Proceedings

A monthly newsletter from McGraw-Hill

March 2013 Volume 4, Issue 8

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Dear Professor,

Spring is near! Welcome to McGraw-Hill's March 2013 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 4, Issue 8 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the March 2013 newsletter topics with the various McGraw-Hill business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. A recent lawsuit involving department store chain Dillard's, Inc. and alleged violations of the Americans with Disabilities Act;

2. A recent Iowa Supreme Court ruling regarding an employer's termination of an employee because he found her too attractive;

3. A recent case involving alleged defamation of a contractor by the homeowner's posting of negative online reviews;

4. Videos related to a) corporate responsibility for cleanup costs associated with toxic waste sites and b) self-defense (more particularly, the use of deadly force) as it relates to the victim of sexual abuse;

5. An "Ethical Dilemma" related to the ethics of employee pay cuts purportedly made to maintain corporate competitiveness; and

6. "Teaching tips" related to Article 1 ("Dillard's Settles Charges It Made Sick Workers Illegally Reveal Conditions") and the Ethical Dilemma ("A Buyout, A Reorganization and the New Face of Job Security") of the newsletter.

May the spring season bring you a newfound appreciation for all this life has to offer!

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Of Special Interest

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

1) A recent lawsuit involving department store chain Dillard's, Inc. and alleged violations of the Americans with Disabilities Act;

2) A recent Iowa Supreme Court ruling regarding an employer's termination of an employee because he found her too attractive; and

3) A recent case involving alleged defamation of a contractor by the homeowner's posting of negative online reviews.

Hot Topics in Business Law

Article 1: "Dillard's Settles Charges It Made Sick Workers Illegally Reveal Conditions"

http://www.huffingtonpost.com/2012/12/18/dillards-settles-discrimination-claims_n_2323934.html?icid=maing-grid7%7Cmaing8%7Cdl1%7Csec3_lnk3%26pLid%3D247755

According to the article, department store chain Dillard's Inc. is paying $2 million to settle charges that it illegally required workers who took sick leave to reveal confidential medical information.

The settlement, announced recently by the Equal Employment Opportunity Commission, resolves a 4-year-old class-action lawsuit that charged Dillard's with violating the Americans with Disabilities Act.

The EEOC said thousands of current and former Dillard's employees who sought sick leave were forced to submit a doctor's note explaining not just that they were being treated, but the exact nature of their medical condition. The commission says workers who didn't feel comfortable disclosing details of their treatment were fired, even when doctors advised them not to reveal private medical information.

Dillard's, which has about 300 stores across 29 states, had argued that the policy was needed to confirm medical absences were legitimate. But the EEOC says employers are not allowed to ask for particulars of treatment unless they are job-related and necessary for the conduct of business.

In a statement, Dillard's denied that its policies violated the ADA.

"In order to avoid further protracted litigation with the EEOC over policies that are no longer in effect, Dillard's determined that the most efficient resolution was to settle with the EEOC," the company said.

Anna Park, an EEOC attorney, said some employees were forced to reveal conditions like cancer, mental illness or gynecological information just to get an excused absence.

"We found that managers weren't trained and they were really harassing people," Park said.

The settlement also resolves allegations that Dillard's fired some workers for taking more sick leave than the company allowed. The company did not confer with employees to see whether more leave was allowed under federal law to accommodate a worker's disability, the EEOC said.

Under a three-year consent decree, Dillard's will pay $2 million to identified victims and establish a class fund for victims who are not yet identified.

Park said at least 75 employees who were victims of the policies have been identified at a Dillard's store in El Centro, Calif., which was the subject of the EEOC's initial lawsuit. She expects thousands more to come forward.

Employees who worked at Dillard's between August 16, 2005 and August 15, 2009 can qualify to receive a monetary settlement award. In addition, anyone who worked at Dillard's and believes they were terminated after May 28, 2008, for taking too much sick leave can make a claim.

The consent decree requires Dillard's to hire a consultant to review and revise company policies and train supervisors and staff on federal disability law. The company will submit annual reports verifying compliance.

Discussion Questions

1. Describe the Americans with Disabilities Act, specifically as it relates to the employer-employee relationship.

The Americans with Disabilities Act, or "ADA," imposes an obligation on employers to accommodate employees with disabilities. If an employee is "otherwise qualified" to perform essential work responsibilities, the ADA requires the employer to "reasonably accommodate" the employee, unless an "undue hardship" would result. A "disability" is a mental or physical condition that interferes with one or more major life activities; "otherwise qualified" means that the employee would be able to perform essential work responsibilities, even with his or her disability, if the employer provided a "reasonable accommodation"; a "reasonable accommodation" is a good-faith solution the employer provides the employee that would permit the employee to perform his or her work responsibilities, even with a disability; finally, an "undue hardship" is an accommodation that would impose an unreasonable burden, such as an extreme financial hardship, on the employer.

2. Based on the information presented in the article, do you believe Dillard's violated the ADA? Why or why not?

This is an opinion question, so student responses will likely vary. Based on the information provided in the article, there is a dispute between Dillard's and affected employees as to whether Dillard's provided a reasonable accommodation, such as time off, for employees to address certain disabilities. Under the ADA, Dillard's does have the right to know whether an employee's affliction amounts to a disability, thereby triggering accommodation under the Act. It would seem reasonable

to conclude that in order for Dillard's to make this determination, they must know the nature of the employee's affliction. The key here is whether, based on the facts, Dillard's acted in good faith, or whether the company was not willing to comply with the employer mandates set forth in the ADA.

3. Does Dillard's agreement to pay $2 million in settlement of the class-action lawsuit constitute a legal admission of liability? Why or why not?

Settlement of a claim does not amount to a legal admission of liability; in fact, the language of the settlement agreement in this case most likely includes an express provision indicating such. Upon reading the article, however, many students may feel that Dillard's would not pay $2 million in settlement unless the company was concerned about prevailing in litigation.

Article 2: "Hey, Hot Stuff—You're Fired: Iowa Court Upholds Termination of Attractive Employee"

http://lifeinc.today.com/_news/2012/12/24/16127478-hey-hot-stuff-youre-fired-iowa-court-upholds-termination-of-attractive-employee?lite

According to the article, Iowa's all-male high court recently upheld the legality of terminating a female employee because her boss found her too attractive.

Iowa dentist James Knight fired his assistant, Melissa Nelson, after a decade-long tenure because he found her "irresistible" and said he would be likely to have an affair with her if he kept her on the payroll, according to the court's opinion.

In 2009, Knight's wife Jeanne demanded that her husband fire his 32-year-old assistant Melissa Nelson after she found out the two sometimes exchanged text messages, according to court documents.

For his part, Knight said he found Nelson's clothes "distracting," saying, "I don't think it's good for me to see her wearing things that accentuate her body." Nelson denied wearing inappropriate attire and said she put on a coat when Knight complained about what she was wearing, say the court documents.

The couple's pastor supported the decision to terminate Nelson although Knight said she was "the best dental assistant he ever had," the court's opinion said.

Nelson sued on the grounds that she was fired because of her gender, while Knight's lawyers argued that the termination was because of the relationship between the two. The court sided with Knight's argument, noting that legal precedent found it acceptable for a boss to fire a worker due to a spouse's jealousy. The court also said Knight didn't discriminate against women as a class. He had other female employees, and replaced Nelson with another woman.

"It opens up a really disturbing door," said Brad Seligman, an attorney who represented plaintiffs in a Wal-Mart gender discrimination class-action suit alleging company-wide discrimination against female workers regarding pay and promotions.

Seligman said that argument wouldn't fly if the case was in the federal court system. "Here it's quite clear that the woman was being perceived as a threat because she was a woman," he said. The termination was "a decision that's totally based on gender."

