

# What to Do About

# PERSONNEL PROBLEMS

June 2010

NEW YORK EDITION

Issue 429

## CONTENTS

### From the Courthouse ..... 2

Gastric Bypass Covered by  
Workers' Comp  
Disabled, but Otherwise Qualified?

### Is Your Compensation Program Working for You? ..... 3

### This Month's Statistics .... 4

## EDITOR'S NOTE

Sharon Parella, Esq., our lead feature interviewee, concentrates in defending employers against discrimination and compensation claims in state and federal courts and federal, state, and local fair employment agencies, and in proceedings before the Financial Industry Regulatory Authority. Her practice also focuses on employment issues related to mergers and acquisitions, and significant restructurings and downsizings. She can be reached at [sharon.parella@kattenlaw.com](mailto:sharon.parella@kattenlaw.com).



## Expert Explains New York's Faithless Servant Doctrine

New York's "faithless servant doctrine" gives employers the power to deny compensation covering periods when an employee acted disloyally. While the doctrine is often applied to fiduciary breaches, recent cases, such as *Astra USA v. Bildman* (Supreme Judicial Court of MA, No. SJC-10361 (2009)), which applied New York law to misconduct including sexual harassment, interfering with an investigation, and intimidating witnesses, have expanded its scope. BLR spoke with Sharon Parella, Esq., a partner of the Manhattan law firm Katten Muchin Rosenman LLP ([www.kattenlaw.com](http://www.kattenlaw.com)), about the doctrine and what it means for New York employers.

**BLR:** *What types of conduct would be considered sufficiently severe for the faithless servant doctrine to apply?*

**Parella:** It's most commonly seen when an employee diverts a business or corporate opportunity, or commits financial improprieties, or diverts customers to another corporate entity to receive kickbacks. Also, when an employee lessens his work activities and misappropriates business secrets while setting up a competitive activity—these are the kinds of cases where the doctrine is most commonly applied.

**BLR:** *Do they have to be repeat offenses?*

**Parella:** Authorities have differed on that point. I think what you'll see over time, as the courts continue to refine the doctrine, is that where there is a substantial offense, it does not necessarily have to be a repeat offense.

**BLR:** *Can an employer use it to deny severance and other pay without resorting to a lawsuit?*

**Parella:** Yes, but I would notify the employee of the basis for withholding,

saying, essentially, "you've violated the faithless servant doctrine, you're subject to the doctrine of equitable forfeiture, and you're not being paid. Sue us if you think you're entitled to the money and this will be our defense." If someone steals from you, you're not going to pay him, and you shouldn't have to.

**BLR:** *One observer, commenting on the Astra case, said, "The notion that an employer can recover whatever it paid the employee without any offset for the value of the work performed is ... pretty dangerous." Is New York's law unusually severe?*

**Parella:** The *Astra* court made a wise statement: "Harshness of the remedy is precisely the point." I think it's indisputable that the *Astra* former employee who was forced to disgorge compensation had behaved in a manner which was extraordinarily harsh for the company. Too often, employees engage in this kind of misconduct and employers are left to clean up the damage done to their workplaces.

The faithless servant doctrine balances the scales a bit. It gives employers the opportunity to say there are real consequences for your actions. I think it's fair because it doesn't give an employer any unilateral power. An employer seeking equitable forfeiture will be subject to an in-depth factual inquiry in court as to the basis for withholding or seeking to recoup payments.

I think the faithless servant doctrine is a good, old-fashioned remedy which, with the help of the courts, has evolved into a valuable tool for employers to protect the integrity of their workplaces.

## Gastric Bypass Covered By Workers' Comp

Gastric bypass surgery for a morbidly obese employee was covered by workers' compensation when the employee's weight gain was caused by compensable injuries and surgery was required to recover.

