left associate compensation as it was but instead greatly reduced hourly rates or offered alternative fee arrangements. They would also be content if firms left associate compensation as it was, but assigned fewer junior associates to their matters, thereby reducing inefficiencies in their representations and conjunctively lowering the cost of services. Finally, they would likely be satisfied if billing lawyers simply did what the law requires of them and either wrote down or wrote off time billed by associates that is excessive or redundant.[99] Long story short, clients simply want cheaper sausage—they do not care how it is made. All these law firms did was offer excuses for associate compensation cuts that seemed more genteel than expressing a desire to boost partner income. By insulting associates' intelligence, the law firm leaders that delivered these messages needlessly antagonized their associates and fostered mistrust.

Many of the law firms that slashed associate compensation assured associates that they could earn back any lost compensation by meeting new performance-based criteria. That did little to soothe associates' ire for the obvious reason that they recognized they were being asked to work harder and longer simply to get back to even. In some cases, the billable work needed to satisfy new performance criteria has either disappeared or dramatically shrunk and is unlikely to return to pre-recession levels—such

97. Zach Lowe, *Seyfarth Latest to Cut First-Year Associate Pay*, LAW.COM (Nov. 23, 2009), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202435728710; Waller, *supra* note 81, at 45; Karen Sloan, *For Post & Schell, Pay Follows Practice Area*, NAT'L L.J., May 25, 2009, at 8, 8.

98. Crittenden, *supra* note 85, at 10; Drew Combs, *The Revolutionaries*, AM. LAW., Aug. 2008, at 102, 129.

99. *See* Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 234 (2000) (calling on lawyers who are responsible for reviewing and sending bills to clients to exercise what courts reviewing fee applications refer to as "billing judgment").

that associates have little or no hope of earning the incentives dangled before them.

A few law firms combined dramatically lower first-year associate compensation with training programs organized along the lines of apprenticeships.[100] First-year associates in these firms were assigned significantly reduced billable hour models with their non-billable time to be occupied with practical skills training.[101] Firms implementing these programs reasoned that by reducing first-year associate compensation and billable hour requirements they could: avoid terminating associates or deferring the starting dates for new associates; achieve at least a short-term recruiting advantage over firms that terminated or deferred associates by appearing to be more concerned about associates' personal well-being, in general, and professional growth and development, in particular; and favorably impress corporate clients, who often complain about junior lawyers' inefficiencies and lack of practical skills when contrasted with the hourly rates at which their time is billed. Unfortunately, these innovative training programs could not stave off associate terminations in at least one of the large law firms that employed this approach.[102] Moreover, these programs obviously come at substantial cost to the firms that implement them. They reduce the host firm's income through participating associates' lost billable time; the billable time lost by the partners charged with mentoring the apprentice lawyers; the cost of the program's administrative infrastructure; and, at least in some instances, the lower hourly rates at which the neophyte lawyers' time is billed, thus calling into serious question the programs' long-term viability.[103] Not surprisingly, the apprenticeship model has not achieved wide acceptance.[104]

Finally, some law firms revised their associate compensation and evaluation systems in comically bad ways. Consider Chicago-based Seyfarth Shaw L.L.P., which reportedly instituted a cruel hoax of a system to be phased in during 2010 and fully implemented in 2011. Under the new Seyfarth system as described in an online report, associates' pay will be tied

100. Karen Sloan, *The Apprentice*, NAT'L L.J., June 14, 2010, at 19; Amanda Becker, *Howrey Law Firm Shifts Pay, Development of Entry-Level Attorneys*, WASH. POST (Apr. 26, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042303429.html; Jordan Furlong, The Return of the Apprentice: New Lawyer Training Models for the 21st Century, at 3-4 (Mar. 22-23, 2010) (on file with the author).

101. Furlong, *supra* note 100, at 9-13 (describing the programs).

102. Passarella, *Drinker Makes Second Round of Associate Layoffs*, *supra* note 62 (reporting that Drinker Biddle & Reath L.L.P., a leader in the associate apprenticeship approach, terminated twenty-two associates well after launching its new model).

103. *See* Becker, *supra* note 100 (discussing Howrey L.L.P.'s apprenticeship program for new lawyers and the firm's decline in profitability).

104. *See* Passarella, *Drinker Makes Second Round of Associate Layoffs*, *supra* note 62 (noting that a small number of firms implement these training programs).

to their annual performance reviews.[105] Consistent with the approach taken by many large law firms, Seyfarth categorizes associates' performance four ways: exceptional, exceeding expectations, meeting expectations, or below expectations.[106] Going forward, Seyfarth associates evaluated as being exceptional will receive a five percent raise; associates who exceed expectations will have their salaries frozen; associates who meet expectations will take a five percent pay cut; and associates who fall below expectations will suffer pay reductions of up to twenty percent.[107]

Assuming the accuracy of the related reporting, what first makes Seyfarth's associate compensation system a cruel hoax is that it intentionally punishes average associates, i.e., those who meet expectations. Every year that an average associate remains at the firm she will suffer another five percent salary reduction because, heaven forbid, she *met expectations*. Viewed charitably, Seyfarth's new system appears to be a scheme to constructively discharge average associates rather than incurring the negative publicity that might accompany their outright termination. A fair argument can be made that Seyfarth hopes to force out even associates whose performance exceeds expectations because exceeding expectations will earn them nothing but financial stagnation. That leaves only "exceptional" associates as valued junior lawyers. What percentage of associates do you suppose are exceptional? By definition it cannot be many. How is Seyfarth's new system *not* a recipe for associate discontent and resentment, and a breeding ground for employment-related claims?

D. Staff Pressures

Law firms have been placing increasing burdens on their staff since well before the latest recession. Since the late 1980s, the ratio of timekeepers to legal secretaries has grown to 3:1 at most firms and even 4:1 or 5:1 at some firms, and administrators and leaders whose firms are not at a 4:1 or 5:1 ratio drool at the prospect of achieving it. Certainly, most large law firms have also added file clerks, created word processing departments, and otherwise re-jiggered their work distribution systems to take some load off their secretaries as the ratio of timekeepers to secretaries has increased, but it remains true that a key segment of firms' workforce perceives that their workload has increased without either (1) a corresponding increase in compensation or (2) enhanced job security. Non-lawyer staff members in various roles now routinely hear from firm leaders the ridiculous mantra

105. Elie Mystal, *Seyfarth Shaw Mystery Meeting Follow Up: Another Firm Moves to Kill Lockstep*, ABOVE THE LAW (Dec. 17, 2009, 17:57 PM), http://abovethelaw.com/2009/12/Seyfarth-Shaw-mystery-meeting-follow-up-firm-firm-moves-to-kill-lockstep/.

106. *Id.*

107. *Id.*

lifted from corporate America that they must "do more with less."[108] In summary, many law firm staffers believe that they are overworked and underpaid and that their professional condition has worsened while partners' has held steady or improved.

E. Expanded Media Coverage of the Legal Profession

For lawyers who are interested in professional developments, gossip, news, and trends, there is almost a limitless supply of information at their fingertips. They can find online legal news at *Law.com* and on the *Am Law Daily* site. Blogs such as *Above the Law* and the *Wall Street Journal Law Blog* probe large law firm life on a daily basis. Most law firm libraries contain the *American Lawyer* magazine and the *National Law Journal*, and subscribers can also read them online. All these sites, blogs, and publications report law firm employment trends and employment-related claims against law firms. At the height of the recession, the *Law Shucks* site tracked lawyer and staff terminations.[109] By way of illustration, the recent cases discussed in the introduction to this article were reported online, and the pleadings were obtained through links on blogs or web sites.[110] Long story short, law firm employment fracases are now widely-known. Employment-related claims and suits against firms are reported in detail. Thus, even if employment litigation against law firms is not increasing, descriptions and reports of cases are now widely available. Unfortunately, those reports can negatively influence lawyers and staff both in the firms described in the reports and in other firms.