Since Nelson's case was tried in and argued based on case law from the state court system, she has little legal recourse at this point, Seligman said. "It's probably the end of the line for this plaintiff." Knight erred by not having policies in writing addressing employee dress code and behavior, said Amy N. Letke, founder and CEO of Integrity HR. "It's really important, when you're the business owner, to set the tone with what's OK."

"People who work hard to be attractive and high performers are typically rewarded," said Letke. "She was punished."

Discussion Questions

1. Discuss the types of discrimination prohibited by Title VII of the Civil Rights Act of 1964.

Title VII of the Civil Rights Act of 1964 prohibits five (5) types of discrimination: 1) race; 2) gender; 3) national origin; 4) culture; and 5) religion. The key question in the subject case is whether Dr. James Knight's decision to terminate his employee, Melissa Nelson, amounted to gender discrimination.

2. Why is this case in the Iowa state court system? Would it not have been more appropriate for the federal court system to address this case?

Without researching the case beyond the information provided in the article, one cannot conclude why the case is in state court, but in your author's opinion, it was based on employee legal protections provided by state law, such as "wrongful termination" theory. The theory of "wrongful termination" states that an employer cannot terminate an employee under circumstances that would amount to a violation of public policy ("Public policy" is broadly defined as something in furtherance of the "public good"—By implication, anything that violates public policy would not be in the public good.) Additionally, the statute of limitations (i.e., the time period provided to file a lawsuit) is usually more generous under state law than it is under federal law. For example, in your author's home state of North Carolina, the statute of limitations period for a civil action in state court is generally three (3) years, while the statute of limitations for violation of Title VII of the Civil Rights Act is only 180 days.

3. Based on the information presented in the article, do you believe Dr. Knight illegally terminated Ms. Knight's employment? Why or why not?

This is an opinion question, so student responses will likely vary. Obviously, gender was a factor in terms of Dr. Knight's decision to terminate Ms. Nelson, but as the article indicates, Ms. Nelson likely has no further legal recourse at this point, since the Iowa Supreme Court has decided against her, and since the statute of limitations has expired on her Civil Rights Act claim.

Article 3: "Injunction Lifted on Home Contractor's Online Critic"

http://www.washingtontimes.com/news/2013/jan/2/injunction-lifted-on-home-contractors-online-criti/?utm_source=RSS_Feed&utm_medium=RSS

According to the article, a woman being sued by a home contractor for posting negative online reviews can continue posting criticism of his work if she chooses, according to a decision by the Supreme Court of Virginia.

The state's highest court ruled recently to reverse a preliminary injunction against Fairfax resident Jane Perez that required her to take down complaints she made against Christopher Dietz and his company, Dietz Development LLC.

While a final ruling has yet to be made on whether Ms. Perez owes Mr. Dietz hundreds of thousands of dollars he is seeking in punitive damages, the court's decision is a victory for free-speech advocates and "a win for consumers," according to Ms. Perez's lawyer.

"If someone is sued through defamation, the law stands to protect them," said Paul Levy, a lawyer with the Public Citizen Litigation Group. "In the meantime, the public has more information with which to make decisions. That's the right approach in a country which values giving everybody their say."

The court's decision, handed down just two days after the petition for the injunction's review was made, admittedly came as "a bit of a surprise," according to Milt Johns, an attorney with Day & Johns law firm, which is representing Mr. Dietz.

"We did not have a chance to respond to the petition or argue to the court," Mr. Johns said. "But that's just a little bit of the process. The Supreme Court didn't rule it wasn't defamation or our client didn't have a case, it just said the injunction wasn't an appropriate remedy."

At the heart of the case are a series of opinions posted last year to online review sites Yelp and Angie's List. The reviews referenced home repairs performed by Mr. Dietz's company in 2011 at Ms. Perez's Fairfax home. Court papers state the two knew each other from high school.

On several occasions, Ms. Perez posted reviews to the online sites that were critical of the work done by the construction company. Among her complaints were that she was "left with damage to my home, and work that had to be redone for thousands of dollars more than originally estimated." She

also complained that Mr. Dietz charged her for work that was not performed, and jewelry had gone missing from her home when she had given a spare key to the developer.

"Bottom line," one review read, "do not put yourself through this nightmare of a contractor."

Mr. Dietz and his company sued Ms. Perez in Fairfax Circuit Court in October, claiming her criticism was not only untrue, but could hurt business. He asked a judge to order Ms. Perez to take the negative comments down until the trial, to refrain from saying anything else negative about the matter, and for a judge to award him $750,000 in damages.

In early December 2012, a judge ordered Ms. Perez to take down her comments, a point at which the Virginia chapter of the American Civil Liberties Union joined the fight and began assisting with Ms. Perez's defense, said legal director Rebecca Glenberg.

"It's not that people can always get away with false comments about people they do business with. It's just that a judge cannot order someone to stop speaking when a lawsuit is pending," Ms. Glenberg said. "These kinds of lawsuits against online critics are becoming increasingly common. It's very important to preserve the Internet as a forum where people can exchange information about the goods and services they purchase."

Speaking in general about the policy of Angie's List, spokeswoman Cheryl Reed said the online review site fully thinks that its members "have a constitutional right to free expression."

"We believe consumers have the right to share their honest experiences," she added. "They shouldn't fear doing that."

Members are required to accept the member agreement, Ms. Reed said, which instructs reviewers to tell the truth about their own experiences and not the experience of others.

Angie's List has a team of experts who study each submission and check for "red flags," she said, such as identical reviews sent multiple times in an effort to weight the system one way or another. "There have been occasions when people honestly, mistakenly have done something to violate the agreement," Ms. Reed said. "There have been other occasions when it's not accidental."

Discussion Questions

1. What is a "preliminary injunction?"

A "preliminary injunction" is a court order that orders a defendant to stop doing something, pending resolution of litigation. If the case is ultimately decided in favor of the plaintiff, the preliminary injunction is typically converted to a permanent injunction, forever mandating that the defendant "cease and desist" from engaging in the proscribed activity.

2. Discuss the relationship between the "free speech" provision of the First Amendment to the United States Constitution and the tort of "defamation."

Although the First Amendment to the United States Constitution generally promotes and protects "free speech," such protection is not unlimited. One cannot yell "Fire!" in a crowded theatre when there is no fire, and similarly, one person cannot defame another without legal repercussions. Defamation is a false statement of fact or a bad-faith opinion, either oral or written, which damages a person's reputation. Defamation is not protected by the First Amendment.

3. Based on the information included in the article, and in your reasoned opinion, did Jane Perez defame Christopher Dietz and his company, Dietz Development LLC? Explain your response.

This is an opinion question, so student responses will likely vary. The ultimate question in this case is whether the comments Jane Perez posted online about Christopher Dietz and his company, Dietz Development LLC, amounted to either factual assertions or good-faith opinions. If her assertions were neither factual nor good-faith opinions, defamation liability could result.

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Video Suggestions

Video 1: “Old Lead Factories May Stick Taxpayers with Cleanup Costs”

http://www.usatoday.com/story/news/nation/2012/12/19/lead-smelter-cleanup-liabilities/1766747/

Note: In addition to the video, refer also to this article, also located at the above-referenced web site:

“Old Lead Factories May Stick Taxpayers with Cleanup Costs”

Several companies manufactured lead for more than 140 years at a massive factory surrounded by homes in the city's Port Richmond area: John T. Lewis & Bros., National Lead, Anzon and others. The factory is long gone, and tests show dangerous levels of lead in nearby yards – putting children at risk of being poisoned by playing in the dirt.

Yet if homeowners want their yards to be made safe, it is up to them – not the companies or the government -- to pay the costs of replacing contaminated soil or capping it with cement. That's the message residents say the Environmental Protection Agency delivered at neighborhood meetings this year.

"That was 100% clear – that it was on us," said Lisa Conway, who attended two of the meetings and hopes the new backyard sod the family had installed will protect their 8-month-old son.

