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Proceedings

A monthly newsletter from McGraw-Hill

July/August 2009 Volume 1, Issue 1

Contents

Dear Professor,

Welcome to McGraw-Hill's inaugural issue of *Proceedings*, a newsletter designed specifically with you, the Business Law educator, in mind. With fifteen years of teaching experience, I know that one of the greatest challenges in delivering Business Law content to students is to keep the material topical by covering constant developments and changes in the law. Research addresses this challenge, but research is time-intensive, and for the average professor, time is a precious and limited commodity.

That is why McGraw Hill is excited to offer you a **new** way to keep your classes interesting and current. This newsletter contains a variety of tools to help freshen your classes: (1) abstracts of recent articles, with accompanying critical thinking questions designed to spark classroom discussion (of course, sample answers are included!); (2) links to interesting new videos, with associated discussion questions and answers; (3) case hypotheticals and ethical dilemmas, with answers; and (4) teaching tips, designed to simplify the integration of the newsletter material into your classroom lecture and discussion.

This newsletter is based upon numerous requests from a host of professors like you. Great care has been devoted to making this newsletter as useful as possible. We hope it is the answer you are looking for, but the only way we will know that we are meeting your needs is through your feedback. Please let us know what you think by forwarding your comments and suggestions for future issues of this newsletter to Christine Scheid at christine_scheid@mcgraw-hill.com or to me, Jeff Penley, at jpenley@cvcc.edu.

The first edition of this newsletter is dedicated to Christine "Chipper" Scheid, who is, in this author's opinion, the best editor in the business. Chipper, this work would not have been possible without your inspiration and leadership. To my colleagues, here's to an enjoyable and rewarding educational experience!

Warmest regards,

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Of Special Interest

This section of the newsletter covers three (3) topics:

1) Affirmative Action and Reverse Discrimination;

2) The Bernard Madoff Scandal; and

3) The Fourth Amendment Right to Privacy (as applied to K-12 students.)

Hot Topics in Business Law

Article 1: "High Court Backs Firefighters in Reverse Discrimination Suit"

http://www.cnn.com/2009/POLITICS/06/29/supreme.court.discrimination/index.html?iref=newssearch

Affirmative action has always been, and perhaps always will be, a controversial topic. Loosely described, an affirmative action policy seeks to address past and current practices of discrimination by giving certain preferences to those individuals belonging to "protected classes." Consider, for example, a public university with a highly competitive admissions process. Further, suppose that the university establishes a "point-based" admissions system, awarding a maximum total of one hundred (100) points for each prospective student, with points assigned based on a range of factors, including high school grade point average, Scholastic Aptitude Test (SAT) score, extracurricular activities, etc. If the university chose to award five (5) points to minority applicants, with Caucasian applicants receiving no points for their race, such a practice would constitute affirmative action, since it would give preference to minority students. Minority students might be pleased to have such a "leg-up" in the competitive admissions process, while white students might consider the university's practice of awarding such points an unfair advantage to minority applicants. A "wedge" political issue, affirmative action sharply divides individuals into two distinct camps: 1) those who favor affirmative action, based on the belief that it represents a decisive and effective way to address practices of discrimination endemic to a particular society; and 2) those who consider affirmative action "reverse" discrimination, with non-protected categories of individuals discriminated against because of their race. Those who consider themselves part of the latter group argue that reverse discrimination is just as reprehensible as other forms of discrimination, and that any affirmative action plan that results in reverse discrimination should be declared illegal.

The above-referenced article, "High Court Backs Firefighters in Reverse Discrimination Suit," represents a recent attempt by the United States Supreme Court to address the contentious topics of affirmative action and reverse discrimination. The case (Ricci v. DiStefano) involves a group of white firefighters who sued the city of New Haven, Connecticut, based on the city's refusal to promote them to available lieutenant and captain positions, even though the plaintiffs scored the highest of all applicants who took promotional examinations administered by the city. City

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attorneys expressed concern about the results of the promotional examinations, based on the fact that minorities had not scored high enough to achieve promotion. New Haven attorneys were specifically concerned about the possibility that the promotional examinations resulted in "disparate impact" on minority applicants, and would expose the city to potential Title VII (Civil Rights Act) liability ("Disparate impact" involves a "facially neutral" employment practice that does not appear to be discriminatory on its face, but that is instead discriminatory in its application or effect.) As a result, New Haven refused to certify the test results, and no promotions were given.

Procedurally, the United States District Court hearing the case supported New Haven's decision to nullify the test results, and in February 2008, the United States Court of Appeals (Second Circuit) ruled to uphold the lower court decision supporting New Haven's move to disregard the results of the promotional examinations. Current United States Supreme Court nominee Justice Sonya Sotomayor was part of the three-judge Court of Appeals panel that chose to uphold the lower court decision.

The United States Supreme Court chose to hear the case, and in a 5-4 decision (with the majority comprised of Justices Kennedy, Roberts, Scalia, Thomas and Alito), the Court concluded that the City's action in discarding the tests was a violation of Title VII of the Civil Rights Act of 1964. Writing for the majority, Justice Anthony Kennedy opined that the "race-based action like the city's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable" under disparate impact law.

Discussion Questions

1. Given the fact that Barack Obama, an African-American, was elected as the President of the United States of America in 2008, is affirmative action still necessary in this country? From a legal standpoint, should affirmative action still be allowed?

This is an opinion question that should prompt vigorous discussion with and among students. There is an argument to be made that affirmative action might have been of greater necessity in the years immediately following implementation of the 1964 Civil Rights Act than it is today. Those who support such an argument would contend that we, as a nation, a people, and a culture, have made great strides in eliminating race-based (and other forms) of discrimination. Barack Obama is a perfect personification of this argument. Those who are not so ready to "pull the plug" on affirmative action, however, would argue that although we have made great strides in addressing and reducing discrimination in the forty-five years since passage of the Civil Rights Act, our nation is not yet in full compliance with the Act. They would argue that more work needs to be done, and affirmative action is a tool that can be utilized to perform such work, since it directly addresses the issue of Civil Rights Act compliance by seeking to eliminate remaining practices of race-based and other forms of discrimination.