F. Summary and Recommendations

While the economy will eventually rebound and law firm financial performance will likely improve within the larger picture, many observers predict that the economic outlook for large law firms does not suggest a return to the pre-recession glory days.[111] But regardless of whether law firm profitability returns to pre-recession heights, reaches some acceptable plateau, or gradually improves, the recent economic adjustments made by many law firms severely strained the relationship between those firms and their partners on one hand and associates and staff on the other. One can

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108. *See* Kate Neville, *How Law Firms Can Maintain Better Relationships with Laid-Off Alumni*, NAT'L L.J. (July 28, 2010), http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202463960592. People do not "do more with less" for the simple reason that they cannot. Instead, they do less with less and either fudge results or suffer the consequences of lowered achievement.

109. *See Layoff Tracker*, LAW SHUCKS BLOG (Sept. 7, 2010), http://lawshucks.com/layoff-tracker.

110. *See supra* notes 1-31 and accompanying text.

111. *See, e.g.*, Meredith Hobbs, *Law Firm Survey Shows That Flat Is the New Up*, LAW.COM (Apr. 6, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202447527270 (discussing the economic outlook for national law firms).

reasonably assume that those injuries need to heal if law firms are to limit their exposure to future employment law claims. Although every firm is different, there are a few frighteningly simple prescriptions that generally apply. For firms that generally adhere to these principles, a gentle reminder is perhaps in order.

First, firms should communicate as candidly as possible with associates and staff about finances and related issues. As a general rule, the more operational information that firms can reasonably share with their employees the better. Such transparency conveys professional commitment, respect, and trust. It also diminishes unhelpful speculation and worry caused by uncertainty. Insofar as associates are concerned, anyway, transparency breeds loyalty and satisfaction.[112] The same is almost certainly true for non-lawyer staff.

Second, firm leaders and managers should strive to be attentive to junior lawyers' concerns about their professional development and the quality of assignments. Partners as a whole should do the same. Law firm leaders and managers need not accommodate or adopt each associate's desire, request, or suggestion, but they do need to listen to associates. Work satisfaction is immensely important to associates.[113] Logic compels the conclusion that dissatisfied associates pose greater employment law risks to firms than do associates who are professionally satisfied.

Third, when firms must discharge lawyers and staff, they should do so as humanely as possible. Doing so helps maintain positive relationships with the employees who are terminated and enhances the firm's relationship with the employees who remain. Where lawyer and staff terminations are not for cause, firms should (1) if practicable, provide reasonable severance to the departing employees; and (2) avoid offering contrived explanations or pretextual reasons for their dismissals.[114] If firms must discharge lawyers or staff for economic reasons, there is no shame in acknowledging that fact. Firms' corporate clients, which face their own economic

112. Breitman, *A Year to Forget*, *supra* note 75, at 61-62 (reporting results of mid-level associate survey).

113. *Id.* (reporting results of mid-level associate survey).

114. *See, e.g.*, Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 203 (2007) (discussing a large law firm's termination of associates for economic reasons that was falsely justified on performance grounds). Firms too often provide contrived explanations for reductions in force that are caused by reduced demand for legal services. For example, a large law firm experienced a decline in its corporate practice and thus discharged eight associates, all of whom had recently received quite favorable evaluations. *Id.* When explaining the terminations to a local business reporter, however, the firm's managing partner said that the firm discharged the associates for inferior performance. *Id.* The terminations were not a result of a decline in business, the managing partner asserted, but a manifestation of the firm's need to maintain its high professional standards. *Id.* The managing partner's misrepresentations surely hurt the associates, who had to seek new jobs because the managing partner's statements publicly branded them as incompetent. *Id.* Such misstatements are potentially unethical. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009) (banning false statements "of material fact or law to a third person"); *id.* R. 8.4(c) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation").

pressures and which often reduce their headcounts in response, understand the situation. Even when firms terminate associates and staff for performance-related reasons, they should still attempt to do so with as much compassion and dignity as the situation realistically permits.

Fourth, firms should consistently, responsibly, and fairly evaluate associates and staff—performance standards should not vary with business pressures. Partners need to understand the importance of providing accurate and thoughtful evaluations. Although it is easy to overlook performance deficiencies when business is plentiful and people are essentially throwing bodies at projects, the fact is that employees either meet expectations or they do not. In a related vein, most veteran employment lawyers can recount stories of firms that fired supposedly inadequate employees only to be sued and have to confront evaluation forms that described those same employees as exemplary.

Fifth, firms should stop publicly touting their profitability, profits per partner, and the like. Law firm profitability announcements fail to impress clients and often antagonize employees, who feel as though they are not sharing in the firm's success.

Sixth, firms should employ sensitivity when dealing with associate and staff morale issues generally. For example, when it comes to managing costs, firms should avoid eliminating relatively low-cost benefits or perks. The elimination of minor perks has a disproportionately negative effect on employment morale. Besides, does anyone really think that a law firm can achieve prosperity by scaling back coffee service, eliminating occasional practice group lunches, or removing plants from common areas to avoid the cost of caring for them?

Finally, law firms must realize that associates and staff are not commodities and should not treat them as such.[115] The fact that an endless supply of candidates for job openings seems to exist should not be interpreted as indicating otherwise. Widely-publicized generational differences between partners and associates, for example, have caused many partners to perceive associates as uncommitted to a career in law, doubtlessly affecting their treatment of them. Although such views may be accurate with respect to some young lawyers, they are misinformed with respect to many others. In any event, the commodification of associates and staff by law firm leaders and partners can only lead to employment law concerns down the line.

In the wake of the recession, numerous consultants to the legal profession have called for firms to abandon lockstep compensation for associates.[116] A number of large law firms have responded, and it appears

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115. A managing partner of the large law firm where I formerly was a partner once told me that associates are "fungible."

116. *See, e.g.*, Dan DiPietro, *Leaving Lockstep Behind*, AM. LAW., Aug. 2008, at 107.

that the most popular approach divides associates into tiers or levels based on performance evaluations and demonstrated competence rather than seniority.[117] These systems are intended to allow firms to reward associates based on their skills rather than their longevity.[118]

Regardless of the particular approach employed, there is certainly something positive about aligning compensation with individual performance, both for firms and associates. Star associates deserve higher compensation than classmates who either do not aspire to excellence or who are incapable of achieving it. Firms want to retain their best associates and recognize that enhanced compensation is one way of doing so. But merit-based compensation systems, without supporting mentoring and training programs, are unlikely to produce the positive effects that law firm leaders hope for, and if systems set unreasonable goals for associates, they are in fact likely to do more harm than good. In short, law firms that are committed to merit-based compensation systems for their associates need to carefully plan and implement those regimes.

In the end, it is impossible for most large law firms to avoid employment-related claims, just as it is for other types of professional services firms. No matter how careful a firm's hiring process or how good its personnel policies and practices, some employees will for various reasons become potential litigants. Some employment claims will naturally have no grounds and, unfortunately, others will prove valid. But regardless of the merits of particular claims, law firm leaders must realize that they reduce the likelihood that their firms will become litigation targets if they attempt to foster good relationships with their associates and staff. The latest recession has severely strained the large law firm work environment, and, while the passage of time will heal some of the ruptures in the relationship between firms and their employees, firms need to consider affirmative steps to either ensure or restore harmony.

III. RETALIATION CLAIMS

Most law firms of any size will at some point become the target of a claim of unlawful employment practices by a lawyer or staff member.[119] What happens after a claim is made is often as important as the circumstances leading up to the claim. As a rule, it is unlawful for employers to retaliate against employees for attempting to enforce their

117. *See, e.g., Jeanne Graham, Baker Botts Associates Moving from Lockstep to Merit-Based System*, LAW.COM (July 30, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202464048800) (reporting new associate compensation system at a large Houston-based law firm).