"I think it's kind of shady that nobody wants to take responsibility for all the years and decades of irresponsible contamination," said Christina DiPietro-Sokol, who has covered her backyard in artificial turf to keep the family's children and their huge dog from coming into contact with the dirt. Estimates to cement over it were in the thousands of dollars, she said. "We have two kids in Catholic school. We can't do that."

Making polluters pay for cleanups is a cornerstone of federal and state environmental laws. Although many of the companies that operated the old lead factories ceased to exist decades ago, some companies associated with the sites are still in business today.

Yet some of these companies have undergone corporate reorganizations or used carefully worded language in purchase agreements to limit their environmental liabilities. Others have used bankruptcy to shed financial responsibility for pollution.

And in some cases, even when companies were intact and could have been held responsible, government regulators failed to act in time.

The result is that taxpayers or homeowners often have to bear the cost of cleaning up the contamination -- if it happens at all. State and federal cleanup programs have limited money to take care of "orphan" environmental sites that have no private party to pay the bill. And internal memos show regulators can be reluctant to use government money to clean up lead in urban soil – even next to old lead factories – because some of the contamination may also have come from lead-based paint or cars that once burned leaded gasoline, non-factory sources the agencies say they don't have the authority or money to address.

Left undisturbed, lead dust can remain on the surface of soil for hundreds of years, posing a risk of reduced IQ and other health problems when children ingest even tiny amounts by putting dusty hands or toys in their mouths.

Officials at the EPA declined repeated requests for interviews since October. In a written statement, the EPA said it can hold companies responsible for cleanups only if it can demonstrate they have liability under the federal Superfund law, which provides the agency the authority to address environmental hazards. At the John T. Lewis factory site in Philadelphia, the EPA said it's still evaluating options to address soil contamination in the area, including looking for financially responsible parties.

Proving responsibility can be difficult when it comes to long-closed factory sites, and legal experts said companies look for ways to shield themselves.

The Environmental Protection Agency held meetings in Philadelphia this year to alert residents living around the former John T. Lewis-National Lead-Anzon factory site that tests have found potentially dangerous levels of lead in some residential yards. Christina DiPietro-Sokol covered the family’s backyard in artificial turf to keep daughter Amelia and their dog, Hobbes, from coming into contact with the dirt. Estimates to cement over it were in the thousands of dollars, DiPietro-Sokol said. “We have two kids in Catholic school. We can’t do that,” she said.

The costs can be staggering: Cleaning the yard around one home in Portland, Oregon, will cost up to $90,000, regulators say, and will involve removing 20 tons of lead- and arsenic-contaminated soil. The EPA has spent nearly $250 million addressing contamination around more than 10,000 homes near a large lead smelter in Omaha.

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"There are enormous amounts of money at issue in these cases. It's worth fighting for and it's worth looking for a way to avoid liability on the part of responsible parties," said environmental attorney Linda Bullen, a former EPA regional counsel now with a law firm in Las Vegas.

Robert Glicksman, professor of environmental law at George Washington University Law School, said: "The trick is distinguishing when they cross the line from clever manipulation and taking advantage of loopholes, to situations when they're abusing the process and should be held responsible for the liability."

In general, successor companies have no liability for contamination at old factories previously operated by the companies they acquired. But there are exceptions, Glicksman said, including if it can be demonstrated that the purchasing corporation is a mere continuation of the previous corporation, if there was essentially a de facto merger of the companies or if the transaction was fraudulent and intended to escape liability.

Proving those things can require interviewing former employees and gaining access to company records – which may no longer exist.

"The reality is, with many of these old sites, it's very difficult to find records," said John Cruden, who previously oversaw environmental enforcement for the U.S. Justice Department and now is president of the Environmental Law Institute in Washington, D.C.

"In truth, there's a lot of times where there simply is no viable party, that company is long gone," Cruden said. "But that's why the Superfund exists."

Yet there's a big problem, he notes: The federal Superfund for environmental cleanups lost its main funding source in 1995 – taxes on oil and chemicals, and an environmental tax on corporations, which were allowed to expire. The result is that the Superfund trust fund's balance had dropped to $137 million by the start of 2009 from a peak in 1997 of $5 billion (in constant 2009 dollars), according to a 2010 report by the Government Accountability Office. The report noted that the EPA's estimated costs to clean up existing Superfund sites exceeded current funding levels from Congress. The EPA said this month that the current balance of the trust fund is now about $80 million.

So, in many cases, finding viable companies that bear legal responsibility is the key to addressing contamination. Doing so can involve unraveling tangled corporate histories. And sometimes, even when responsible companies are still in business, regulators fail to act in time.

The EPA was given a list in 2001 of more than 460 potentially unrecognized former sites of lead factories, which primarily operated and shut down during the 1930s to 1960s. The EPA was warned by the private researcher who compiled the list from old factory directories that many of them had likely contaminated the soil of surrounding properties with a toxic layer of lead fallout.

Despite the warnings, federal and state regulators had done little to investigate many of them or warn thousands of families and children in harm's way.

One of those unaddressed sites is in Pittsburgh's Bloomfield neighborhood. The former Federated Metals factory there processed lead, tin, copper and other metals from 1893 to about 1951. The factory is gone, but its vandalized guard shack remains.

Although the company that operated the factory for many of its final years – the giant metals corporation ASARCO – is still in business, it says it has no responsibility for investigating or cleaning up any potential toxic fallout on nearby homes and a playground. That's because ASARCO went through bankruptcy and agreed by December 2009 to pay $1.79 billion in cleanup costs to settle EPA and state environmental claims at more than 80 sites across the country. The EPA and state regulators never filed a claim for the Pittsburgh Federated Metals site – even though four years earlier EPA investigators had written a report about the site warning of contamination risks and the need for further investigation.

ASARCO's vice president for environmental affairs, Thomas Aldrich, said the Pittsburgh Federated Metals site was never mentioned during the bankruptcy proceedings. "Apparently, EPA knew about the site and decided not to file a claim regarding it," Aldrich said. "Any action would now be barred by the bankruptcy discharge."

The EPA said that's likely the case. The agency said it didn't have enough evidence during ASARCO's bankruptcy that a cleanup was needed at the Pittsburgh location.

And the EPA still hasn't done the additional assessment recommended by its contractors in September 2005 to determine whether the factory "contaminated nearby residential areas." That assessment is still planned, the EPA said recently, but no date was given. Pennsylvania environmental regulators haven't evaluated the site, either, and said they are "awaiting the results of EPA's study."

Meanwhile, parents like Michelle Mazzotta worry about their children playing in nearby Osceola Parklet, a popular neighborhood gathering spot that's within a few hundred feet of the now-vacant Federated Metals site. "It's kind of sad," she said, after being told about the EPA's 2005 report. "This is a big community with a lot of children in it."

Pittsburgh city officials were unaware of the potential risks identified by the EPA until recently, and will be asking the state's environmental agency to do soil sampling in the area, city spokeswoman Joanna Doven said.

Federated Metals' buildings were demolished in 2009, after years of being used to store vehicles for an auto repair business.

The University of Pittsburgh Medical Center, which cleared the factory buildings and some nearby parcels, wants to build a parking garage. UPMC spokeswoman Susan Manko said it would be "inappropriate" for the hospital to share its private environmental assessments of the property.

"Nothing in those studies indicated there was an immediate environmental concern but that UPMC may have to undertake some environmental cleanup prior to developing the property, which of course we would do," she said.

Taxpayers are now facing the bill for any action needed around the old factory.

"EPA is planning a reassessment of this site to determine appropriate next steps and further actions," the agency said.

Bankruptcy is one way companies can shed environmental liabilities.

In other cases, decades of sales, divisions and mergers have obscured the corporate lineage of companies that operated old lead factories.