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In terms of the legal question, the best argument for allowing affirmative action to continue to exist is that it can be used as a vehicle to transport our nation to the "promised land" of full or substantially-complete Civil Rights Act compliance. The best legal argument against affirmative action remains that of "reverse" discrimination.

2. In your reasoned opinion, is reverse discrimination just as reprehensible as any other form of discrimination?

This is also an opinion question that should prompt intriguing classroom discussion. The argument of reverse discrimination is based on the assumption that affirmative action results in discrimination against non-protected classes of individuals. This is the essence of the argument in the Ricci v. DiStefano (New Haven, Connecticut white firefighters) case. Those who oppose affirmative action argue that reverse discrimination is just as reprehensible, and just as harmful, as any other form of discrimination. Those who argue for affirmative action might contend that non-protected classes of individuals (for example, white firefighters in the Ricci v. DiStefano case) already have a societal advantage over protected classes of individuals, and that even if non-protected classes of individuals might be somewhat disadvantaged by an affirmative action plan, this is a small price for our society to pay in order to give greater opportunities to those individuals in protected classes that have been victimized by endemic and longstanding practices of discrimination. The four-decade-plus-long debate regarding affirmative action and reverse discrimination rages on, and it may never be fully resolved.

3. In his famous "I Have A Dream" speech, delivered at the Lincoln Memorial in Washington, D.C. on August 28, 1963, Dr. Martin Luther King, Jr. proclaimed that he had a "dream," "deeply rooted in the American dream," that "my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." Does affirmative action help achieve Dr. King's "dream," or does affirmative action instead inhibit its fulfillment?

In 1997, a state ban on all forms of affirmative action was passed in California. The law, entitled Proposition 209, directed that "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." (Note that Proposition 209 does not ban a private employer's implementation and use of an affirmative action plan). Arguably, Proposition 209 does not represent a hostile "shot across the bow" in terms of Civil Rights Act compliance; instead, it represents California's assessment that as one of the most diverse states in the nation, it is truly ready to judge people not by the color of their skin, but by the content of their character, as Martin Luther King, Jr. dreamed. The State of California has decided that it no longer needs affirmative action in order to achieve Civil Rights Act compliance. Whether other states are prepared to follow in kind remains largely to be seen.

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Article 2: "Madoff Sentenced to 150 Years—Federal Judge Gives Maximum Sentence to Ponzi Mastermind Following His Apology and Victim's Request for Life Sentence"

http://money.cnn.com/2009/06/29/news/economy/madoff_prison_sentence/index.htm

The much-awaited sentencing of Bernard Madoff, orchestrator of the largest "Ponzi scheme" in the history of the country, occurred on June 29, 2009, when Judge Denny Chin of United States District Court in New York ordered Madoff to serve one hundred and fifty (150) years behind bars. It was the maximum sentence available. He had previously pleaded guilty to eleven (11) criminal counts, including fraud, money laundering, perjury, false filing with the United States Securities and Exchange Commission, and other crimes. Federal prosecutors estimated that Madoff's criminal actions resulted in approximately $65 billion in client losses.

A Ponzi scheme is a fraudulent investment operation that pays returns to investors from their own money and/or from money paid by subsequent investors, instead of from any actual profit earned. It is named after Charles Ponzi, who infamously used the technique after emigrating from Italy to the United States in 1903. Although Charles Ponzi did not invent the technique, his notoriety led to the scheme bearing his name.

The Ponzi scheme usually offers higher and/or more consistent investment returns compared to other investment opportunities, in order to entice investors. A Ponzi scheme requires a steady influx of money from investors in order to perpetuate the scheme. It is prone to eventual collapse, especially as time passes and as more investors become involved, as the operator of the scheme finds it increasingly difficult to "deliver" on the promised returns.

The above-referenced article, "Madoff Sentenced to 150 Years—Federal Judge Gives Maximum Sentence to Ponzi Mastermind Following His Apology and Victim's Request for Life Sentence," sheds insight on the criminal sentencing process. Before sentencing, Madoff was allowed to speak. He offered an apology, as represented in the following quotes:
"I live in a tormented state for all the pain and suffering I created. I left a legacy of shame. It is something I will live with for the rest of my life."
"Saying I'm sorry is not enough. I turn to face you (the victims). I know it will not help. I'm sorry."
"How can you excuse betraying thousands of investors? How can you excuse deceiving hundreds of employees? How can you excuse lying to and deceiving your wife who still stands by you?"
Before sentencing was handed down by Judge Chin, several of Madoff's victims were also given the opportunity to speak, as represented by the following quotes:
"We implore you (Judge Chin) to give the maximum sentence at a maximum prison for this deplorable low-life. This is a violent crime without a tangible weapon."
"I have a marriage made in heaven. You have (a) marriage made in hell, and that's where you'll return. May God spare you no mercy." (Spoken by one victim on behalf of himself and his wife)

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Prior to sentencing, Madoff's attorney, Ira Lee Sorkin, had requested a twelve-year sentence for his client, contending that Madoff only has a life expectancy of thirteen (13) years (Madoff is seventy-one years old), and that anything more would be tantamount to a life sentence. His argument "fell on deaf ears," however, as Judge Chin assessed a 150-year sentence based on the number of Madoff's victims, the amount of money he stole, and the extent of the damage he caused.

Although federal authorities have seized Madoff's property in an attempt to compensate his victims, they will be fortunate to recover mere pennies for each dollar invested.