118. *Id.*

119. *See, e.g.*, Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 123 F. App'x 558, 562-63 (4th Cir. 2005) (affirming jury verdict for associate against law firm on retaliation claim).

rights to a workplace free from discrimination or harassment.[120] Many employment laws recognize a separate cause of action for employees who are allegedly retaliated against for seeking to vindicate their rights.[121] Employees generally may maintain retaliation claims even if their underlying claims of discrimination or harassment are baseless.[122] In many instances, alleged acts of retaliation cause substantially more problems for defendant-employers than the original claims of discrimination or harassment ever could have posed.

Law firms are commonly the target of retaliation claims by employees.[123] For example, associates who complain about alleged discrimination or harassment routinely assert that they were thereafter denied professional opportunities or quality work assignments, were frozen out of practice groups, or were subjected to unfair criticism or scrutiny because they complained about their unlawful treatment.[124] The frequency of retaliation claims against law firms initially seems odd because lawyers ought to recognize the potential for retaliation claims better than most employers or supervisors, and accordingly, resist any temptation to take revenge on a complaining colleague. Perhaps the competitive men and women who typically populate the senior ranks of law firms are especially susceptible to angry or spiteful reactions when they are either rightly or wrongly accused of misconduct. Depending on the relationship between the accuser and the accused, it is possible that the person accused of retaliation feels a deep sense of betrayal that animates his or her actions. Consider, for example, the relationship between an important partner and an associate who serves as the partner's "right hand" or a core member of the partner's "team." A discrimination or harassment claim by that associate might be expected to provoke unusually strong reactions by the partner.

The threat of retaliation claims poses some very difficult managerial challenges for law firms given the collaborative and often intense fashion in

120. *See, e.g.*, Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 129 S. Ct. 846, 849 (2009) (observing that Title VII of the Civil Rights Act of 1964 "forbids retaliation by employers against employees who report workplace race or gender discrimination"); CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) (holding that 42 U.S.C. § 1981 encompasses retaliation claims).

121. *See, e.g.*, 42 U.S.C.A. § 2000e-3(a) (West 2008) (prohibiting retaliation under Title VII of the Civil Rights Act of 1964); 42 U.S.C.A. § 12203(a)-(b) (West 2008) (prohibiting retaliation under the Americans With Disabilities Act of 1990); 29 U.S.C.A. § 623(d) (West 2008) (prohibiting retaliation in connection with age discrimination claims under the Age Discrimination in Employment Act of 1967); *see also* Lynn Ridgeway Zehrt, *Retaliation's Changing Landscape*, 20 GEO. MASON U. C.R. L.J. 143, 152 n.67 (2010) (listing federal statutes protecting employees against retaliation).

122. Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1118 (8th Cir. 2006) ("In general, as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment, the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claim.").

123. *See, e.g.*, *Gallina*, 123 F. App'x at 560-63 (discussing an associate's retaliation claim against a law firm; the associate successfully alleged that she was retaliated against because she complained about gender discrimination).

124. *See supra* notes 4-9, 15, and accompanying text.

which lawyers work. Consider, for example, a case in which an associate accuses a partner of harassment or discrimination, but the firm properly determines that the associate's complaint lacks merit. The associate did not make the allegations in bad faith but rather, overreacted to critical comments or actions by the partner. If you were the partner, would you trust that associate in the future? While you appreciate the associate's right to be free from unlawful workplace conduct, you might believe, in this instance, that his or her complaint reflects a disturbing lack of maturity or judgment. Would you want to work with that associate in the future? How would you interact with the associate? If the answer to either of the first two questions is no and the associate's career is somehow retarded as a result, does the associate have a claim for retaliation against you or the firm? These are often difficult, nuanced, and sensitive issues.

Long story short, law firms—like other employers—should expressly prohibit retaliation against complaining lawyers and staff in their employment policies. All lawyers and staff need to understand the prohibition against retaliation, including examples of the types of conduct that may constitute retaliation. It is necessary to educate lawyers and staff on these issues because the threat of arguably valid retaliation claims is simply too great to discount or ignore, and the consequences of such claims can be substantial. If employees allege that they are the victims of discrimination or harassment, a firm representative must meet with the people accused of the offensive behavior and tactfully and respectfully remind them that any form of retaliation is expressly prohibited and is otherwise undesirable. A firm representative should also meet with the complainants and assure them that they will not be retaliated against, but further explain that if they perceive any sort of retaliation, they should promptly report it pursuant to an established procedure. It is also advisable for an appropriate firm representative to occasionally follow up with complainants to confirm whether feelings of perceived retaliation exist. In the unfortunate event that a complainant is retaliated against, the firm must act swiftly to remedy the situation and, if necessary, take strong action against those exacting revenge.

IV. WORKPLACE BULLYING

As noted at the outset of this article, employment claims against law firms are now old-hat. Assuming that they satisfy certain criteria, such as having a certain number of employees, law firms, like other employers, are subject to federal and state anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, Section 1981 of the Civil Rights Act of 1866, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Uniformed Services Employment and Reemployment Rights Act of 1994

(USSERA), as well as being exposed to state common-law employment claims.[125] Increasingly, however, "workplace bullying" is being discussed as a law firm employment practices issue. For example, in 2007, the American Bar Association's National Conference on Professional Responsibility featured a program on "Law Firm Bullies: What Makes Them Tick and How to Control Them."[126]

Workplace bullying refers to harassment that is not necessarily based on the victim's age, disability, gender, race, or other protected characteristic.[127] Bullying may take the form of severe verbal abuse, physically threatening behavior, or a combination of the two.[128] The concept of workplace bullying took hold in the 1990s, when some European countries began investigating and regulating various categories of emotional and psychological abuse of employees.[129] The recognition of workplace bullying as an employment law concern then spread to the United States, where bullying's alleged frequency and seriousness have attracted considerable attention from human resources professionals, scholars, and legislators.[130] In the United States, at least 37% of employees report being bullied at work, with two studies suggesting that the percentage is actually higher.[131] Interestingly, workplace bullying is substantially more prevalent than sexual harassment.[132]

In most instances, workplace bullying is characterized by a power imbalance between the alleged bully and victim, as in the case of hostile behavior by a superior toward a subordinate.[133] The obvious example in the law firm context would be a partner's or shareholder's extreme or persistent verbal abuse of an associate, legal assistant, or secretary. Setting aside context for a moment, workplace bullying as a basis for legal action received a boost in 2008 when the Indiana Supreme Court decided *Raess v. Doescher*.[134]

The plaintiff in *Raess*, Joseph Doescher, was a perfusionist at an Indiana hospital.[135] The defendant, Dr. Daniel Raess, was a cardiovascular

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125. *See supra* note 121 and accompanying text.

126. *See* Press Release, A.B.A., Buried Bodies, Bad Apples and Law Firm Bullies: Lawyer Ethics Conference Deals with Tough Issues (May 22, 2007).

127. David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 481 (2000).

128. *See id.*

129. Brian L. McDermott & Christopher C. Murray, *A Primer on Workplace Bullying*, FOR THE DEF., Apr. 2008, at 44, 45.

130. *See id.* at 46-47 (reporting that thirteen states have introduced anti-bullying legislation since 2003).

131. Sarah Morris, *The Anti-Bullying Legislative Movement: Too Quick to Quash Common Law Remedies?*, BENCH & B. OF MINN., Nov. 2008, at 22, 23.

132. McDermott & Murray, *supra* note 129, at 46 (indicating that workplace bullying is reported to be four times more prevalent than "illegal harassment").

133. Yamada, *supra* note 127, at 481.

134. *See* Raess v. Doescher, 883 N.E.2d 790 (Ind. 2008).