**What happened.** The employee, "James," slipped and fell at work in 2002. His ensuing workers' compensation case claimed injuries to his head, neck, back, and knees. He claimed that his morbid obesity resulted from his inability to move and exercise as he had been able to do before his on-the-job injury. As a result, James claimed that he developed knee and back problems and, in an effort to combat those problems and counter a broader threat to his survival, he sought authorization to undergo gastric bypass surgery.

A workers' compensation law judge granted his request. Upon review, the Workers' Compensation Board affirmed, holding that the surgery was causally related to the compensable injuries.

**What the court said.** In affirming the decision, the Appellate Division of the Supreme Court of New York

## Disabled, but Otherwise Qualified?

A New York boat captain's Coast Guard-issued license depended on periodic submissions of urine samples to be tested for illegal drugs. But, afflicted with "shy-bladder syndrome," the captain often had trouble submitting a large enough sample within the 3-hour time frame. Finally, in 2001, the Coast Guard demanded that he admit he had "refused" to take the drug test. That's when things got difficult.

**What happened.** "Kearney" ran a boat, ferrying waste from water treatment plants to plants that made it into fertilizer. Hired by the New York City Department of Environmental Protection (DEP) in 1988, he first had trouble producing a urine sample for a random drug test in 1992, again in 1996, but not in 1998. But in 2001, DEP decided, upon Kearney's inability to produce a sample, that it would term him as having refused to take the test. He was transferred to a medical clinic, but the clinic refused to take the sample he offered to produce. He appealed to the drug testing contractor, which gave him instructions to pass on to his doctor about documenting the medical condition preventing him from producing samples. The doctor answered in a timely manner that Kearney's condition is chronic and can be treated with a prescription the doctor had given him. But for no reason

held: "The employer is obliged to pay for claimant's medical care for such period as the nature of the injury or the process of recovery may require" (Workers' Compensation Law Sec. 13[a]; *Spyhalsky v. Cross Construction* (2002)).

"There is evidence in the record that claimant has gained a substantial amount of weight since 2002 due to the sedentary lifestyle imposed by the compensable injuries," the court continued. "Claimant's (James's) treating orthopedic surgeon opined that claimant's back and knee pain was exacerbated by his obesity and that such could be alleviated by weight loss. While material in the record before us could support a different result, substantial evidence exists for the Board's determination that claimant's weight gain was caused by his compensable injuries and that gastric bypass surgery 'would assist in [his] recovery.'" (Workers' Compensation Law Sec. 13[a]; *Bolds v. Precision Health, Inc.* (2005)). *Laezzo v. New York State Thruway Authority*, Supreme Court, Appellate Division, Third Department, 2010 NY Slip Op 1860 (2010).

### POINT TO REMEMBER

In this case, there was substantial evidence that the employee's obesity occurred *after* his injuries. However, employers are left to wonder what happens when an obese employee sustains compensable injuries. The state's expansive position in granting employees' claims for workers' compensation may give employers pause.

that's clear in the legal opinion, the city's medical review officer found the notice insufficient. Over the ensuing months, Kearney offered hair samples, blood tests, and saliva tests, all of which were negative for drugs. But the Coast Guard refused to renew his captain's license, and DEP would let him work only temporarily and on land duty. He was eventually fired in June 2003—apparently for refusing to admit he'd refused to take the drug test. He sued, charging violation of the Americans with Disabilities Act (ADA). A jury in federal district court ruled in his favor, awarding him \$225,000 in back pay and damages. Both sides appealed to the 2nd Circuit, which covers Connecticut, New York, and Vermont.

**What the court said.** Appellate judges ruled that because he needed the Coast Guard license to perform his job, he wasn't an otherwise qualified employee under ADA. So they overturned the jury's verdict. *Kinneary v. City of New York*, U.S. Court of Appeals for the 2nd Circuit, Nos. 08-1330-cv(L) and -1630-cv(XAP) (3/19/10).

### POINT TO REMEMBER

Given the refusals of the agencies involved, appellate judges no doubt felt they had to rule against Kearney. But we think he got a raw deal, a victim of the agencies' circular arguments and unreasonable demands. Note that he complained twice to the city's civil rights office and never got an answer.