Discussion Questions

1. In your reasoned opinion, has justice been served in this case? In answering the previous question, to what extent did emotion influence your response? For years, many have argued that the law is not "tough" enough when it comes to white collar crimes (A "white collar" crime is generally defined as a crime occurring without the use of force, fear or violence, or as a crime committed by a person of respectability and high social status in the course of his or her occupation. Examples of white collar crimes include fraud, bribery, insider trading, embezzlement, computer crimes, and forgery). Does Madoff's sentence of one hundred and fifty (150) years, amounting to a life sentence for someone seventy-one (71) years old, definitively put an end to this argument?

Most (if not all) students will likely applaud the sentence in the Bernard Madoff case. Even though Madoff's sentence equates to life imprisonment (due to his age, the length of the sentence, and the fact that parole is not available in this case,) most will say that he received his "just deserts." Emotion does tend to influence one's opinion regarding Madoff's sentence. Victims were certainly emotional when they made their statements pre-sentencing, and to say that emotion did not factor into Judge Chin's decision to impose the maximum sentence would probably be naïve. In law schools across the nation, students are taught that the law is supposed to be based on objective reason; in reality, however, subjectivity does often factor into a jury's verdict, or into a judge's sentencing decision.

In terms of "white-collar" crimes, although the criminal justice system was once perceived as lenient on white-collar criminals (after all, they did not rob, rape, or murder anyone,) there has been a definite, discernible trend, particularly since the corporate scandals of the early 2000s, to punish white-collar criminals to the fullest extent of the law. Although the Madoff sentence may not put an end to the argument as to whether the criminal justice system punishes white collar criminals severely enough, it is certainly "proof positive" of the legal trend in that direction.

(Note: Arguably, the only sentence more severe than Madoff's would have been the death penalty. Although the death penalty only currently applies to first-degree murder cases, it would be interesting to see whether any students would favor application of the death penalty to white-collar criminals like Bernard Madoff, taking into consideration the gravity of the crime, including the number of victims, and the magnitude of the financial losses. Those who would oppose such application of the death penalty might argue that it would violate the Eighth Amendment to the United States Constitution, which prohibits "cruel and unusual" punishment.)

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2. In handing down a sentence of one hundred and fifty (150) years, Judge Chin stated that the maximum sentence was important for deterrence, and also for the victims. Obviously, the sentence will specifically deter Bernard Madoff (as indicated previously, he will essentially serve a life sentence with no possibility of parole,) but will it generally deter other potential criminals from committing similar crimes?

The world may never know, since it would be virtually impossible to establish how many prospective criminals choose not to engage in such a crime because of the severity of the punishment. It might be interesting for students to know that in states that carry the possibility of the death penalty for first-degree murder, the incidence of murder in those states is not lower than the rate of murder in non-capital-punishment jurisdictions. Paradoxically, some research indicates that the rate of murder is higher in death penalty states than in non-death penalty states! Ponzi schemes have been around for a long time; in fact, Charles Dickens' 1857 novel Little Dorrit described such a scheme decades before the crime's namesake, Charles Ponzi, was even born!
History often repeats itself, and a certain segment of the population will always be inclined to commit crime, despite the risk. Accordingly, it should not surprise anyone if years from now, some heretofore unknown criminal surpasses Bernard Madoff's Ponzi scheme record "take" of $65 billion!

3. In your opinion, what did Madoff's victim mean when he said, in the presentencing phase of the case, that "This is a violent crime without a tangible weapon?"

Although this statement is subject to interpretation, it appears that this victim intended to impress upon the court (and Judge Chin, who would soon impose Madoff's sentence) the gravity of the crime committed. As stated previously, in times past, white-collar criminals received less severe penalties than criminals committing more "traditional" crimes of force, fear and/or violence, based on the fact that white-collar crimes do not result (at least not immediately) in physical harm to the victim. In recent years, our society has begun to realize that financial harm can be just as devastating as physical harm. In the Madoff case, there were well over one thousand victims, who incurred an estimated collective loss of $65 billion. From a financial standpoint, many lives were ruined. There are stories of some victims over seventy years of age forced to come out of long-planned-for retirement, simply to "make ends meet." Bernard Madoff did not carry a gun when he "robbed" his victims (instead, he used a devious mind,) but from a financial standpoint, he most assuredly left a massive amount of "blood in the streets."

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Article 3: "Court Faults Strip-Search of Student"

http://online.wsj.com/article/SB124593034315253301.html

The issue of school administrative rights versus student constitutional rights in an academic setting is a contentious issue that will most likely never be fully resolved. School officials often argue that student constitutional rights must be restrained for the sake of order and for the purpose of fulfilling the academic mission. Students, to the contrary, argue that constitutional rights (particularly those rights set forth in the Bill of Rights, such as First Amendment free speech rights and Fourth Amendment privacy rights) are instrumental in defining what it means to be an American; they further contend that constitutional rights do not end at the front door of the schoolhouse, but instead extend into the academic setting. The United States Supreme Court will always be called upon to referee this dispute, and each case involving questions of student constitutional rights carries its own unique set of facts and circumstances.

Consider, for example, the United States Supreme Court's most recent foray into the "arena" of student constitutional rights, Safford Unified School District #1 et al. v. Redding. In Safford, the Court was asked to determine whether the "strip-search" of a thirteen-year-old girl in an unsuccessful hunt for ibuprofen constituted a violation of the Fourth Amendment ban on "unreasonable searches and seizures."

As indicated in the above-referenced article, the case arose after a Safford Middle School (Arizona) student was found with several "pain relief" pills in her possession (the medication involved was relatively harmless—400 mg ibuprofen pills, equivalent to two Advil tablets.) The student indicated that Savana Redding, a fellow middle-school student, had supplied her with the pills. Assistant principal Kerry Wilson proceeded to search Ms. Redding's backpack, and after finding nothing, ordered two female school employees to search her clothing.

Stripped to her underwear, Ms. Redding was forced to shake out her bra and panties, so that any items hidden within would fall out. This resulted in the student exposing her breasts and pelvic area to some degree. The search was fruitless.