The former Glidden Co., which dates to the 1900s, once made lead-based paint and had a Metals Refining division that operated plants across the country, including sites in Cleveland and Hammond, Ind., records show. But the company that today sells paint under the Glidden name notes that it is not the same company that operated the old lead factories and said it is not responsible for them.

AkzoNobel obtained the Glidden trademark by buying another company that had previously purchased only certain parts of still another company that had acquired the old Glidden Co.
Two other old lead factory sites can be traced to Kaydon Corp., a publicly traded company with headquarters in Ann Arbor, Mich., and its Canfield Technologies division.

One of them is the former Thos. F. Lukens Metal Co., which operated a factory at the corner of Hedley and Bath streets in Philadelphia's Bridesburg neighborhood. A company called Lukens Metal became a part of Canfield Technologies about 30 years ago, said Chris Synosky, a longtime Canfield sales manager. Synosky said factory operations had ceased at the location and Canfield used the site for several years as a distribution warehouse.

The former Lukens factory site is across the street from homes where children live. Tests have found hazardous levels of lead in nearby yards. The EPA says it plans to assess the area in 2013.

The second site is the former M.C. Canfield Sons factory site in Newark, which is now under part of a condominium complex. Tests by New Jersey have found high levels of lead in the soil and have asked the EPA to do a cleanup.

Kaydon vice president and general counsel Debra Crane said the company has no responsibility at the two factory sites. That's because Kaydon purchased only certain assets of Canfield Technologies in 2000 – and that purchase did not include the company's historical environmental liabilities. "We did not assume any liabilities under that asset purchase agreement," she said.
Crane added: "It's kind of a stretch, I think, to say the fact that we wanted to use a name that has recognition for marketing purposes is sufficient to require us to be liable for operations and manufacturing facilities that we've never seen, never walked on, never touched and had no connection to."

Records filed with the Securities and Exchange Commission show Kaydon "acquired substantially all of the assets" of Canfield. The unpurchased parts of Canfield Technologies remained behind in a company that was renamed as DGRM Corp. during the month of the sale. DGRM Corp. stopped filing annual reports for years after the sale and had its New Jersey corporation status revoked.

Daniel Grossman, listed as Canfield Technologies board chairman on the August 2000 name-change document, declined to be interviewed or to answer questions about what happened to DGRM Corp. and whether it has any responsibility to investigate and remediate contamination around the sites in Philadelphia and Newark.

In an e-mail, Grossman said he'd "never heard of Thos. F. Lukens Metal Co." and that the "Canfield Technologies owned by me and my partners certainly never acquired Thos. F. Lukens Metal Co." Grossman acknowledged involvement with a Lukens firm with a slightly different name: Lukens Metal Corp. – Corp. instead of Co., and no first name or middle initial.

"Lukens Metal Corp. was merely a name-saving corporation with no assets or operations," Grossman said, noting that Canfield and later Kaydon marketed a few products under the Lukens brand.

"Whether 50-70 years ago there was a business relationship between an earlier Canfield and Thos. F. Lukens Metal Co. I have no way of knowing," Grossman said. "But even if there were, I do not believe this would have any legal relation to Canfield Technologies or Kaydon Corporation."

Pennsylvania corporation records show that the Lukens Metal Corp. that Grossman and Canfield transferred to Kaydon listed its address as "Hedley & Bath Streets" in Philadelphia when it was incorporated in 1984. That's the same location that historical Sanborn fire insurance maps and other records show was once the Thos. F. Lukens Metal Co. factory site. The factory on Hedley Street used a shortened name -- "Lukens Metal Co." -- in advertisements for its solder products in the 1950s.

Canfield Technologies transferred the newer Lukens Metal Corp. and assigned all of its capital stock to Kaydon in 2000, according to the asset purchase agreement Kaydon filed with the Securities and Exchange Commission. Kaydon's CEO in 2001 signed papers dissolving this Lukens, records filed with Pennsylvania show.

Grossman did not respond to questions about both Lukens companies being listed at the same Hedley Street location. Crane, Kaydon's attorney, said the two Lukens-named firms were "two separate companies," and that the Lukens Metal Corp. purchased by Kaydon never acquired the real estate at Hedley and Bath streets.

Crane said Kaydon has "absolutely nothing at all in our files about any of the old Canfield Technologies sites. But we wouldn't because we weren't interested in them, we didn't want them." Grossman didn't respond to questions about the Newark location. New Jersey corporation records show that M.C. Canfield Sons changed its name to Canfield Technologies in 1996.

New Jersey environmental regulators investigating the contaminated Newark condo property also have made some initial connections between M.C. Canfield Sons and Canfield Technologies and DGRM Corp. and shared them with the EPA, according to an August 2012 state memo.

The EPA declined to be interviewed about the sites or the potential liabilities of the companies. If the agency were to incur cleanup costs, "EPA would then make a determination about a company's environmental liabilities," the agency said in a statement.

In Philadelphia, where residents say they are being told to clean up their own yards around the old John T. Lewis-National Lead-Anzon factory site, it may be difficult or perhaps impossible to hold corporations accountable.

Pennsylvania environmental regulators allowed Anzon, the last company operating the plant, to enroll in a voluntary state program to clean up just the factory's property around 1998 – without requiring any investigation of potential toxic fallout on the surrounding neighborhood. Successful completion of the program, known as Act 2 or the state's Land Recycling Program, generally gives companies liability relief, with a few exceptions, from "ever having to do more cleanup in the future ... either because the DEP wanted it, or because citizens sued for more cleanup," according to a Q&A document on the department's website.

Even though homes surrounded the factory, which had operated since the 1800s, the Pennsylvania Department of Environmental Protection says no testing was required to determine the extent of contamination beyond the factory's borders.

"There is no such requirement under Act 2 for sites being remediated for non-residential use. These are voluntary cleanups conducted to bring former industrial sites back into productive reuse," the DEP said in a statement.

The factory property was turned into a commercial area with shops and restaurants.

The DEP declined to be interviewed about whether the state did enough during the Anzon cleanup to protect the health of nearby residents. The department said generally that Act 2's "liability protection only applies to the area that was investigated and remediated." DEP officials would not discuss

whether, as a practical matter, the passage of years has made it impossible to make Anzon pay for possible future costs. Many of Anzon's assets were sold to another company years ago, records show. Sandy Salzman, one of the neighborhood residents who attended EPA meetings this year, said federal officials weren't optimistic about getting the factory's operators to pay for any cleanup.

"They said that would be really difficult because most of them aren't around anymore," said Salzman, executive director of the New Kensington Community Development Corp.

And the EPA said it had no federal funds for testing or cleanup, recalled Maggie O'Brien, president of Fishtown Action, a neighborhood group that hosted an EPA meeting in April 2012. "They were basically acting like they weren't under any obligation to do anything about it other than to tell us," O'Brien said. "They couldn't or wouldn't do anything."

The EPA is aware of community frustration. An internal agency e-mail recounts how during a community meeting in March a neighborhood group official "expressed a strong opinion that EPA should be doing more than just outreach and education as we really seemed to drop the ball since the facility closed in 1996."

Anzon was a part of the Cookson Group, a British company that continues to be a leading global supplier to the steel and foundry castings industries. Spokespeople for the Cookson Group didn't respond to repeated requests for interviews or comment. Officials at NL Industries, the company formerly called National Lead, also didn't respond to interview requests about their operation of the plant, which court records say was from 1960 to 1979.

The factory's operators did emergency cleanups along "nearby streets" in 1988 and 1991 after a plant fire and accident, according to the EPA. Around the same time, residents sued NL Industries and Anzon claiming that the plant's operations harmed their families. According to court records in the class action, Anzon entered into a settlement in the case before the trial ended. Because NL Industries didn't settle, in 1994 the case went to the jury to decide each company's liability. The jury found negligence by Anzon, including that it was liable for $2 million for testing to determine cleanup needs in one of three geographic zones involved in the case. The jury found no negligence on the part of National Lead.