# Is Your Compensation Program Working for You?

Compensation expert Ann Bares, managing partner of Altura Consulting Group, devoted a 60-minute webinar sponsored by *Workforce Management* magazine to trying to persuade HR and comp professionals to steer more organizational dollars toward variable pay as companies emerge from the current economic downturn. She called her talk “Making Compensation Work in 2010 and Beyond” and followed up by answering attendee questions on the magazine’s website.

**Business realities are new**, and your compensation strategy should be, too. Bares stresses that organizations have historically relied on base pay almost exclusively to accomplish all of a firm’s goals. It isn’t flexible enough to do so, she cautions—and worse, it looks backward, on past performance, rather than forward.

So if past performance isn’t the key criterion, what is? Bares says we should be focusing instead on individuals with mission-critical talents and on people’s longer-term potential to contribute to the organization.

Another huge problem with overreliance on base pay is that it creates and nurtures a culture of entitlement—something organizations can’t afford in this economy. As she says, “Salaries are forever.” Instead, Bares advises, firms should look at the whole range of components of what many compensation experts call “total rewards”—a combination of cash, recognition, opportunities for training and development, equity, benefits, growth opportunities, work/life balance including flexible schedules, corporate culture, and values.

That’s a lot of content for a structure that typically focuses only on base pay. But Bares’s latest research has shown that 33 percent of survey respondents are adding development opportunities to their compensation assessments, knowing that employees who pursue those chances are more valuable to other employers as well as their own.

**Why change now?** In short, given both the poor economy and skyrocketing costs for healthcare coverage (which experts say have stifled raises for at least the last 8 years), companies can ill afford to grant across-the-board, semiautomatic merit increases. Bares’s research shows that between 2000 and 2008, such increases averaged 3.9 percent. In 2009 (with economists saying the current downturn began in September 2008), the average raise was 2.2 percent, and companies anticipated granting increases of 2.5 percent in 2010. But that’s the average among companies that planned to give any raises at all this year.

Some 52 percent froze base pay in 2009, with only half of those firms planning to resume normal increases this year. Furthermore, 13 percent have reduced pay, of which only 39 percent plan to raise pay levels this year.

It’s high time, says Bares, for companies to begin diversifying the total rewards they offer, much as investors have always been advised to diversify their portfolios. In compensation, by contrast, companies have typically focused only on base pay to accomplish all organizational goals.

**Get top management involved.** Revamping your compensation structure to better align it with corporate goals isn’t a task that can be left to HR. What are the CEO and CFO’s goals for the company, even in the short term? And which type of rewards, whether cash or noncash, are best suited to achieve those goals?

As Bares says, “The whole question of positioning your compensation program for success in 2010 and beyond must be framed in the larger context of what your organization must do to succeed.” Be sure to look, she adds, at “the threats as well as the opportunities.”

When you approach top management to begin the dialog and planning process for revamping compensation, acknowledge that it is either the, or one of the, biggest expenses in any business. So ask top managers if they feel they’re getting a good return on investment with the current system. Chances are they’ll see it as less than it could be.

Moving forward, remember as well that although the economic downturn has squeezed pay and benefits, “crisis is a game changer,” says Bares. “It provides us with the chance to hit the reset button and make new deals.”

**It’s not about equality.** Attendees at Bares’s webinar repeatedly expressed concerns that employees will perceive variable pay as inherently unfair. Bares addressed their point this way: “The labor market is going to keep doing what the labor market does best: sort through talent supply and demand, and drive up the price of those skills most critical to the most organizations. This is a reality that we who manage pay programs cannot afford to ignore.

“I think we owe our employees an education in how the talent marketplace works, and the impact it has on compensation programs and practices. I think it would be even smarter to provide regular information to employees about the organization’s critical skill needs and create resources and opportunities for those who are motivated to retool and position themselves for greater earning potential.”