Litigation ensued, with Savana Redding claiming that her constitutional rights were violated, since the search violated the Fourth Amendment ban on "unreasonable searches and seizures." The school district defended the strip-search as part of its aggressive campaign to eradicate drug abuse.

In an 8-1 ruling, the United States Supreme Court concluded that the facts of the Safford case demonstrated an overzealous investigation based on scant evidence, in violation of the Fourth Amendment. The majority ruled that the school's effort to keep drugs off campus did not justify what Justice Ruth Bader Ginsburg called "abusive" treatment of an innocent honor student, who later claimed that the search represented "the most humiliating experience" of her young life. Writing for the majority, Justice David Souter asserted that while the search of Ms. Redding's backpack and outer clothing was reasonable under the circumstances, the strip-search was an entirely different matter altogether. In his written opinion, Justice Souter cited social-science research to support a conclusion that teenagers' "adolescent vulnerability" intensifie(d) the "patent intrusiveness" of the exposure.

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Discussion Questions

1. Given the current legal and political climate, many United States Supreme Court decisions are decided by "razor-thin" margins, with 5-4 votes (there are nine Supreme Court Justices) being the typical "order of the day." Ideologically, Justices Breyer, Ginsburg, Stevens and Souter often coalesce on the "left" side of the Supreme Court bench, while Justices Alito, Roberts, Scalia and Thomas typically congregate on the "right." Frequently, Justice Anthony Kennedy has been called upon to serve as the "swing" vote, with his vote determining the majority opinion. Notice that the Safford case was decided by an 8-1 vote (Judge Clarence Thomas filed the only dissenting opinion.) Does it surprise you that Justices Alito, Roberts and Scalia, often referred to as "law and order"-type justices, sided with the majority in this case?

This is a rather surprising decision and vote, in light of the ideological divide on the United States Supreme Court, and given the trend (in recent years) of the Court toward supporting school administrators in this constitutional debate. No individual who follows developments at the Supreme Court should be surprised that Judge Clarence Thomas sided with school administrators in the Safford case, since he is well-known for his staunch conservative views. However, it is interesting that other conservative, "law-and-order"-minded judges sided with the student in this case.

2. Despite concluding that the school search (as conducted) constituted a violation of the Fourth Amendment, Justice David Souter, writing the opinion for the majority, exempted from liability the assistant principal who ordered the search. According to Justice Souter, the assistant principal should be immune from liability, since it might not have been clear to him that his action (ordering the search) was unconstitutional. Do you support Justice Souter's logic in deeming the assistant principal immune from liability?

Ordinarily, ignorance of the law (or of the impact of the law's application) is not an excuse. Nevertheless, this does seem to be the very reason why Justice Souter exempted assistant principal Kerry Wilson from liability for ordering the search. The fallacy of Justice Souter's argument appears evident based an answer to the following question: Does one need to be fully knowledgeable of the law in order to be held liable under the law? Clearly, the answer to this question is "no." It is interesting to note that although Justices John Paul Stevens and Ruth Bader Ginsburg sided with the majority in this case, they nevertheless wrote separate opinions indicating that they would have upheld the lower federal appeals court ruling that left the assistant principal exposed to liability for violating student Savana Redding's constitutional rights. That is not to say that they would have necessarily deemed assistant principal Wilson liable; instead, they would have made that issue a matter of jury discretion.

3. Suppose that in the Safford case, the suspected drug involved was not "relatively harmless" ibuprofen, but instead, methamphetamine. In your opinion, would this have affected the outcome of the Safford case?

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This question represents an interesting "what if" scenario, although it is obviously impossible to determine whether the nature of the drug would have changed the outcome of the case, or narrowed the vote between the majority opinion and the dissenting opinion. For what it is worth, this author believes that had a more dangerous drug been the subject of the search, the Supreme Court deliberations would have been more contentious, resulting in a narrower vote total separating the majority and dissenting opinions, or perhaps changing the outcome of the case altogether. It would be interesting to engage students in the question of whether their opinions concerning the case (including the majority decision declaring the search unconstitutional) are affected by the fact that the drug involved, ibuprofen, is a relatively innocuous substance (certainly when compared to methamphetamine.)

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Video Suggestions

Video 1: "Help Pass Hate Crimes Legislation Once And For All"

http://www.youtube.com/watch?v=wWwIEn2Cc6k

Purpose of video: To discuss the propriety of the "hate crimes" legislation currently pending in the United States Congress

Discussion Questions

1. A "hate crime" occurs when a perpetrator targets a victim because of his or her perceived membership in a certain social group, defined by such characteristics as race, religion, color, national origin, sexual orientation, gender, gender identity or disability. Hate crimes under current federal law apply to acts of violence against individuals on the basis of race, religion, color, or national origin. Federal prosecutors have jurisdiction only if the victim is engaged in a specific federally-protected activity, such as voting. Legislation currently pending in the United States Congress would (if passed by both the House of Representatives and the Senate, and signed into law by President Obama) extend the hate crimes category to include sexual orientation, gender, gender identity or disability, and would give the federal government greater jurisdiction over such crimes (for example, the requirement that the victim must have been engaged in a federally-protected activity when the crime occurred would be eliminated.)

Should federal hate crimes legislation be expanded to include crimes based on a victim's sexual orientation, gender, gender identity or disability? Why or why not?

Student opinions in response to this question may vary. The strongest argument in favor of expanding federal hate crimes legislation to include crimes based on a victim's sexual orientation, gender, gender identity or disability is that such an expansion would be in the "spirit" of the Civil Rights Act of 1964 and other anti-discrimination laws that have been passed since the enactment of the Civil Rights Act. Consider as examples the Civil Rights Act itself, which prohibits discrimination on the basis of gender (as well as race, national origin, color and religion,) and the Americans With Disabilities Act of 1990, which prohibits discrimination on the basis of disability. Although sexual orientation (e.g., homosexuality) discrimination and gender identity (e.g., transsexuality) discrimination have not yet been specifically

prohibited by the United States Congress (perhaps because the issues are too politically controversial,) there is a strong argument to be made that hate crimes legislation addressing crimes based on a victim's sexual orientation, gender, gender identity and disability would logically "flow" from the nation's forty-plus year legislative history of anti-discrimination law.