The EPA said it assessed the site in 1995, but no further action was taken "in light of pending sampling and cleanup work to be conducted " by Anzon as a part of the court settlement. Exactly what cleanup Anzon did is unclear.

The EPA sent investigators back to the neighborhood in 2005, after the site was included on the 2001 list of unrecognized lead-smelter sites. They recommended soil tests, which were done in 2009. Of the 17 samples from four homes' yards, 14 had elevated lead levels, most of them well above the EPA's hazard standard for residential soil where children play.

Soil sample tests revealed dangerous levels of lead in area yards.

Still, internal EPA documents show that agency staff questioned whether the lead in the yards came from the massive lead factory, or perhaps from lead paint or the tailpipes of cars that once burned leaded gasoline. Urban areas, the agency has said, have many sources of lead, and the EPA is authorized to address only contamination that can be tied to factories.

At the John T. Lewis site in Philadelphia: "Continued assessment of these properties may yield properties with elevated levels of lead without clear information on the major source contributor," Jack Kelly, the EPA official assigned to the site, wrote in a "Hot Issue" memo in May to the EPA's regional administrator. "The urban lead-in-soil problem arguably exceeds EPA's Superfund resources making a traditional removal approach (dig & cover) likely infeasible."

It's unclear how much of EPA's approach at the site is driven by the Superfund's lack of money, and how much is driven by public health, science and what the agency is allowed to do under the law. John Pendergrass, a senior attorney at the Environmental Law Institute, says that while the EPA needs to trace lead to a factory, "they don't need to trace all the lead" found in the area to one specific source. Pendergrass noted that it's possible for the EPA to do lead "species" testing that can help the agency show lead came from the factory. "I would think in this case there would be evidence they could find to show that it comes from a smelter that had been there that long," he said.

In a statement, the EPA said it "has made no decisions regarding the source of lead in sampled soils, the potential liability of any party, or response actions to be taken" and that it is still "considering the value" of doing lead species testing in the neighborhood.

The EPA said it has issued information requests to companies believed to be successors to the businesses that operated the facility and has evaluated their responses. The agency didn't name the companies or provide further details.

"The search for financially viable potentially responsible parties is ongoing," the EPA said.

Discussion Questions

1. Legally, how can companies who pollute avoid the costs of cleaning up toxic sites?

There are at least four (4) ways companies who pollute can avoid the costs of cleaning up toxic sites:

a. By filing for "Chapter 7" liquidation bankruptcy;

b. By simply going out of business;

c. By filing for "Chapter 11" reorganization bankruptcy; or

d. By being acquired by another company. As the article indicates, even the acquiring company can potentially avoid legal responsibility for pollution committed by the company it is acquiring by

including carefully-worded language in the associated legal documents indicating it is acquiring only the assets of the purchased company, and not the liabilities.

2. As the article indicates, state and federal cleanup programs have limited money to take care of "orphan" environmental sites that have no private party to pay the bill. In your reasoned opinion, should the government (state and federal) increase funding for such cleanup programs? Why or why not?

This is an opinion question, so student responses will likely vary. Obviously, federal and state budgets have come under close scrutiny in recent years, and momentum is building for substantial "cost-cutting" at both the federal and state levels. That being said, federal and state cleanup programs, such as the federal "Superfund," were created to promote public policy; more specifically, a clean (or at least cleaner) environment.

3. According to the article, as a general rule of law, successor companies have no liability for contamination at old factories previously operated by the companies they acquired. Should successor companies have liability for such contamination? Why or why not?

This is an opinion question, so student responses will likely vary. The argument for successor companies having no liability for contamination at old factories previously operated by the companies they acquire is that the successor companies did not commit the pollution. The argument in favor of liability is that if successor companies are not required to pay, state and federal taxpayers will; with this line of reasoning, if successor companies will enjoy the assets of the companies they are acquiring, they should also be required to assume the liabilities of such companies.

Video 2: "Jodi Arias Trial: Defense Claims Victim Was Sexual Deviant"

http://abcnews.go.com/US/jodi-arias-trial-defense-claims-victim-sexual-deviant/story?id=18119972#.UOWUJeQ0V8E

Note: In addition to the video, refer also to this article, also located at the above-referenced web site:

"Jodi Arias Trial: Defense Claims Victim Was Sexual Deviant"

Defense attorneys for Jodi Arias, the 32-year-old Arizona woman who has admitted to brutally murdering her former boyfriend Travis Alexander in 2008, claim that she was abused and controlled by Alexander, who she says was a sexual deviant.

In a case that is already being compared to the dramatic 2010 murder trial of Casey Anthony, Arias is facing the death penalty if convicted in the capital murder case. She is accused of stabbing Alexander 27 times, slitting his throat and shooting him in the head as he showered in his Mesa,

Arizona, home in 2008. A jury will have to decide if she is a cold-blooded murderer or was a victim of domestic violence, as she claims, who was forced to kill.

Appearing in court recently as the trial opened, Arias cried through much of the opening arguments. Prosecutor Juan Martinez told the court that it's clear that Arias murdered Alexander.

"This is not a case of whodunit," he said. "The whodunit sits in court today."

Prosecutors told the jury recently that Alexander was a devout Mormon who was seduced and then stalked by Arias, and killed by her in a jealous rage when she learned he was dating other women. She rewarded that love by sticking a knife in his chest," Martinez told the court. "She slit his throat as a reward for being a good man."

Arias' attorney Jennifer Willmott told the jury her client was forced to kill in self-defense, saying that her client -- who recently won a Christmas caroling contest behind bars -- was abused and controlled by Alexander, who she claims was a sexual deviant. Willmott showed the jury a t-shirt she says he made Arias wear, with lettering that says 'Travis Alexander's.

"That t-shirt is the perfect example of how Travis treated her," she said.

The couple only dated a few months after meeting in 2006 at a work convention in Las Vegas. But the two continued a sexual relationship -- including on the day of the crime.

Police found a camera in Alexander's washing machine. They say Arias was literally trying to wash away the evidence.

Found on the camera's memory card were pictures of their final sexual encounter, shots of Alexander in the shower -- seconds before he was killed -- and pictures that appeared to be taken accidently when the camera was dropped. One of the images shows Alexander's bloody body, and another shows Arias actually dragging his body across the ground.

In a series of jailhouse interviews since her 2008 arrest, Arias repeatedly changed her story. First she denied being at Alexander's house the night of the murder, but two weeks later, she told the TV show "Inside Edition" she was there.

"I witnessed Travis being attacked by two other individuals," she said, "Who were they? I don't know."

Now she admits to killing Alexander, but says she had to after he attacked her when she dropped his new camera.

"Jodi Arias killed Travis Alexander," Willmott said in court Wednesday. "The million-dollar question is what would have forced her to do it, and throughout this trial you will hear that Jodi was indeed forced."

Willmott told the court that Arias, who has remained in jail since her arrest, repeatedly lied about the killing because she was scared.

Discussion Questions

1. Should a victim of sexual abuse be allowed to kill his or her attacker in self-defense? Explain your response.

This is admittedly a difficult question to answer. Traditional law states that one can only use lethal (deadly) force in self-defense if the victim reasonably believes he or she might be killed in the attack by the aggressor. The "saving grace" for the victim in such situations is that juries will most likely give the victim the "benefit of the doubt" in terms of formulating the decision to use deadly force in self-defense.

2. Should there be any restrictions on the rights of a sexual abuse victim to kill his or her attacker? If so, what should those restrictions entail?

As indicated in response to Discussion Question 1 above, traditional law states that one can only use lethal (deadly) force in self-defense if the victim reasonably believes he or she might be killed in the attack by the aggressor. Presumably, this restriction applies to a sexual abuse scenario.