135. *Id.* at 793.

surgeon.[136] Doescher had complained about Raess's treatment of other perfusionists to the hospital administration.[137] Doescher's complaints to the administration infuriated Raess, who later confronted Doescher in a hospital surgical suite.[138] There, Raess "aggressively and rapidly advanced on [Doescher] with clenched fists, piercing eyes, beet-red face, popping veins, [while] screaming and swearing at him."[139] Doescher backed up against a wall and defensively raised his hands for fear that Raess intended to hit him.[140] Raess suddenly stopped his advance, spun on his heels, and stormed out of the room, pausing momentarily to tell Doescher that he was "finished" and "history."[141]

Doescher sued Raess for assault, intentional infliction of emotional distress, and tortious interference with employment.[142] A jury returned a $325,000 verdict for Doescher on his assault claim.[143] The Indiana Supreme Court affirmed the trial court judgment for Doescher.[144] En route to doing so, the *Raess* court concluded that there was "substantial evidence or reasonable inferences" that Raess had assaulted Doescher.[145] The court further concluded that there was ample evidence to support the plaintiff's damage award because Doescher had been unable to return to work as a perfusionist following the confrontation "because of the resulting emotional response, lack of focus, lack of confidence, and inability to make split-second decisions."[146]

As *Raess* illustrates, workplace bullying is not a separate cause of action, but is offensive behavior for which recovery may lie if the behavior satisfies the elements of a recognized cause of action.[147] Although the plaintiff in *Raess* recovered on an assault theory, the tort of intentional infliction of emotional distress or outrage would seem to be a more likely vehicle for recovery in most cases.[148] While there are slight variations

136. *Id.*
137. *Id.* at 794.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 793.
143. *Id.*
144. *Id.* at 799.
145. *Id.* at 794.
146. *Id.* at 795.
147. *See id.* at 794.
148. *See, e.g.*, Wenigar v. Johnson, 712 N.W.2d 190, 206, 208-09 (Minn. Ct. App. 2006) (affirming award for plaintiff for intentional infliction of emotional distress where, among other forms of mistreatment, his employer repeatedly called him "stupid," "brain dead," a "retard," a "dumb f-ker," and a "no good sh-t," and told him that he came from a retarded or stupid family); GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 613-14 (Tex. 1999) (involving a supervisor who "repeatedly physically and verbally . . . terrorized them"; the supervisor "was continuously in a rage" and would "walk quickly toward or 'lunge' at the employees, stopping uncomfortably close to their faces while screaming and yelling" at them).

between jurisdictions, the interchangeable torts of intentional infliction of emotional distress and outrage typically require proof that the defendant's conduct (a) was intentional; (b) was so extreme or outrageous as to be intolerable in a civilized society; and (c) caused the plaintiff severe emotional distress.[149] Whether a person's conduct is sufficiently extreme or outrageous as to be considered tortious is judged according to an objective standard.[150] The clear challenge for plaintiffs is proving that alleged workplace bullying is so extreme and outrageous that it satisfies the high standard required for recovery. Liability for intentional infliction of emotional distress will not flow from "a series of indignities" in the course of employment, nor does the cause of action exist to remedy "the ignoble and vast realm of unpleasant and often stressful" workplace misconduct.[151]

A Texas case, *GTE Southwest, Inc. v. Bruce*, illuminates potential liability for intentional infliction of emotional distress arising out of workplace bullying.[152] In *Bruce*, GTE employees Rhonda Bruce, Linda Davis, and Joyce Poelstra sued the company for intentional infliction of emotional distress based on constant abusive and humiliating behavior by their supervisor, Morris Shields.[153] The employees offered ample evidence of Shields's verbal abuse, and, most importantly, testified that he "repeatedly physically and verbally threatened and terrorized them."[154] More particularly:

> There was evidence that Shields was continuously in a rage, and that Shields would frequently assault each of the employees by physically charging at them. When doing so, Shields would bend his head down, put his arms straight down by his sides, ball his hands into fists, and walk quickly toward or "lunge" at the employees, stopping uncomfortably close to their faces while screaming and yelling. The employees were exceedingly frightened by this behavior, afraid that Shields might hit them.[155]

Numerous witnesses testified that Shields frequently screamed and yelled, shouted profanities, and pounded his fists on his desk when asking employees to perform tasks.[156]

Shields repeatedly threatened to fire Bruce and told Bruce and Davis that he would have them "sent to the unemployment line" and replaced by

149. Nolan v. Memphis City Schs., 589 F.3d 257, 270 (6th Cir. 2009) (applying Tennessee law); Corey v. Pierce Cnty., 225 P.3d 367, 374 (Wash. Ct. App. 2010).

150. Bailey v. Bayer CropScience L.P., 563 F.3d 302, 311 (8th Cir. 2009) (referring to "a reasonable person" standard).

151. Denton v. Chittenden Bank, 655 A.2d 703, 706 (Vt. 1994).

152. *Bruce*, 998 S.W.2d at 609.

153. *Id.* at 608-10.

154. *Id.* at 613.

155. *Id.* at 613-14.

156. *Id.* at 614.

young temporary workers.[157] He made Bruce and Davis purchase vacuum cleaners with company funds and required them to vacuum their offices daily, even though GTE contracted with a janitorial service for cleaning services.[158] When Poelstra "forgot her paperwork for a driving test, Shields [commanded] her to wear a post-it note on her shirt that said, 'Don't forget your paperwork.'"[159] Shields seemed to especially enjoy tormenting Bruce, however.[160] For example:

> Shields called her into his office every day and would have her stand in front of him, sometimes for as long as thirty minutes, while [he] simply stared at her. Bruce was not allowed to leave Shields' office until she was dismissed, even though Shields would periodically talk on the phone or read papers. This occurred several times a day. Bruce testified that it made her nauseated and intimidated her.[161]

The plaintiffs prevailed at trial on their intentional infliction of emotional distress claims, with a jury awarding Bruce and Davis over $100,000 and awarding Poelstra over $75,000.[162] A lower appellate court affirmed the judgments and GTE appealed to the Supreme Court of Texas.[163] In the supreme court, GTE argued that Shields' conduct could not be characterized as extreme and outrageous.[164] According to GTE, Shields's conduct was not actionable because, when distilled to their essence, the plaintiffs' allegations of abuse amounted to complaints that Shields was "a poor supervisor with an objectionable management style."[165] The court disagreed.[166]

The *Bruce* court acknowledged that while "[o]ccasional malicious and abusive incidents [cannot] be condoned, [they] must often be tolerated."[167] But here, Shields's abusive and threatening conduct was so severe and regular that it qualified as extreme and outrageous.[168] Employees should not be expected to endure regular assaults, intimidation, and threats, nor is such conduct acceptable in civilized society.[169] Although employers have considerable leeway in how they supervise and discipline employees,

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157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 609.
163. *Id.* at 608.
164. *Id.* at 611.
165. *Id.* at 616.
166. *Id.* at 617.
167. *Id.*
168. *Id.*
169. *Id.*

"terrorizing them is simply not acceptable."[170] The supreme court ultimately affirmed the court of appeals' judgment for the employees.[171]

Turning now to bullying in law firms, it "is not uncommon," according to one law professor, "for one or more of a firm's senior lawyers to verbally, physically or psychological[ly] abuse subordinate lawyers and support staff."[172] In terms of bullying behavior, some lawyers reportedly scream at colleagues, while others hurl insults and still others hurl objects.[173] As for the objects thrown, staplers are supposedly a favorite.[174]

It is difficult to evaluate claims of workplace bullying in law firms. There is a dearth of case law involving law firm bullying. Many anecdotal reports of bullying are likely inaccurate. In this context, as elsewhere, accounts of alleged events are embellished with every retelling. Many descriptions and reports of law firm partners bullying associates and staff seem to be little more than urban myths. Many of the commentators who are most concerned about or focused on law firm bullying are academics or experts from other disciplines who either have no law firm experience or who are long removed from the practice of law. Yet, the prevalence of bullying in the workplace generally would seem to suggest that it takes place in law firms as well, even if lawyers and law firm staff are better equipped than most employees to confront it by virtue of their legal training and experience. On the other hand, it would also seem that law firm partners or shareholders would insist that bullies be swiftly disciplined, expelled, or terminated out of the legitimate concern that such conduct could potentially expose the firm to liability, cost the firm the services of valued employees who leave as a result of victimization, or materially impair the firm's recruiting efforts if bullying incidents become generally-known. Not surprisingly, then, most concerns about bullying in law firms focus on rainmaking partners whose business generation supposedly immunizes them against discipline.[175] These are the supposed "800 pound gorillas" of law firms.