2. Dr. James C. Dobson, founder of the religious organization "Focus on the Family," has warned that the true intent of the proposed federal hate crimes legislation is "to muzzle people of faith who dare to express their moral and biblical concerns about homosexuality." Dobson has told his followers that in the event the proposed legislation is enacted, if you read the Bible in a certain way (i.e., if you interpret the Bible as condemning homosexuality,) "you may be guilty of committing a 'thought crime.'" Assess Dr. Dobson's comments and concerns in light of the proposed hate crimes legislation.

With all due respect to Dr. Dobson, this appears to be a misinterpretation of federal hate crimes legislation. The proposed expansion of federal hate crimes legislation would not commission the creation of the "thought police." Individuals would still have the right to oppose homosexuality from a philosophical and/or religious standpoint, and to exercise their First Amendment right to speak out against homosexuality, whether from the pulpit or from the corner curb. The proposed legislation even includes express provisions reaffirming such rights as consistent with constitutional protections. In the longstanding tradition of the law, the proposed federal hate crimes legislation would not condemn thought, nor would it condemn speech; instead, it would prohibit and punish "acting out" on such thoughts and speech by committing a serious crime against an individual because of that person's homosexuality.

3. In your reasoned opinion, does federal hate crimes legislation represent an unwarranted intrusion on state's rights? In answering this question, consider that forty-five (45) states and the District of Columbia already have hate crimes legislation addressing various types of bias-motivated violence or intimidation (the exceptions are Arizona, Georgia, Indiana, South Carolina and Wyoming.) Each of these statutes covers bias on the basis of race, religion, and ethnicity; thirty-two (32) of them cover sexual orientation, thirty-two (32) cover disability, twenty-eight (28) cover gender, thirteen (13) cover age, eleven (11) cover transgender/gender-identity, and five (5) cover political affiliation.

(Source: **http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf**)

In large part, this is a "Supremacy Clause" question. The Supremacy Clause of the United States Constitution indicates that whenever there is a conflict between state and federal law, the federal law "reigns supreme." The proposed expansion of federal hate crimes legislation would give greater power to the federal government to prosecute hate crimes under federal law, and would leave intact existing state hate crimes legislation. This would increase the possibility that for a particular hate crime, there would be two (2) "causes of action" against the defendant: one on a federal level, and one on a state level. Dual (state and federal) causes of action are not unprecedented; as an example, consider drug crimes, which can result in the defendant's prosecution in both state and federal courts. The proposed federal hate crimes

legislation, which would add the categories of sexual orientation, gender, gender identity and disability to existing federal hate crime law, would not "trump" existing state law regarding hate crimes; instead, it would supplement state law, as does existing federal hate crimes legislation prohibiting discrimination on the basis of race, religion, color, or national origin.

Video 2: "Continental Pilot Dies In Flight - Plane Lands Safely"

http://www.youtube.com/watch?v=us3EOK7rLnc

Purpose of video: To discuss the legality of a mandatory retirement age for airline pilots

Discussion Questions

1. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination against persons forty (40) years of age or older, and yet the United States Congress has established a mandatory retirement age of sixty-five (65) for commercial airline pilots. Does such a mandatory retirement age represent age discrimination? How is such a restriction permissible, in light of the ADEA?

Any seasoned "veteran" of the law well knows that although there is always a general rule of law, there are always exceptions to that law! Such is the case with age discrimination law. The Age Discrimination in Employment Act of 1967 (ADEA) generally prohibits discrimination on the basis of age against any person forty (40) years of age or older. (Interestingly enough, the ADEA does allow age discrimination against anyone under the age of forty; it might be interesting to discuss with students why the law allows for age discrimination against the "under-40" segment of the population, especially since most students are part of that category!) One exception to the ADEA is the mandatory retirement age of pilots, currently sixty-five (65) years of age. The government has allowed this based on the assumption that such a restriction represents a "bona fide occupation qualification (BFOQ)." The BFOQ defense will be more fully addressed in Discussion Question 3 below.

2. Until 2007, the mandatory retirement age for commercial airline pilots was sixty (60.) The "in-flight" death of the Continental Airlines Flight 61 pilot has renewed debate about whether the mandatory retirement age for commercial pilots should be reinstated to sixty (60) years of age. Would you support reinstatement of the 60-year-old mandatory retirement age for commercial pilots? Why or why not?

This is an opinion question; accordingly, student responses to this question will vary. Any mandatory retirement age is, to a great extent, arbitrary; what about age fifty-seven (57) or age sixty-two (62?) Admittedly, had the law not been changed (i.e., had the mandatory retirement age still been 60, as was the law since the 1950s,) this particular pilot would not have been flying a commercial airplane. It should be noted that regardless of the "age 60

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versus age 65" debate, the Federal Aviation Administration requires commercial pilots to take (and pass) two (2) physical examinations each year; medical conditions such as heart problems, diabetes, psychosis and personality disorders all could ground a pilot. Further, according to the Aerospace Medical Association, there have been very few significant medical events in flight in the history of commercial aviation, with apparently none causing an accident. Finally, consider the experience and heroics of U.S. Airways pilot Chesley Sullenberger, fifty-eight (58) years of age, who safely landed his plane in New York's Hudson River after the jetliner was crippled by bird strikes while taking off from LaGuardia Airport. I am convinced that if polled, Sullenberger's passengers would unanimously favor his "presence in the cockpit" for many more years to come! These facts seem to justify the increased mandatory retirement age, in spite of the recent events concerning Continental Flight 61.