3. Based on the information provided in the video and accompanying article, and in your reasoned opinion, does Jodi Arias' defense have merit? Explain your response.

This is an opinion question, so student responses will perhaps vary. In your author's opinion, Jodi Arias will have difficulty prevailing in her defense. Not only does she have credibility problems, based on the fact that she "changed her story" in terms of who actually killed her boyfriend, but in her "new version" of what happened, Jason Alexander was not attacking her when she killed him; rather, he was in the shower.

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Of Special Interest

This section addresses the question of the ethics of employee pay cuts purportedly made to maintain corporate competitiveness.

Ethical Dilemma

"A Buyout, a Reorganization and the New Face of Job Security"

http://openchannel.nbcnews.com/_news/2012/12/26/15907309-a-buyout-a-reorganization-and-the-new-face-of-job-security?lite

According to the article, Momentive Performance Materials sprawls near the banks of the Hudson River, just outside Albany, New York, its silver silos and windowless sheds nestled in the low, rolling hills. Men who work there see deer on the road as they drive their pickups to work.

Inside the plant, the tranquility vanishes. It's not just that the workers are handling toxic, explosive chemicals. That's par for the course in silicone manufacturing. Many Momentive employees have been at the company for decades, back when it was part of General Electric. They accept the risks in exchange for a steady, sizable paycheck.

The problem is that the paycheck is neither as steady nor sizable as it used to be.

Apollo Global Management, a private equity firm, bought the former GE Advanced Material (Silicones & Quartz) in 2006 and renamed it Momentive. Two years later, in the middle of a three-year contract, Apollo slashed the wages of some 450 union workers by up to 40 percent. Suddenly, workers found themselves being paid what they had made 10 or 20 years earlier

The Momentive workers were standing still, but the world was changing around them. A contract isn't what it used to be. The men — and they are mostly men — at Momentive have what millions of unemployed Americans covet: a job. And not just any job, but a union job in manufacturing, the kind of job likely to get increasingly rare as right to work laws spread. But that job pays less than it did a decade ago, and many Momentive employees say they're slipping backward. Some are losing their homes. This is job security in 2012, the new face of stability in the American workplace.

Momentive produces silicones for dozens of familiar brand names. Its customers include Goodyear, Motorola, L'Oreal and The Home Depot. Its silicones are in caulks, gaskets, carpets and bedding. They're the conditioning

ingredient in "2-in-1" shampoo. When Neil Armstrong took his one giant leap, the sole of his moon boot was made of silicone rubber produced at the Waterford plant.

Workers used to make 700,000 pounds of silicone gum every week at the factory, according to one longtime Momentive worker, who like many others interviewed for this story spoke on condition of anonymity, fearing retribution from the company. Now, he says they make less than 200,000 pounds. It's not clear if the overall production has declined or been shifted elsewhere. In addition to its factory in New York, Momentive has factories in Ohio and West Virginia, Japan, Germany and Italy. A finishing plant started up in Chennai, India, in 2010, as did a joint venture in Jiande, China. Another Chinese plant is slated for completion in 2013.

Momentive declined to share production information, but in a statement it said, "Waterford continues to be an important facility in our North American network and we have recently consolidated our Silicones and Quartz divisional headquarters at this site. It is also critical that we continue to strengthen our global footprint, which will allow us to meet the needs of our geographically diverse customer base."

When GE spun off its silicones plant six years ago, the Waterford workers were apprehensive. They had a pretty good thing going, and most weren't excited about a change. Back then, it wasn't uncommon for a Momentive worker to take home $100,000 a year – serious money for seriously skilled labor. "I make more than some husbands and wives combined," one man told me. But, he said, "It's not a perfume factory down there." The plant operates 24 hours a day, 7 days a week, 365 days a year. The men say they regularly worked 60- to 70-hour weeks, including overtime. Schedules of seven days on, one day off, seven days on again were common, they say.

As the union negotiated its first contract with Apollo, it was bracing for major cuts, said Dominick Patrignani, president of IUE-CWA Local 81359, part of the Communications Workers of America, which represents workers at the Waterford plant. Apollo's $3.8 billion acquisition of the company, completed in December 2006, was financed with more than $3 billion in debt, and workers figured the company would be tightening the belt.

To their surprise, the agreement reached was nearly identical to the previous contract under GE. The three-year contract, which covered two locals at the Waterford plant and workers at a Momentive facility in Ohio, was signed in October 2007. A company newsletter praised it, saying it "locks in gains in pay and pensions" and "retains key job security provisions."

That didn't last.

In December 2008, days before Christmas, more than 400 hourly workers at Momentive's Waterford plant were called in to speak with their supervisors. One by one, workers were told that their pay would be cut, workers say. They would be assigned to new jobs, with new duties and wages.

In its written statement, Momentive said it has had to make “difficult decisions regarding our operations in a challenging economic environment to remain competitive on a local and global basis.”

Workers were told that the pay cuts sought to bring their wages in line with the prevailing wage in the region, they said. But as several noted, others in Saratoga County don’t work with toxic and dangerous materials. Their wages should be compared to those of workers in the chemical sector, they said.

Those new wages also varied wildly, according to documents obtained through a Freedom of Information request to the National Labor Relations Board. One man, a 35-year veteran of the plant, dropped from $29.11 an hour to $17. Another, closing in on 20 years at the company, dropped from $29.11 to $19.50. A man with two years on the job kept his $29.11 wage rate. The longest-tenured worker, with more than 39 years of experience, went from $29.11 to $24. A plant services operator, hired in 1978, found himself earning $14 an hour — a cut of almost $12 from his previous wage. “Guys with a year or two of service ended up with a higher rate than I did,” said one longtime worker who has two children in college. Before the cuts, he earned $27.31 an hour His new hourly wage was $19.50.

The wage cuts were like “an attack on my family,” another Momentive employee said. He has two children, too, and he regularly worked 70-hour weeks to “give them a good opportunity to go to a good school, get a good education, without going into debt.”

If the company had proposed a 5 to 10 percent pay cut for all workers, including management and technicians, that would have been easier to swallow, several men told me. “It was the arbitrariness that really pissed everyone off,” one said.

In fact, Momentive executives did take a 10 percent pay cut, in April 2009. But in January 2010, just as the workers’ pay cuts took effect, the executives’ “temporary pay reduction” was reversed, “as a result of the recovery in our business,” according to the company’s 2010 annual report.

As the Momentive workers saw it, the abrupt wage changes violated the contract signed in 2007, less than 18 months before the pay cuts were imposed. The local representing the affected workers filed 477 separate complaints with the National Labor Relations Board in January 2009, one for each affected worker. They asserted that Momentive “has been engaging in unfair labor practices,” by changing wages, promotion, how people got overtime — all things spelled out in the original contract.

The company argued asserted that negotiating wage and rate changes at the local plant level was allowed, under the terms of the national agreement. The company said the changes were needed to stay competitive and bring wages in line with the skills required.

More than a year later, following months of investigation, the NLRB responded. The board's regional director found that Momentive had indeed "failed to continue in effect all the terms and conditions of the National Agreement." In other words, it had broken the contract. The order also found that Momentive had failed to bargain collectively with the union in violation of the law. The board sought an order requiring the company to restore the wage scale, rate, progression, job descriptions, and several other points. The board also wanted the company to pay interest on any back pay or other monetary awards.

The NLRB scheduled a hearing for April 5, 2010. That hearing got pushed to June, in hopes that the union and the company would reach a settlement, a common move in such cases.

But June 2010 was also when the original three-year contract — the one Momentive had broken with the wage cuts — was slated to expire. When Momentive executives proposed a deal, the union found itself negotiating a settlement and a new contract at the same time.