Law practice occasionally produces strong emotions on lawyers' part. Although never welcome, no one should be surprised that lawyers sometimes exhibit anger or frustration when dealing with colleagues. Direction often displaces collaboration or consultation in the course of daily practice. There is, however, a substantial difference between an occasional angry outburst, other expression of frustration, or intense direction of subordinates and the types of behavior that legitimately qualify as bullying.

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170. *Id.*

171. *Id.* at 620.

172. *Bullying In Law Firms: Hard to Define, Easy to Spot*, AM. BAR ASS'N (June 2007), http://www.abanet.org/media/youraba/200706/article03.html (crediting law professor Lisa G. Lerman).

173. *Id.*

174. *Id.*

175. *See id.* ("When bullying appears in a law firm, especially if the bully is a highly productive partner, there can be organizational hurdles to taking action.").

If law firms have bullies in their midst, law firm leaders must confront them as soon as their behavior is exposed. No law firm bully should be immune from confrontation or counseling, nor exempt from discipline or discharge, based on a book of business or other stature. No matter the intensity or urgency of law practice, behavior that might truly constitute bullying is unacceptable. Regardless of whether bullying is actionable, it is incredibly disruptive and depresses morale. Among other things, bullying lowers productivity and leads to employee attrition. Apart from employment law concerns, even average business judgment compels the conclusion that law firms cannot tolerate bullying by their members regardless of a bully's status.

V. THE TENUOUS WORLD OF PARTNERSHIP

From an employment law perspective, the contemporary legal environment has affected partners' careers as well as those of associates and staff, albeit to a lesser extent. Although the numbers are imprecise, reports indicate that a number of partners were forced out of their firms as a result of the recession, while others were de-equitized.[176] For lawyers who once thought that election to partnership was akin to earning tenure in academia in terms of the employment security it provided, recent years have yielded a starkly different perspective. Law firms are increasingly forcing out partners who are seen as unproductive or under-productive.[177] Even in the

176. *See* J. Mark Santiago, *The Future Profitability of Law Firms*, ACCOUNTING & FIN. PLAN. FOR L. FIRMS, Apr. 2010, at 3, 3 (comparing associate, partner, and staff terminations since 2008 and stating that "[w]hile the numbers are not as precise, it is clear that partners were not spared, and many lost their jobs during this period"); Shannon Henson, *Firms Target Equity Partners Amid Recession Woes*, LAW360 (Aug. 12, 2009), http://www.law360.com/print_article/111521 ("While law firm associates have been hobbled by the recession through layoffs and pay cuts, significant numbers of partners have also been hit as firms strip them of equity status and force them to join the nonequity ranks . . . .").

177. *See, e.g.*, Elizabeth Goldberg, *The Departed*, AM. LAW., May 2007, at 144, 145 (identifying several large law firms orchestrating exits of allegedly under-performing partners); Leigh Jones, *Downsizing: Who's Next?*, NAT'L L.J., Mar. 12, 2007, at 1, 1 (discussing firms downsizing equity partner ranks); Leigh Jones, *Ex-partner's Lawsuit Highlights Title VII Issues*, NAT'L L.J., Aug. 28, 2006, at 10, 10 (discussing lawsuit by former equity partner who alleges that she was de-equitized and then fired after complaining about the firm's hostile work environment); Nathan Koppel, *Partnership Is No Longer a Tenured Position*, WALL ST. J., July 6, 2007, at B1 (describing increasingly frequent partner de-equitization, expulsion, and "decompression" as firms attempt to increase profitability); Anthony Lin, *Some Partners Will Get the Ax at Chadbourne*, NAT'L L.J., Feb. 6, 2006, at 10, 10 (reporting firm's intention to expel some partners given disappointing financial results); Lynne Marek, *Jenner & Block Takes Some Partners Off Equity Level*, NAT'L L.J., June 11, 2007, at 10, 10 (reporting on law firm de-equitizing some partners and asking others to leave); Allison Retka, *Missouri's Largest Firm Husch Blackwell Sanders' Profits Dip*, MO. LAW. WKLY, Mar. 29, 2010, at 3, 3 (reporting that a large law firm "trimmed its equity partnership ranks by 21 attorneys" in 2009); Ameet Sachdev, *Jenner & Block Law Firm Cuts Several Partners*, CHI. TRIB., Mar. 6, 2008, § 3, at 1 (reporting on second round of partner de-equitizations and expulsions at firm); Ross Todd, *The Accidental Laterals*, AM. LAW., Feb. 2009, at 72, 72 (reporting partner cuts at several large law firms); *Citing a Soft Economy, Sonnenschein Cuts 37*, NAT'L L.J., June 2, 2008, at 3, 3 (reporting that a large law firm expelled six partners as a result of its slowing real estate and financial practices).

five or so especially robust years preceding the recent recession, thirty-seven of the nation's richest law firms shrank their equity partnerships.[178] Many other firms outside the top tier did the same. Firms accomplished some of these reductions by de-equitizing partners who were considered inadequate in one fashion or another, but many firms also expelled partners or negotiated their withdrawal from the firm, thus accomplishing a clean break.[179] This trend is unlikely to change in the foreseeable future as firms continue to pursue all available alternatives for increasing their profitability. Law firm consultants encourage firms to shed under-achieving partners, and some firms are openly preparing to do so.[180] Firms that are unwilling to expel or negotiate the departure of under-achieving partners are not standing still, but are instead weighing de-equitization. For example, more than one-third of the firms that responded to a 2010 survey indicated that they either would or might de-equitize partners in 2010.[181] Although the sample size was limited, there is no basis to believe that the reported results would be inaccurate when applied to a larger population. For lawyers practicing in large law firms, remaining an equity partner has arguably joined becoming an equity partner as a career aspiration.[182]

A. Partners and the Employment Law Paradigm

At least initially, it seems unusual to consider partners' potential employment law rights. Partners are typically considered to be employers, not employees, and therefore are not protected against adverse employment action under federal anti-discrimination laws.[183] This essential principle is true in the law firm context as elsewhere.[184] In fact, courts have historically

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178. Press & O'Connor, *supra* note 49, at 131.

179. *See* Douglas R. Richmond, *The Partnership Paradigm and Law Firm Non-equity Partners*, 58 U. KAN. L. REV. 507, 511 (2010) [hereinafter Richmond, *The Partnership Paradigm*]. De-equitization refers to the demotion of a partner from equity status to non-equity status. *See id.* De-equitization typically affects a partner's compensation and, at least to some extent, the partner's right to participate in firm leadership or management. *Id.*

180. *See, e.g.*, Zach Lowe, *Howrey to Cut Between 20 and 30 Partners*, LAW.COM (Mar. 12, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202446098729 (reporting on Howrey L.L.P.'s plan to cut up to thirty partners because of substantial drop in 2009 profits per partner).

181. ALTMAN WEIL, INC., 2010 LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY 2 (2010) ("Over a quarter of all law firms [that responded to the survey] reported de-equitizing partners in 2009 and 37% will or might do so this year.").

182. *See* Koppel, *supra* note 177, at B1 (offering this observation about law firm partnership generally, rather than referring specifically to equity partnership).