3. The term "bona fide occupational qualification" (BFOQ) refers to any act or requirement that is "reasonably necessary" for the normal performance of a job, or for the normal operation of a particular business. If accepted by a jury, the BFOQ argument is a complete defense to liability in an employment discrimination case. In your reasoned opinion, is a mandatory retirement age for commercial pilots a "bona fide occupational qualification?"

With all due respect for the elderly, when asking my students to address the issue, I ask them the following question: "Consider that you are about to embark on a transcontinental flight, and that upon entering the plane, the captain greets you. In your best estimate, the pilot appears to be eighty (80) years old. Would you continue to board the plane?" Although many students indicate that they would board nevertheless, an equal or greater number respond that they would immediately turn around and head for "terra firma!" Although an individual eighty-year-old pilot might be in better condition than a particular thirty-year-old counterpart, in a statistical sense, a thirty-year-old is much more likely to be in better physical condition than an eighty-year-old pilot. These statistics, as well as the heightened need for safety in the airways, justify a mandatory retirement age for pilots. In terms of what the specific age should be, the issue will most likely never be fully resolved.

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Of Special Interest

This section of the newsletter addresses the question of whether a prosecutor in a criminal case has an ethical/legal obligation to disclose evidence to the court and to the defendant that would assist the defendant.

Hypothetical and Ethical Dilemma

Mark T. Birdsong, District Attorney for Tobacco County, has assumed responsibility for an alleged rape case. The case involves exotic dancer Kristal Bluefield (also known by her stage name, "Crystal Blue") and Robert "Bobby" Dawkins, a local student at Tobacco County's nationally-renowned private institution of higher learning, Prince University (PU). Dawkins is a member of one of the more popular fraternities on the PU campus, Lambda Alpha Chi (LAX). Bluefield claims that she was hired to perform exotic dancing services at an LAX "end-of-semester" party last December 12, and that while applying makeup in a fraternity restroom in advance of her performance, Dawkins entered the room, locked the door, and sexually assaulted her.

Based on Bluefield's positive identification of Dawkins in a photographic array (the array, commissioned by District Attorney Birdsong, consisted of the presentation of pictures of all current LAX fraternity members, and Bluefield's identification of Dawkins as the perpetrator), Birdsong charged Dawkins with first-degree sexual assault. He then commissioned DNA testing of various pieces of evidence (collectively referred to as the "rape kit") gathered by the Tobacco County Police Department at the scene of the alleged assault.

This morning, DNA Identification, Inc. (DII), the private company retained to perform scientific analysis of the evidence contained in the rape kit, informed District Attorney Birdsong that testing had conclusively "ruled out" Bobby Dawkins as the perpetrator. Needless to say, the results of the DNA testing have not given Birdsong reason to be optimistic about his chances of successfully prosecuting Dawkins. After all, the only evidence the District Attorney presently has to use in Dawkins' prosecution is the positive identification of Dawkins in a photographic array, by an alleged victim the jury might deem less than credible.

Birdsong is also presently troubled by an ethical conundrum. Should he reveal the results of the DNA testing to the court and to Dawkins' defense attorney, or should he "bury the report in his desk" and rely on Bluefield's positive identification of Dawkins as the perpetrator (and perhaps other evidence that might develop before trial) in order to prove his case "beyond reasonable doubt"?

Birdsong has an ethical, and most likely legal, obligation to inform the court of the results of the DNA testing. Failure to do so could result in dismissal of all charges against the defendant, and disbarment of the prosecuting attorney. This hypothetical is loosely based on the actual disbarment

proceeding entitled The North Carolina State Bar v. Michael B Nifong, more commonly referred to as the "Duke University Lacrosse" case. In that case, involving the alleged sexual assault of exotic dancer Crystal Mangum by three Duke University Lacrosse players—Colin Finnerty, Reade Seligman and David Evans—Durham County District Attorney Michael B. Nifong commissioned DNA testing, which conclusively "ruled out" Finnerty, Seligman and Evans. Nifong elected not to reveal the DNA test results to the Durham County Court and the defense attorneys, and his refusal to do so contributed to his subsequent disbarment. The North Carolina State Bar used (among other applicable provisions) Rule 3.8(d) of The North Carolina State Bar Revised Rules of Professional Conduct to justify disbarment. Rule 3.8(d) reads, in pertinent part, as follows: "Special Responsibilities of a Prosecutor—The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence of information known to the prosecutor that tends to negate the guilt of the accused…" Michael B. Nifong is the first prosecutor in North Carolina history to lose his law license based on actions in a criminal case.

This case hypothetical, and the Duke University Lacrosse case itself, raises a very interesting question: If a defendant admits to his/her attorney the commission of a crime, the attorney is ethically and legally obligated to keep his client's admission in confidence, even if such a confession would (if revealed) benefit the prosecution; why, then, is a prosecutor obligated to reveal evidence that would be beneficial to the defense? The answer, of course, is that the defendant's confession to his/her attorney would be revealed in the course of the attorney/client privilege, while no such privilege would exist or apply in the course of the prosecution's gathering of evidence.

For more information related to The North Carolina State Bar v. Michael B. Nifong, please see the "Teaching Tips" Section included in this newsletter.

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Of Special Interest

This section of the newsletter will assist you in covering:

1) the **"Hypothetical and Ethical Dilemma"** presented earlier in this newsletter; and

2) Article 1 of the **"Hot Topics in Business Law"** Section ("High Court Backs Firefighters in Reverse Discrimination Suit.")