The proposed settlement was simple: the 400-plus workers whose wages were cut would get back pay covering their lost earnings. Going forward, though, they'd all be getting the new, lower wage, in their newly defined positions. The company agreed to a $2 an hour bump — on the reduced pay. The NLRB case would be closed, ending any negotiation over job descriptions or the other issues in dispute.

Workers said the company dangled the settlement payments at the vote on the contract, held in the company firehouse at the Waterford plant. "They had a box of envelopes, and the envelopes had statements in them with a number, how much money each worker would get in back pay, under the settlement," one recalled.

They also warned that "if you keep going with the NLRB action, it could take years," several employees said.

By the time of the settlement proposal, which called for payments of more than $10,000 for many of the workers and more than $30,000 for some, many whose wages had been cut were struggling. "They were just so desperate," one said. "They were just in a hole," another added.

Still, workers in Local 81359 say they voted down the contract, preferring to move forward with the NLRB action.

But they weren't the only local voting. The contract covers three bargaining units, including another local in the plant, representing salaried and technical workers, and workers at an Ohio branch. Although those workers didn't have their pay cut, and weren't covered by the settlement, they had a say in whether it would be approved or rejected, because it was tied to the contract. Those locals voted to approve the proposal, and the contract was ratified. The Local 81359 workers got back pay with interest, but the wage cuts would stand.

Not everyone at Momentive took a pay cut.

Steven Delarge, a Momentive executive, received a bonus of more than $400,000 in 2010, in part for his role in "the successful completion of collective bargaining agreements" with union workers, according to the company's annual report. He also got a raise, bumping his salary from just under $400,000 to $450,000 in 2011. He has since left the company.

Momentive CEO Jonathan Rich received a bonus of $1.3 million for the year, The bonus was based on "the achievement of applicable performance targets," according to the company's annual report, which stated, "The Company achieved its primary environmental objective and, although it did not achieve its safety objective, the results were improved over the prior year." Rich, who left the company in October 2010, also received severance payments of $975,000, and an additional $350,000, the reasons for which are not spelled out in company filings. His total compensation for the year was more than $6.5 million, according to company documents.

The current executives, Craig Morrison and William Carter, are well-compensated, too. Morrison's total compensation was nearly $3.5 million in 2011, Carter's more than $2.6 million.

Apollo Chairman and CEO Leon Black is also doing well. Last year, he celebrated his 60th birthday with a blowout at his Hamptons home, featuring "a seared foie gras station" and a $1 million performance by Elton John, according to the New York Times.

Discussion Questions

1. If non-managerial employees are required to take a pay cut, does management have an ethical obligation to take a corresponding, comparable pay cut? Explain your response.

This is an opinion question, so student responses will likely vary. Some students will perhaps contend that in terms of managerial decision-making, management must "serve by example"—In other words, if financial circumstances dictate a pay cut for non-managerial employees, management should share the burden in terms of taking a comparable pay cut as well. Some students may contend that pointing an accusatory "finger" at managers who do not take a personal pay cut represents "class warfare!"

2. Consider and assess the argument that Apollo Global Management/Momentive Performance Materials actually acted ethically in this case, preserving jobs by cutting employee pay.

In terms of answering this question, the key factor is determining whether an employee pay cut was truly necessary to preserve jobs and promote corporate competitiveness. As the article indicates, managers ultimately did not share the burden of the pay cuts by assuming pay cuts themselves—For non-managerial employees, the question will always remain whether their own pay cuts, or at least the extent of those pay cuts, were truly necessary and fair.

3. The latter part of the article refers to specific Apollo/Momentive executive compensation details (for example, Apollo CEO Leon Black's extravagant 60th birthday party celebration). Is this merely "class warfare" on the media's part, or do such details shed important "light" on the issue of the growing divide between the wealthy and the non-wealthy in the United States?

This is an opinion question, so student responses will likely vary. Some students may contend that if non-managerial employees are not satisfied with the extent of their pay, they should either find employment elsewhere, or aspire to the managerial ranks. Despite this argument, pay equity is a pressing issue for all organizations, and the extent to which employers address this issue can determine, to a great extent, whether employees continue to be motivated to promote the best interests of the organization as a whole.

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Of Special Interest

This section of the newsletter will assist you in covering Article 1 ("Dillard's Settles Charges It Made Sick Workers Illegally Reveal Conditions") and the Ethical Dilemma ("A Buyout, A Reorganization and the New Face of Job Security") of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Article 1, "Dillard's Settles Charges It Made Sick Workers Illegally Reveal Conditions"):

For an excellent summary of the Americans with Disabilities Act as it pertains to employment, refer to the following article from the Equal Employment Opportunity Commission:

"Facts About the Americans with Disabilities Act"

http://www.eeoc.gov/facts/fs-ada.html

Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA's nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules.

An individual with a disability is a person who:

Has a physical or mental impairment that substantially limits one or more major life activities;

Has a record of such an impairment; or

Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

Making existing facilities used by employees readily accessible to and usable by persons with disabilities.

Job restructuring, modifying work schedules, reassignment to a vacant position;

Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the individual applicant or employee. Not all people with disabilities (or even all people with the same disability) will require the same accommodation. For example:

A deaf applicant may need a sign language interpreter during the job interview.

An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.

A blind employee may need someone to read information posted on a bulletin board.

An employee with cancer may need leave to have radiation or chemotherapy treatments.

An employer does not have to provide a reasonable accommodation if it imposes an "undue hardship." Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

An employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids.

An employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one. if an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs a reasonable accommodation. Once a reasonable accommodation is requested, the employer and the individual should discuss the individual's needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.

Title I of the ADA also covers:

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Medical Examinations and Inquiries

Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

Medical records are confidential. The basic rule is that with limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional. For example, an employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

Drug and Alcohol Abuse

Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADA.

Teaching Tip 2 (Related to the Ethical Dilemma, "A Buyout, a Reorganization and the New Face of Job Security")

For further information regarding Apollo Global Management's buyout of Momentive Performance Materials, refer to the following accompanying article:

"After Buyout, Union Workers Get a Lesson in Modern Economics"

http://openchannel.nbcnews.com/_news/2012/12/27/16074805-after-buyout-union-workers-get-a-lesson-in-modern-economics?lite

According to the article, when Apollo Global Management bought Momentive Performance Materials, a chemical factory in upstate New York, in 2006, it administered a lesson in modern-day economics at what had long been one of the biggest and most stable employers in the Albany area.

Private equity companies like Apollo make money through debt. In a leveraged buyout, a firm hones in on a company, often one that is publicly traded, and struggling, and takes it private. The acquisition is financed by borrowing against the company itself. The goal is to take the company public again, ideally in three to five years, and net a profit for the investors and the firm. The debt remains with the company.

The debt load can translate to major belt-tightening at the acquired company. The buyer is looking to increase productivity, reduce inefficiencies and, as jargon would have it, create synergies. That often means a private equity firm will buy up a few companies in a particular industry, mash them together and eliminate the overlap. That often means eliminating jobs.

Whether private equity firms, on average, create or destroy jobs is a matter of debate. Buyouts by private equity firms have a generally positive effect on the financial performance of the acquired companies but are "associated with lower employment growth," according to a 2008 report by the Government Accountability Office. A more-recent academic paper found that post-buyout, companies see increases in both layoffs and jobs created. On balance, the authors write, there is a 1 percent net loss of jobs when a company is taken over by a private equity firm.

But the loss of jobs is often not the only toll for workers caught in the middle of a leveraged buyout, as Momentive workers learned soon after Apollo purchased their company from General Electric.

Apollo cut the wages for most of the production and maintenance workers at its Waterford plant. The National Labor Relations Board investigated and tentatively concluded that the company had violated the contract. But with other locals rallying behind a new contract offer, hundreds of the production workers were forced to accept drastically reduced pay.