183. *See* Wheeler v. Hurdman, 825 F.2d 257, 276 (10th Cir. 1987) (involving an ADEA claim by a general partner in an accounting firm and stating that "in general the total bundle of partnership characteristics sufficiently differentiates between the two to remove general partners from the statutory term 'employee'"); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) ("[W]e do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business.").

184. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 991-92 (1st Cir. 1997) (concluding that equity partner in law firm was not eligible for Title VII protection); Levy v. Schnader, Harrison, Segal &

been reluctant to extend employment law precepts "to the management of a law firm by its partners" because the relationship among law partners has traditionally been thought to "differ[] markedly" from employer-employee relationships.[185] Yet, that judicial reluctance has been yielding in recent years in a variety of related contexts. Pointedly, federal courts have recognized for more than a decade that the centralized management common among large professional partnerships has so blurred the line between partners and employees that partners may sometimes enjoy the protection of anti-discrimination laws.[186] Many decisions on which law firm partners once voted and which supported the conclusion that they owned their firms rather than being employed by them are now entrusted to managing partners, small committees of partners, and non-lawyer executive directors.[187] In large law firms, the traditional partnership structure in which partners governed by consensus has essentially disappeared.[188] In short, it should be clear today that the title "partner," while meaningful, is not itself determinative in employment disputes.[189] The same is true with respect to shareholders in law firms organized as professional corporations.[190]

Over the years, reported cases in which law firm partners sought protection from their firms of alleged discrimination under federal anti-discrimination laws were sporadic and tended to be decided in favor of the firms.[191] In 2002, however, the partner versus employee debate was energized by the Seventh Circuit's decision in *E.E.O.C. v. Sidley Austin Brown & Wood.*[192] The *Sidley Austin* case arose out of a decision by the

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Lewis, 648 N.Y.S.2d 572, 573 (N.Y. App. Div. 1996) (dismissing plaintiff's state law age discrimination claim because he was a partner and therefore not an "employee"); *see also* Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 82 (8th Cir. 1996) (rejecting the plaintiff's arguments that the shareholder-directors in a law firm structured as professional corporation were "employees" for purposes of Title VII and Missouri Human Rights Act).

185. Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring).

186. *See, e.g.*, Simpson v. Ernst & Young, 100 F.3d 436, 443-44 (6th Cir. 1996) (affirming age discrimination verdict for accounting firm partner); Strother v. S. Cal. Permanente Med. Grp., 79 F.3d 859, 867-68 (9th Cir. 1996) (finding that doctor's status as partner rather than employee of large medical group required further factual inquiry).

187. Richmond, *The Partnership Paradigm*, *supra* note 179, at 528.

188. *Id.*

189. *See Simpson*, 100 F.3d at 441 (agreeing with district court that "'partner' was a title that carried no legal significance"); *Strother*, 79 F.3d at 867-68 (rejecting district court's conclusion that doctor's label as partner precluded a finding that she was an employee within the meaning of a California anti-discrimination statute); Rhoads v. Jones Fin. Cos., 957 F. Supp. 1102, 1106 (E.D. Mo. 1997) (explaining that courts must look beyond labels such as "partner" when evaluating liability for discrimination).

190. Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 82 (8th Cir. 1996) (stating that all relevant factors must be examined to determine whether a shareholder is an employee or an employer).

191. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 991-92 (1st Cir. 1997) (concluding that equity partner in law firm was not eligible for Title VII protection); Levy v. Schnader, Harrison, Segal & Lewis, 648 N.Y.S.2d 572, 573 (N.Y. App. Div. 1996) (dismissing plaintiff's state law age discrimination claim because he was a partner and therefore not an "employee").

192. E.E.O.C. v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002).

leaders of Sidley Austin (Sidley), as the firm was then known, to demote thirty-two equity partners to counsel or senior counsel status.[193] Sidley targeted certain lawyers in their 50's and older as part of a plan to create unspecified professional opportunities for younger partners and associates.[194] The EEOC began an investigation into the firm's possible violation of the ADEA.[195] As part of that investigation, the EEOC subpoenaed a range of information from the firm.[196] For an ADEA violation to exist, the EEOC had to show that the demoted partners were in fact employees before their demotions.[197] Sidley resisted the subpoena in part, so the EEOC requested that the district court enforce it in full.[198] The district court ordered the firm to comply fully with the subpoena and Sidley immediately appealed to the Seventh Circuit.[199]

Sidley contended that the EEOC had no jurisdiction to investigate the demotions because partners are employers within the meaning of the federal anti-discrimination laws if (a) their income includes a share of the firm's profits; (b) they contributed capital to the firm; (c) they are liable for firm debts; and (d) they have some administrative or managerial duties.[200] The court's focus, however, quickly concentrated on the firm's centralized management structure:

> The firm [was] controlled by a self-perpetuating executive committee. Partners who [were] not members of the committee ha[d] some powers delegated to them by it with respect to the hiring, firing, promotion and compensation of their subordinates, but so far as their own status [was] concerned they [were] at the committee's mercy. It [could] fire them, promote them, demote them (as it did to the 32), raise their pay, lower their pay, and so forth. The only firm-wide issue on which the partners ha[d] voted in the last quarter century was the merger with Brown & Wood .... Each of the 32 partners at the time of their demotion . . . had a capital account with the firm, averaging about $400,000. . . . [E]ach was liable for the firm's liabilities in proportion to his capital . . . . Their income, however, was determined by the number of percentage points of the firm's overall profits that the executive committee assigned to each of them. Each served on one or more of the firm's committees, but all these committees [were] subject to control by the executive committee.[201]

193. *Id.* at 698.

194. Michael Bologna, *EEOC Reaches $27.5 Million Settlement in Age-Bias Action Against Sidley Austin*, 23 No. 21 ABA/BNA LAW. MAN. ON PROF'L CONDUCT 533, 534 (Oct. 17, 2007).

195. *Sidley Austin*, 315 F.3d at 698.

196. *See id.*

197. *Id.*

198. *Id.* at 699.

199. *Id.*

200. *Id.*

201. *Id.*

Sidley had satisfied Illinois law insofar as forming and maintaining a partnership was concerned, and the demoted partners were indeed partners for state law purposes.[202] The EEOC contended, however, that even if the demoted lawyers were partners under state law, that fact did not determine their status under federal anti-discrimination laws.[203] The question was whether Sidley partners were employers under the ADEA so as to escape the statute's reach.[204] The court was not satisfied that Sidley, by proving that the demoted lawyers were partners, had established that they were employers.[205] As the court explained in comparing Sidley to a corporation:

> This case . . . involves a partnership of more than 500 partners in which all power resides in a small, unelected committee (it has 36 members). The partnership does not elect the members of the executive committee; the committee elects them, like the self-perpetuating board of trustees of a private university or other charitable foundation. It is true that the partners can commit the firm, for example by writing opinion letters; but employees of a corporation, when acting within the scope of their employment, regularly commit the corporation to contractual undertakings, not to mention tort liability. Partners who are not members of the executive committee share in the profits of the firm; but many corporations base their employees' compensation in part anyway, but sometimes in very large part, on the corporation's profits, without anyone supposing them employers. The participation of the 32 demoted partners in committees that have . . . merely administrative functions does not distinguish them from executive employees in corporations. Corporations have committees and the members of the committees are employees; this does not make them employers. Nor are the members of the committees on which the 32 serve elected; they are appointed by the executive committee. The 32 owned some of the firm's capital, but executive-level employees often own stock in their corporations. . . . [T]here is authority that employee shareholders of professional corporation are still employees, not employers, for purposes of federal antidiscrimination law.[206]

The court concluded that the ADEA's potential application to the demoted partners remained opaque despite Sidley's partial compliance with the subpoena, and that the EEOC was entitled to full compliance with the subpoena insofar as coverage was concerned.[207] The Seventh Circuit thus remanded the case to the district court with directions.[208] Sidley settled the