Teaching Tips

Teaching Tip 1:

Students will likely be fascinated to know that the Case Hypothetical and Ethical Dilemma included in this newsletter is based on an actual case. I actively encourage you to discuss the facts of the Duke University Lacrosse Case, along with the accompanying disbarment proceeding entitled The North Carolina State Bar v. Michael B. Nifong, with your class. I have included below, for your use, pertinent statements, findings of fact and conclusions of law related to The North Carolina State Bar's investigation and handling of the Nifong case, including 1) Selected Statements From F. Lane Williamson, Hearing Panel Chairman of The Disciplinary Hearing Commission of the North Carolina State Bar (Many of these statements are particularly "ripe" for "in-class" discussion; for example, consider Chairman Williamson's assessment that "…the person who is the most powerful in the criminal justice system is not the judge, and…it's not the jury. It's the prosecutor who makes the charging decision to start with"); 2) Pertinent Findings of Fact in The North Carolina State Bar v. Michael B Nifong; 3) District Attorney Nifong's Violations of The North Carolina State Bar Revised Rules of Professional Conduct, according to The North Carolina State Bar; and 4) Findings of Fact Regarding Discipline in The North Carolina State Bar v. Michael B. Nifong, according to The North Carolina State Bar.

The North Carolina State Bar v. Michael B. Nifong
The 2006 Duke University Lacrosse Case

1) Statements From F. Lane Williamson, Hearing Panel Chairman, The Disciplinary Hearing Commission of the North Carolina State Bar:

- *"…there is no discipline short of disbarment that would be appropriate in this case given the magnitude of the offenses that we (the members of The Disciplinary Hearing Commission) have found and the effect upon the (legal) profession and the public."*
- *"This matter has been a fiasco"*
- *"…at the root of (this case) is self-deception arising out of self-interest."*
- *"…what we have here…is…a prosecutor who was faced with a very unusual situation, in which the confluence of his self-interest collided with*

a very volatile mix of race, sex and class, a situation that if it were applied in a John Grisham novel would be considered to be…too contrived."

- *"…the person who is the most powerful in the criminal justice system is not the judge, and…it's not the jury. It's the prosecutor who makes the charging decision to start with."*

- *"The prosecutor…is imbued with an aura that if he says it's so, it must be so. And even with all of the Constitutional rights that are afforded criminal defendants, the prosecutor, merely by asserting a charge against defendants, already has a leg up. And when that power is abused, as it was here, it puts Constitutional rights in jeopardy. We have a justice system, but the justice system only works if the people who participate in it are people of good faith and respect those rights."*

- *"…there are very few deterrents upon prosecutorial misconduct… (Prosecutors) are virtually immune from civil liability. About the worst that can happen to them in the conduct of a case is for the case to be overturned. The only significant deterrent upon prosecutors is the possibility of disciplinary sanction."*

2) <u>The North Carolina State Bar v. Michael B. Nifong—Findings of Fact</u>:

- *Nifong appointed District Attorney in 2005; in late March 2006, Nifong engaged in "highly contested" political campaign to retain office*
- *March 14, 2006—Crystal Mangum, an exotic dancer, reports that she was raped by three men during a party*
- *Various pieces of evidence (collectively referred to as "rape kit") obtained for later DNA testing*
- *Durham Police Department (DPD) execute search warrant on house where incident reportedly occurred. Residents are captains of Duke University lacrosse team; majority of party attendees are team members*
- *March 16—Residents voluntarily assist DPD in executing search warrant; evidence gathered, including residents' statements and DNA samples*
- *March 26—Nifong assumes responsibility for the case*
- *March 27—Rape kit and lacrosse players' DNA samples delivered to SBI*
- *March 27—Nifong briefed by Sergeant Gottlieb and Investigator Himan (DPD) about status of investigation; Gottlieb and Himan note a number of weaknesses in case, including inconsistent statements from Mangum, fact that the other exotic dancer at the party disputes Mangum's story of the alleged assault, Mangum's inability to identify alleged attackers in two photo arrays*
- *Shortly after briefing by Gottlieb and Himan, Nifong acknowledges to them that case would be very hard to win, and says "you know, we're (f----d)"*
- *March-April—Nifong makes numerous public statements and comments to news media about case*

- *References "stonewall of silence" from lacrosse players*
- *Expresses disappointment that "no one has been enough of a man to come forward"*

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- *Hints at bringing "aiding and abetting" charges against lacrosse players who allegedly refuse to cooperate with investigation*
- *States "(I) wonder why one needs an attorney if one was not charged and had not done anything wrong"*

- *March 30--SBI notifies Nifong that SBI had examined rape kit, and was unable to find any semen, blood, or saliva*
- *April 4—DPD conducts photo identification procedure in which photographs of 46 members of Duke lacrosse team shown to Ms. Mangum. Procedure conceived and/or approved by Nifong. Mangum told all 46 members of team present at party. Mangum identifies Colin Finnerty, Reade Seligman, and David Evans as perpetrators (she had not identified Finnerty, Seligman and Evans in previous photo arrays)*
- *April 5—Nifong seeks and obtains court order transferring rape kit items and other evidence from SBI to private company, DNA Security, Inc. (DSI) for "more sensitive" testing*
- *April 7-10—DSI finds DNA evidence from up to four different males in rape kit, but rules out lacrosse team members*
- *April 10—Meeting between Nifong, two DPD officers and Dr. Brian Meehan (DSI lab director)—Meehan shares results of DNA analyses with Nifong*
- *April 17—Nifong obtains indictments against Finnerty and Seligman for first-degree rape, first-degree sex offense, and kidnapping*
- *April 20—DSI additional testing indicates DNA from multiple males on at least one other piece of evidence from rape kit*
- *April 20—DSI rules out all lacrosse players, including Finnerty and Seligman*
- *April 21—Follow-up meeting between Nifong, two DPD officers, and Meehan. Meehan tells Nifong 1) DNA from multiple males found on several items in rape kit; 2) testing ruled out all lacrosse players, including Finnerty and Seligman; and 3) incomplete testing revealed DNA on fingernail specimen found in David Evans' garbage can*
- *April 21-May 12—Nifong instructs Meehan to prepare report reflecting matching (but inconclusive) DNA testing on fingernail in Evans' garbage can; report does not reflect that DNA testing revealed multiple unidentified males, and that all 46 lacrosse players had been ruled out*
- *May 12—Nifong receives Meehan's report, and provides copies to Finnerty, Seligman, and Evans*
- *May 15—Nifong indicts David Evans for first-degree rape, first-degree sex offense, and kidnapping*
- *May 17—Finnerty serves discovery requests on Nifong, including request that any expert witness report results of any examinations conducted by expert*
- *May 18—Nifong provides another copy of DSI's written report to Finnerty, Seligman, and Evans, and states to court that "(t)he state is not aware of any additional material or information which may be exculpatory in nature with respect to the Defendant."*
- *December 15—Hearing on Motion to Compel Discovery (filed by Defendants): Dr. Meehan's testimony:*
- *He discussed with Nifong at several meetings the results of all DSI tests, including the potentially exculpatory DNA test results*
- *He and Nifong agreed that "we would only disclose on our report those reference specimens that matched evidence items"*