In the months after the contract vote, the stress level at the plant was through the roof, said one worker, who, like his colleagues, spoke on condition of anonymity because he feared retaliation from company officials. His doctor treats lots of Momentive workers, he said, "and she says Xanax should be in our drinking water."

The anxiety "was affecting my stomach," another worker said. "I can't eat. I'm drinking more than I've ever drank in my whole life."

Since the wage cuts, workers said, attracting qualified hires has been difficult. The new contract, they said, has brought more responsibility for less pay. They alleged that new hires are asked to perform dangerous tasks with inadequate training. And longtime workers are taking second jobs to make up for lost pay, several men said.

"There's a guy near me who has a part-time job at Wal-Mart," one man said, adding that in his unit people work seven afternoons in a row, with one day off, then seven straight days of midnight shifts. "He often says he's only got three hours of sleep" before returning to work, he said.

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"This is suicidal," another man said.

Momentive, in a written statement, says it "seeks to attract a world-class workforce through competitive compensation and benefits, while providing a safe work environment." The company also notes that since 2006, when Apollo took over, the Waterford site has shown improvement on two of OSHA's key measures of worker safety.

Still, the union has raised safety concerns. For years, the Waterford plant was part of a special program at the Occupational Safety and Health Administration that honors workplaces with exemplary safety and health records and procedures. Waterford was a VPP Star site, the highest rank within the Voluntary Protection Program. The benefits of the VPP star aren't just a nice flag to fly in front of the factory. Once in the program, the site is exempt from random checks by OSHA inspectors.
In late 2010, the union withdrew its support for the VPP program in Waterford, which is required for the certification. Such a loss of union support is rare, according to OSHA. In January 2011, the plant lost its VPP status.

That withdrawal from the program was a long time coming. In November 2008, the membership of Local 81359 had sent a letter to Momentive's management, saying the company's "actions and tactics have created this hostile work environment and we fear for the health and safety" of the plant workers.

After that warning, OSHA inspectors found eight serious violations at the plant over several months in 2010, each resulting in a $4,500 fine.

One of the violations involved "an uncontrolled release of sulfuric acid," exposing employees to "inhalation and burn hazards." Momentive did not furnish employment "free from recognized hazards that were causing or likely to cause death or serious physical harm," according to the violation notice. (Four of the violations were later "deleted" by the agency during discussions with the company of fines and penalties.)

"The night of the sulfuric acid release there were some young new guys there, and a guy who had been there for a long time," said Dominick Patrignani, a union official. "He kept people from getting burned. We would have been reading about it in the obit section, possibly."

"The knowledge base of the people they're bringing in is nothing like we've ever seen before, because you can't get highly skilled workers at $14 and $15 an hour."

On May 25, 2011, two workers on the night shift were severely burned in a flash fire at the plant. In the early morning, the men were preparing to clean some equipment, according to one worker with knowledge of the incident. But when they started to take apart a piece of pipe, gas somehow ignited. The men were severely burned and were airlifted to the Burn Center at nearby Westchester Medical Center. Both survived, but now face a long recovery.

"This whole event could have been prevented," Patrignani said, adding that he had raised safety concerns about that area of the plant to the operations manager the week before the accident. In November 2011, an OSHA investigation of the May accident resulted in $81,000 in additional fines for Momentive, for 10 serious violations and one repeat violation. The company is appealing the fines and OSHA has yet to issue a final determination.

For Momentive's Waterford workers, the wage changes are a done deal. A group of workers filed additional complaints with the National Labor Relations Board, but those went nowhere. Some organized a vote to decertify the union — essentially, to fire the union as their representatives — but that failed.

They have received their settlement checks, and most are resigned to the drastically lower pay, new responsibilities and the tension. But resignation doesn't mean the living is easy.

I met with one Momentive worker, his fiancée and their young daughter at a Dunkin' Donuts off Route 9. When I mentioned that someone told me I should talk to the wives if I want to get the real picture of the pay cuts and their impact, she nodded. "We almost lost him, you know," she said. "He had a heart attack from the stress." He was now seeing a therapist and a psychiatrist, and was taking multiple anti-anxiety drugs, she said.

Over coffee and a box of doughnut holes, the couple laid out what they've been through since the pay cuts took $400 a week out of his paycheck.

First they got jammed up on bills and they cut down to one car, a hardship in an area where you can't hail a cab or catch a bus, and you can't get a gallon of milk without driving to a store.

The man had to ask a friend for a ride to work. "It was hard to do that," he said quietly. "I'm not used to asking for help."

Since then, they've scaled back a lot.

"We're OK with that," his fiancée was quick to say. She doesn't get her hair done any more, or her nails, things they took for granted before. They don't go on vacation, or to the movies. But the furnace is on its last legs, she said, and they don't know how they would pay for repairs if it conks out.

And it's not just the little things. When his wages were cut, they fell behind on their mortgage, and the bank wasn't willing to lower their rate, now at 8.5 percent. They couldn't refinance with another lender, because their credit was bad. "Of course it was bad," she said. "We lost a huge chunk of our income."

When they couldn't refinance, and couldn't get a loan modification, they said they got tangled up with a foreclosure rescue scam, which took cash up front and advised them to fall further behind on

their loan. Efforts to work with government programs didn't pan out. Now they've declared bankruptcy and the house is in foreclosure.

"It's all I've ever wanted, to work. To provide for my family. I didn't want El Dorados and Rolexes," the Momentive worker said, worrying the sleeves of his brown work jacket.

As the workers and their families settle in to their new reality, more changes may lie ahead. Momentive continues to "pursue various cost reduction initiatives" across its sites, including "sourcing through low-cost countries, overtime reduction and other labor efficiency," according to its 2010 annual report. Whether that means moving more production to China, where the company expects to "generate future growth," remains to be seen. Momentive said in its written statement that "Waterford continues to be an important facility" in the company's "North American network."

The company has also been making moves in the United States, merging Momentive with competitor Hexion in late 2010.

Then, in April 2011, Momentive filed the paperwork for an $862 million initial public offering that would have brought the company out of Apollo's hands and return it to public trading. But the company is, as its 2011 annual report notes, still a "highly leveraged company," owing $2.9 billion at the end of the year. By June 2012, that figure had grown to nearly $4 billion. In August, Standard & Poor's downgraded Momentive's debt from B- to CCC. A month later, Momentive withdrew the IPO filing.

While Momentive may not go public, its owner, Apollo Global Management, did. Following in the footsteps of industry giant Blackstone, Apollo launched an IPO in March 2011. At the time of the IPO, Apollo CEO Leon Black held more than 90 million shares, according to the company's prospectus, worth almost $1.8 billion when the IPO launched. A company spokeswoman, Melissa Mandel Kvitko, said none of Apollo's management, employees, affiliates, or strategic investors sold shares in this offering.

As for Momentive workers, they still take home a nice paycheck. They know that. They work hard at their union jobs, and they get paid enough to support themselves and their families, maybe save enough to survive into old age. But something besides the pay has changed.

"I don't like what's happening. I don't think it's right. I don't think it's fair. But at the same time, I still have mixed feelings. I'm probably paid better than 90 percent of people," one man said. It's the principle, he said: It's as if he had $10 in his pocket, and Apollo came along and took $2. He still has eight bucks, but that doesn't make it right. And while he makes more than most people, he said, being able to retire comfortably after decades of work is what's supposed to happen. It's not an outrageous luxury, nor should it be.

Now, though, the canceled IPO and the debt load have him wondering about the plant's future, and the future for young workers at Momentive. "I realize they're a good employer, and they provide a lot of good jobs," he said. "I don't want to see them fail."

He goes to work every day, he said, and does the best he can. But the contract fight has changed his relationship with a job he once loved. "It's like being betrayed by a spouse," he said. "It's awful hard to go back. It's never going to be the same for me."

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