202. *Id.* at 702.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 702-03.
207. *Id.* at 707.
208. *Id.*

case for $27.5 million following remand.[209] For settlement purposes, Sidley admitted that the demoted partners were employees within the meaning of the ADEA,[210] but did not admit that it violated the ADEA in demoting them.[211]

Many law firms closely followed the *Sidley* case, and the decision attracted considerable attention when it came down.[212] In hindsight, the *Sidley* decision—although unquestionably important—probably was not as momentous as it seemed at the time. After all, the *Sidley* court did not hold that the demoted partners were employees or that they were entitled to ADEA protection.[213] The case does not stand for the proposition that law firms cannot de-equitize or expel under-performing partners.[214] As a practical matter, law firms must be able to de-equitize or expel partners for legitimate reasons if they are to function efficiently.[215] Nor does *Sidley* stand for the proposition that a law firm that vests most management authority and decisions in an executive or management committee necessarily converts its partners into employees. At the very least, Sidley's tight concentration of authority in a self-perpetuating executive committee, combined with the nearly complete absence of partnership voting on major firm issues, reflects a centralized form of governance that is more extreme than the structures employed by most large law firms.[216] As a result of the *Sidley* decision, however, prudent law firms studying possible changes in their relationships with unproductive partners began considering the employment law aspects of their actions. They continue to do so today. Although partnership law and principles remain critically important when firms consider whether to sever or alter relationships with partners, they do not exclusively determine firms' legal obligations in all cases.

After *Sidley* was decided, the Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells* was required to determine whether four physicians who were shareholder-directors in a professional corporation were employees within the meaning of the ADA.[217] Focusing

209. Bologna, *supra* note 194, at 533; Ameet Sachdev, *Age Suit Could Raise Bar*, CHI. TRIB., Oct. 6, 2007, § 2, at 1, 1.

210. Bologna, *supra* note 194, at 533.

211. Sachdev, *supra* note 209, at 2.

212. *See* Bologna, *supra* note 194, at 534 (noting that the *Sidley* case had been closely watched by law firms because of the partnership issues involved).

213. Richmond, *The Partnership Paradigm*, *supra* note 179, at 548.

214. *Id.*

215. *See id.* at 543 (explaining why law firms must be able to de-equitize partners).

216. James W. Jones, De-equitizations and Other Issues Related to Law Firm Changes, Presentation at Lawyer and Law Firm Disputes: Problems and Prevention, Sponsored by the State Bar of Texas and Texas Tech University School of Law (Sept. 17, 2010) (describing the Sidley management structure as "truly unique") (transcript on file with the State Bar of Texas); Douglas R. Richmond, *Expelling Law Firm Partners*, 57 CLEV. ST. L. REV. 93, 135 (2009) (explaining some key differences); Elizabeth Goldberg, *Gray Matters*, AM. LAW., Dec. 2007, at 119, 120 (characterizing Sidley's governance structure as "a particularly top-down approach").

217. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 442 (2003).

on the element of control, the Court identified six factors as being relevant to the determination of whether a shareholder-director is an employee: (1) whether the organization can hire or fire the individual or set the rules and regulations governing her work; (2) whether and to what extent the firm organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and to what extent the individual is able to influence the organization; (5) whether the parties intended the individual to be an employee as expressed in written agreements or contracts; and (6) whether the individual shares in the organization's liabilities, losses, and profits.[218] These factors are not exhaustive, and no one of them is decisive.[219]

The question in *Clackamas* was whether a professional corporation was an employer under the ADA; the Court did not address whether a director-shareholder could sue such an organization for unlawful discrimination.[220] It is clear, however, that courts may employ the *Clackamas* factors to determine whether law firm partners are employees for employment law purposes.[221] The outcome of any case decided by application of the *Clackamas* factors will turn on its facts.[222] Professional partnerships are not all alike.[223] Depending on the characteristics of a given law firm, partners may be able to establish that they are employees for purposes of anti-discrimination laws.[224] The same is equally true of shareholders in law firms that are structured as professional corporations.[225] In this context, there is no material difference between partners and shareholders.[226] It is in any event the *Clackamas* indicia of control that will determine whether a partner or shareholder is an employee and thus entitled

218. *Id.* at 449-50.

219. *Id.* at 450 n.10, 451.

220. *See id.* at 442.

221. *See, e.g.*, Solon v. Kaplan, 398 F.3d 629, 633 (7th Cir. 2005) (concluding that no reasonable juror could conclude that a law firm partner was an employee); Simons v. Harrison Waldrop & Uhereck, L.L.P., No. Civ. A. V-05-71, 2006 WL 1698273, at *6-8 (S.D. Tex. June 14, 2006) (finding that three equity partners who held small stakes in partnership and were thus subject to the control of senior partners were not employees under ADEA); Panepucci v. Honigman Miller Schwartz & Cohn L.L.P., 408 F. Supp. 2d 374, 376-78 (E.D. Mich. 2005), *aff'd*, 281 F. App'x 482 (6th Cir. 2008) (applying the *Clackamas* factors and concluding that plaintiff's employment status could not be determined on motion to dismiss).

222. Mike Delikat & John D. Giansello, *A "Partner" May Not Be a Partner*, NAT'L L.J., Apr. 27, 2009, at S1, S9.

223. Richmond, *The Partnership Paradigm*, *supra* note 179, at 551.

224. Delikat & Giansello, *supra* note 222, at S9 ("Whether partners or shareholders will be able to assert discrimination claims as 'employees,' or whether coverage will be unavailable because they will be deemed to be 'employers,' will turn on the facts and circumstances of each partnership structure.").

225. *Id.*

226. *See* E.E.O.C. v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) ("The role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation."), *abrogated by* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003).

to statutory protections, not simply the form of the organization in which the lawyer practices.[227]

What are law firms to do about the potential expansion of employment law protections to partners? As a rule, the more firm governance or management issues on which partners vote, the greater the number of partners involved in firm policy-making roles, and the greater partners' participation in the selection of firm leaders through nomination or election processes, the more likely it is that partners will be considered to be employers rather than employees for purposes of anti-discrimination laws. As a practical matter, however, law firms that have adopted centralized management practices or structures cannot completely reform or retool those regimes in order to turn back the clock and confidently recast all of their partners in the traditional partnership mold as it once existed. In large law firms, anyway, the pressures of modern law practice rarely allow for firm governance models in which partners make all management or administrative decisions through consensus, and few busy partners want such responsibilities. Rather, law firms should continue to strive to implement sound human resource management practices and appropriately factor employment law considerations into all personnel decisions—including those affecting partners. Prudent law firms should also attempt to negotiate unproductive or misfit partners' withdrawals on terms that are fair both to the partners and to the firm to avoid claims of unlawful treatment by those partners.

B. Mandatory Retirement Policies: The New Employment Law Battleground?

Looking ahead, law firm retirement policies for partners seem like an especially fertile source of employment litigation. Over 70% of law firm partners are baby boomers, meaning that over the next two decades senior lawyers will make up a larger percentage of law firm workforces than ever before.[228] Senior lawyers often want to continue working beyond traditionally-conceived retirement dates, and they retain the skill and vigor to do so. Firms' need for top talent makes the retention of many senior lawyers a business necessity.[229] At the same time, law firms are understandably concerned about the appropriate transition of senior partners' client relationships and leadership responsibilities to succeeding

227. *See, e.g.*, Kirleis v. Dickie, McCamey & Chilcote, P.C., No. 09-4498, 2010 WL 2780927, at *1-2 (3d Cir. July 15, 2010) (applying the *Clackamas* factors and concluding that law firm shareholder was not an employee and therefore was not protected by anti-discrimination laws).