- *He would have prepared a report setting forth results of all DSI's tests if Nifong had requested him to do so"*

- *January 12, 2007—Nifong recuses himself from prosecution of Duke defendants*
- *January 13—North Carolina Attorney General assumes responsibility of case*
- *April 11—North Carolina Attorney General dismisses case against all Duke defendants*

3) Nifong's Violations of The N.C. State Bar Revised Rules of Professional Conduct:

- *Rule 3.3(a)(1): Candor Toward The Tribunal--A lawyer shall not knowingly make a false statement of material fact or law to a tribunal*

- *Rule 3.4(c): Fairness To Opposing Party And Counsel--A lawyer shall not knowingly disobey…a…ruling of a tribunal*

- *Rule 3.4(d): Fairness To Opposing Party And Counsel--A lawyer shall not…fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party*

- *Rule 3.6(a): Trial Publicity--A lawyer who is participating…in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if there is reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter.*

- *Rule 3.8(d): Special Responsibilities of a Prosecutor—The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence of information known to the prosecutor that tends to negate the guilt of the accused…*

- *Rule 4.1: Truthfulness In Statements To Others—In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person*

- *Rule 8.1(a): Disciplinary Matters--…(A) lawyer…in connection with a disciplinary matter…shall not knowingly make a false statement of material fact*

4) The North Carolina State Bar v. Michael B. Nifong—Findings of Fact Regarding Discipline:

- *"Nifong's misconduct resulted in significant actual harm to the legal profession. Nifong's conduct has created a perception among the public within and outside North Carolina that lawyers in general and prosecutors in particular cannot be trusted and can be expected to lie to the court and to opposing counsel. Nifong's dishonesty to the court and to his opposing counsel, fellow attorneys, harmed the profession. Attorneys have a duty to communicate honestly with the court and with each other. When attorneys do not do so, they engender distrust among fellow lawyers and from the public, thereby harming the profession as a whole."*

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- *Nifong's misconduct resulted in prejudice to and significant actual harm to the justice system. Nifong has caused a perception among the public within and outside North Carolina that there is a systemic problem in the North Carolina justice system and that a criminal defendant can only get justice if he or she can afford to hire an expensive lawyer with unlimited resources to figure out what is being withheld by the prosecutor."*

- *"Nifong's false statements to the Grievance Committee of the North Carolina State Bar interfered with the State Bar's ability to regulate attorneys and therefore undermined the privilege of lawyers in this State to remain self-regulating."*

Teaching Tip 2:

In reviewing the article "High Court Backs Firefighters in Reverse Discrimination Suit" (Article 1 in the "Hot Topics in Business Law" Section of this newsletter) and the related facts and rulings of law in the Ricci v. DiStefano case, I kept wondering how Dr. Martin Luther King, Jr., if he were alive today, would view the case. Would he support the United States Supreme Court's conclusion, implicit in its ruling favoring the white firefighters, that reverse discrimination is just as reprehensible as any other form of discrimination (i.e., would he favor promoting the white firefighters to lieutenant and captain positions, based on the fact that they scored the highest on the promotional examinations), or would he instead support the cause of the African American firefighters (as did the United States District Court and the United States Court of Appeals,) that affirmative action dictates the invalidation of promotion examinations that only whites are able to pass? Such a question would make for lively classroom discussion, and I encourage you to discuss the topics of affirmative action, reverse discrimination, and Ricci v. DiStefano after reviewing with your class the content of Dr. King's "I Have a Dream" speech.

For the full text and video of Dr. Martin Luther King, Jr.'s "I Have a Dream" speech, see http://www.americanrhetoric.com/speeches/mlkihaveadream.htm)

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Chapter Key for McGraw-Hill/Irwin Business Law texts

	Hot Topics	Video Suggestions	Hypothetical or Ethical Dilemmas	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 5, 7, 42 and 43	Chapters 7, 42 and 43	Chapter 7	Chapters 7, 42 and 43
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 2, 4 and 24	Chapters 2 and 24	Chapter 2	Chapters 2 and 24
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 3,4, 5 and 51	Chapters 5 and 51	Chapter 5	Chapters 5 and 51
Barnes et al., Law for Business, 10th Edition	Chapters 3, 4, 5 and 25	Chapters 5 and 25	Chapter 5	Chapters 5 and 25
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 1, 2, 5 and 35	Chapters 5 and 35	Chapter 5	Chapters 5 and 35
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 2, 6, 12 and 20	Chapters 12 and 20	Chapter 12	Chapters 12 and 20
McAdams et al., Law, Business & Society, 9th Edition	Chapters 1, 2, 3 4, 5, 13	Chapters 4 and 13	Chapter 4	Chapters 4 and 13

This Newsletter Supports the Following Business Law Texts

Barnes et al., Law for Business, 10th Edition, 2009© (007352493X)
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition, 2009© (0073524948)
Kubasek et al., Dynamic Business Law, 2009© (0073524913)
Kubasek et al., Dynamic Business Law: The Essentials, 2010© (0073377686)
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition, 2010© (0073377643)
McAdams et al., Law, Business & Society, 9th Edition, 2009© (0073377651)
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition, 2010© (007337766X)

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