Go beyond individuals. Any good compensation program, Bares advises, should be designed to reward goal achievements by departments, project teams, and the company as a whole. Most compensation programs focus only on individual performers.

# This Month's Statistics

	Latest Period	Current	Prior Report	A Year Ago	12 Month % Change
<b>CPI-U</b>					
National	Mar\10	217.6	216.7	212.7	2.3%
Northeast Region	Mar\10	233.2	232.4	227.3	2.6%
<b>CPI-W</b>					
National	Mar\10	213.5	212.5	207.2	3.0%
Northeast Region	Mar\10	230.6	229.9	223.6	3.1%
<b>ECI Employment Cost Index</b>					
Total Compensation--National	1Q\10	111.1	110.2	109.3	1.6%
Total Compensation--Northeast Region	1Q\10	111.8	111.0	109.8	1.8%
Wages and Salaries--Private Industry	1Q\10	111.4	110.9	109.8	1.5%
Wages and Salaries--Civilian Workers	1Q\10	111.7	111.2	110.0	1.5%
Wages and Salaries--Northeast Region	1Q\10	111.7	111.1	109.9	1.6%
Benefits--Private Industry	1Q\10	110.4	108.8	108.2	2.0%
<b>Average Weekly Gross Wages</b>					
National, Total Private*	Mar\10	\$629.37	\$626.25	\$613.01	2.7%
New York, Manufacturing	Mar\10	\$741.74	\$737.35	\$701.57	5.7%
<b>Average Hourly Wages</b>					
National, Total Private*	Mar\10	\$18.90	\$18.92	\$18.52	2.1%
New York, Manufacturing	Mar\10	\$18.18	\$18.62	\$18.27	-0.5%
<b>Unemployment*</b>					
National	Mar\10	9.7%	9.7%	8.6%	1.1%
New York	Mar\10	8.6%	8.8%	7.8%	0.8%

\*seasonally adjusted

## KEY TO STATISTICS

**CPI-U:** Consumer Price Index for all urban consumers; the newer index representative of the buying habits of about 87% of the total U.S. population. (1982–84=100)

**CPI-W:** Consumer Price Index for urban wage earners and clerical workers; the older index covering only about 32% of the U.S. urban population.

**ECI:** Measures change in compensation per hour worked, including wages, salaries, and employer costs of benefits. (6/89=100)

**Average Weekly Gross Wages and Average Hourly Wages (National, Total Private):** Data relate to production workers in manufacturing and mining; construction workers; nonsupervisory workers in transportation, public utilities, and wholesale/retail trade; also finance, insurance, real estate, and other services. Accounts for approximately 80% of the total employees on private, nonfarm payrolls.

## Want to Increase Productivity? Create a Strong Learning Culture

Companies that cultivate a strong learning culture within their organization experience distinct business advantages, says a recent study from Bersin & Associates ([www.bersin.com](http://www.bersin.com)). The study, titled *High-Impact Learning Culture*, found that the majority of these companies are market leaders with highly productive employees and satisfied customers.

“In fact, we found that a company’s learning culture has more positive business impact than any other factor—including budget size,” said Josh Bersin, firm president, who explains that a learning culture includes all programs, processes, and related investments that support ongoing skills development and learning, both formally and informally, across an organization.

The study revealed that 96 percent of companies with strong learning cultures reported high employee productivity. These employees feel empowered and demonstrate the ability to quickly acquire new skills and bring innovation to their jobs, reports Bersin. Participating companies also report they are better able to maintain competitive costs and respond to customer needs than organizations that do not support workplace learning.

*What to Do About Personnel Problems* is issued monthly by BUSINESS & LEGAL REPORTS, INC., 141 Mill Rock Road East, P.O. Box 6001, Old Saybrook, CT 06475-6001; Phone: 800-727-5257; Visit us on the Internet: [www.blr.com](http://www.blr.com); E-mail: [cceplenski@blr.com](mailto:cceplenski@blr.com)