228. Goldberg, *supra* note 216, at 120. So-called "baby boomers" are people born between the years 1948-64. *Id.*

229. *Id.* at 121.

generations of partners.[230] Particularly in light of firms' reasonable concerns about business and leadership transitions, it is no surprise that many law firms have mandatory retirement policies or related provisions in their partnership agreements.[231] For example, a recent survey indicated that 58% of law firms with more than 100 lawyers had mandatory retirement policies.[232] Mandatory retirement ages for partners range from 60 to 75 years.[233] A mandatory retirement policy in a law firm partnership agreement might provide:

> A Partner shall retire on the December 31, which is, or next follows, the Partner's 67th birthday ("Normal Retirement Date"). A partner may voluntarily retire (a) on the December 31, which is, or next follows, the Partner's 60th birthday or any date thereafter, or (b) with the consent of the Executive Committee, on any date prior to the December 31, which is, or next follows, the Partner's 60th birthday ("Early Retirement Date").[234]

Alternatively, a partnership agreement might state:

> The retirement of each partner shall occur automatically at the end of the calendar year in which such partner, or if the partner is a professional corporation, the president thereof, shall attain the Mandatory Retirement Age as herein defined. The Mandatory Retirement Age for all partners is 72. A partner who has reached the Mandatory Retirement Age may submit a request each year for approval of the Management Committee to extend such partner's retirement for one additional year.

Finally, a firm's partnership agreement might simply provide that a partner can hold no interest in the firm (whether described as "shares," "points," or otherwise) upon reaching a specified age. Such a provision leaves open the possibility of a lawyer who has aged out of partnership remaining with the firm in some other capacity, but some lawyers might consider it to be a mandatory retirement provision in fact if not in name.

Mandatory retirement policies for law firm partners have come under increasing criticism in the past few years.[235] Some bar associations have

230. *Id.* at 120 (reporting that managing partners who were interviewed about the aging of the bar identified "how to ensure a smooth succession to the next generation" of partners as a key question).

231. *Id.* (reporting that 64 percent of the Am Law 200 firms have mandatory retirement policies).

232. Nate Raymond, *Firms Cling to Retirement Policies Despite Continuing Criticism*, LAW.COM (Apr. 8, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202447731307.

233. PROFESSIONS RESEARCH, INC., RESEARCH REPORT: SURVEY OF LAW FIRM TRANSITION & RETIREMENT PRACTICES 7 (2007) (available through the American Bar Association website).

234. Confidentiality obligations prevent me from identifying the law firms from whose partnership agreements the following mandatory retirement provisions have been adapted.

235. *See* LESLIE D. CORWIN & ARTHUR J. CIAMPI, LAW FIRM PARTNERSHIP AGREEMENTS § 6.04[2], at 6-42 (2008) (footnotes omitted) ("With the ranks of baby boomers reaching retirement age, [mandatory retirement] provisions have come to the legal forefront and have and will continue to cause consternation and possibly lawsuits.").

formally opposed mandatory retirement.[236] The attendant employment law concern is that mandatory retirement policies potentially violate the ADEA.[237] This is true even though the ADEA does not prohibit mandatory retirement for employees who were either bona fide executives or held high policy-making positions for the last two years of their employment and who are immediately entitled to receive certain retirement benefits.[238] Among other issues, law firm partners often cannot satisfy the executive or policymaker criteria in light of the way most modern law firms are managed. Exemplifying the risk to firms in this area, in January 2010, the EEOC sued Kelley Drye & Warren, L.L.P., for allegedly violating the ADEA by (a) operating under a partnership agreement that required all attorneys who reached the age of 70 and who wished to continue practicing law to surrender their equity interests in the firm, relinquish their ability to participate in firm management, and accept as compensation a discretionary bonus; and (b) paying these "life partners" much less than younger lawyers with similar client collections, billings, and other measures of productivity.[239] Kelley Drye discontinued its retirement policy a few months after being sued by the EEOC.[240]

There are no easy answers for law firms, in part because it is difficult to generalize both senior lawyers' performance and law firms' legitimate practice concerns. Different firms often have very different cultures that naturally influence their approaches to partner retirement. In some firms, even those partners who are approaching retirement age favor mandatory retirement policies. All that said, law firms must recognize that mandatory retirement policies are generally undesirable for at least two obvious reasons. First, depending on the retirement age specified, these policies risk alienating senior lawyers who wish to continue working beyond that time, and those partners may move laterally (taking books of business with them) rather than surrendering their practices. Second, and apart from that significant business concern, there is a risk that a firm's mandatory retirement policy will spawn litigation under the ADEA and state analogs. Prospects for liability are by no means certain, but nor can they be ignored.[241] Although some firms may legitimately feel differently, the positive aspects of mandatory retirement policies are generally not of equal

236. Leslie D. Corwin, *Changing Aspects of Law Firm Partnerships: The Age of Senescence*, LAW FIRM P'SHIP & BENEFITS REP. (LAW JOURNAL NEWSLETTERS, PHILADELPHIA, PA), Jan. 2010, at 1, 1-2 (referring to official positions taken by the American Bar Association and the New York State Bar Association).

237. *Id.* at 8.

238. *Id.* at 7 (citing 29 U.S.C. § 631(c)(1) (2006)).

239. Complaint at 3, E.E.O.C. v. Kelley Drye & Warren, L.L.P., No. 10 CIV 0655 (S.D.N.Y. Jan. 28, 2010).

240. Nate Raymond, *Faced with Suit, Kelley Drye Drops Retirement Policy*, N.Y.L.J. (Apr. 9, 2010), http://www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?id=1202447778562.

241. *See* Goldberg, *supra* note 216, at 121.

force or weight. On balance, therefore, firms with mandatory retirement policies should consider abandoning them. As a general principle, firms are better off dealing with senior partners' business and leadership transitions and retirements on an individual basis rather than strictly adhering to a blanket rule. In this way, they can retain senior partners who are making material contributions to the firm and, at the same time, appropriately manage their relationships with other senior partners whose performance does not meet reasonable expectations.

Alternatively, law firms may wish to soften mandatory retirement policies by providing mechanisms for senior partners to postpone their retirements with firm approval. For example, a partnership agreement might specify a mandatory retirement age but allow a partner who reaches that age or who is at least bumping up against it to apply to the firm's executive or management committee to extend her retirement date.[242] In firms with both equity and non-equity partnership tiers, partners who have reached a specified age might surrender their equity stakes but continue active practice as non-equity partners, thereby allowing some valued non-equity partners to ascend to equity status.[243] These approaches also allow firms to balance their interests with those of partners who have reached some presumptive retirement age. These approaches do not, however, necessarily resolve any employment law concerns. The fact remains in both instances that the firm is treating partners in a particular way based solely on their age.

Finally, firms that wish to study the wisdom of mandatory retirement policies are wise to meaningfully include partners who are approaching retirement age in the process. These lawyers obviously have relevant perspectives and thoughts to offer the firm's decision-makers, and their participation in the process may in some cases blunt allegations of discrimination should a firm decide to retain or impose a mandatory retirement policy.

VI. CONCLUSION

It is tempting to consider law firms a low risk for employment claims. After all, alleged discriminators or harassers usually are lawyers and therefore should be deterred from misconduct by their educations, legal knowledge, and experience. Unfortunately, the deterrent effect that one might expect to result from a background in the law is all too often missing. There are many recent examples of lawyers and firms being sued by associates, staff attorneys, and non-lawyer staff for various forms of discrimination, harassment, and retaliation. Even partners are potential

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242. *See id.* at 121-22.
243. *See id.* at 119-20, 122.

plaintiffs these days. Accordingly, firms must be ever-sensitive to employment law issues. This sensitivity arguably needs to be ratcheted up following the recent recession. The recession has severely tested the relationships between many law firms and their employees. Firms that do not pay serious attention to their work environments risk time-consuming and costly litigation, and, short of that, reduced associate and staff productivity, lowered associate and staff morale, and the loss of valuable employees through attrition. Responsibly addressing the factors that create employment law risk is simply good business. More fundamentally, treating colleagues with respect is a core element of professionalism. Lawyers should not need federal or state employment laws to remind them of this obligation.