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Civics Education Continues During Year Two of the Pandemic

BY JUDGE MICHAEL CHMIEL

Editor's Introduction: What's Happening in the Realm of Civics Education Initiatives of the ISBA's LRE Committee?

For many years, the members of the ISBA Law Related Education (LRE) Committee have been witness to the passion of Committee member, McHenry County Circuit Court Judge Michael J. Chmiel, for his communications about the functions and merits of the legal system to the public, and in particular, to students and teachers in their community schools. Those communications include how the judicial system works and what it can accomplish for the litigants in court proceedings and for the public in general. Thus, we are familiar with the Civics Education Project he has long overseen for LRE which has delivered many benefits to the very communities the Committee is tasked to enlighten. That Project has multiple parts to it that, together, engage a broad cross-section of the Illinois State Bar Association (ISBA) membership which offers important awareness of the legal system to the intended

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Martin Luther King Jr. Day 2022: A Different Perspective on the 'Legacy' of MLK Jr. From Civil Rights Attorney Vernon Jordan

BY SHARON L. EISEMAN

First, before turning to a discussion of Dr. King's legacy and what it means, let's review how a holiday in his memory was established. Are you surprised to learn that serious controversy arose in 1983 when Congress moved to create a national holiday to honor Dr. Martin Luther King, Jr. and commemorate his legacy? It did, from southern legislators as well as from President Ronald Reagan who opposed any national observance for Dr. King who was variously described as "an outside agitator" (by Senator Strom Thurmond in 1968 following Dr. King's assassination), and as someone who "welcomed collaboration with Communists" (by North Carolina Senator Jesse Helms). To express his resistance that year, Helms led a sixteen-day

Local Government Administrative Hearings: What Are They, How Do They Operate, and Does Your Community Have Such a Process?

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audiences.

In his role as 'overseer' of the LRE Committee's Civic Education Project, Judge Chmiel engages in outreach to ISBA members, encouraging them to serve as volunteers for one or more of the Project's diverse components which are quite varied. All of them, however, are aimed at serving the public-and its various local government entities that deliver educational resources to their communities-to ensure representatives of the legal profession are present to identify for their populations the various resources related to the functions and purposes of our broad legal system. The following overview of the Project's initiatives, authored by Judge Chmiel, was shared by him at the October meeting of the LRE Committee.

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When your author became a judge, he asked to be appointed to the Standing Committee for the Law-Related Education of the Public, a committee of the Illinois State Bar Association ("LRE"). The 'ask' was in consideration of his new-found role in the legal system as a Judge, where he could give neither legal advice nor advisory opinions. More than a decade ago, LRE largely focused on the ISBA Mock Trial Invitational. Then, a Civics Education Subcommittee (the "CES") was formed within the confines of LRE, whose objective was to expand opportunities to educate the public about civics, especially with a focus on the court system. LRE meets about six times each year, to discuss and otherwise advance the efforts of the ISBA with mock trials, presentations to students and their teachers, presentations to adults, and written materials made accessible to the public, including the LRE Newsletter.

ISBA Lawyers in Classrooms is a program which boasts well over 100 volunteers located throughout the State of Illinois. Names and contact information are published at ILCivics.org, which routes the Internet surfer to the offerings of LRE. The volunteers are members of the ISBA and freely give of their time and knowledge to talk about civics. Some topics are suggested in the published listing, but the participants are typically open to other topics which may more readily fit into a lesson plan. With the Pandemic still in effect, many, if not most, presentations continue being offered remotely through Zoom and similar platforms.

ISBA Speakers Bureau is a program which is almost identical to ISBA Lawyers in Classrooms, but with one important exception: it is designed to teach adults. As with students, members of the ISBA have often commented on the need for adults to be informed, or at least updated, on civics. These presentations are often made to community-based organizations. Recently, the Bureau has received a request from a public library for a presentation on estate planning issues.

Outreach by the CES has also become an important function of the Subcommittee, in that members of the ISBA are often very generous with their time, and stand ready, willing, and able to make presentations. Often, the challenge is to get 'gigs'. As a consequence, LRE typically participates in the conferences of the Illinois Council for the Social Studies, where presentations to social studies teachers are made and informational tables are staffed. As well, we have reached out to regional superintendents of education, Rotary International, and the like in an effort to inform these officials and organizations of the wide range of civics education programs we offer.

ISBA Civics Education Awards were established a few years ago, to recognize ISBA members who volunteered their time and talents to educate folks about civics. In 2021, three awardees have been recognized, including Judge Jennifer Johnson and Attorneys Steve Rakowski and Stanley Wasser. Judge Johnson sits in the Twenty-Second Judicial Circuit of the State of Illinois, where she handles all of the traffic cases for her Circuit, which is assigned cases for McHenry County, Illinois. In part, she received this recognition for making more than a dozen presentations, often

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Sharon L. Eiseman

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

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through remote means, and notwithstanding the Pandemic. Attorney Rakowski is engaged in the private practice of law in Chicagoland and received this recognition for his participation in the Speakers Bureau. Attorney Wasser, also engaged in the private practice of law but in Springfield, received this recognition for his years of service on the Mock Trial Subcommittee of LRE. Congratulations are extended by the LRE to each of these highly valued volunteers whom we hope will be an inspiration to others to also offer their time.

Miscellaneous matters related to civics education are regularly considered by the CES and LRE. The CES recently reviewed an Illinois Law Day Program which would be made available to Illinois residents through remote means and involve the leaders of the Illinois legal system. The CES is also working to reach out to libraries throughout the State. Other civics-related public education items are being developed, and as such, questions, comments, and suggestions are always welcome. Thank you for your consideration of all aspects of our mission. ■

Martin Luther King Jr. Day 2022: A Different Perspective on the 'Legacy' of MLK Jr. From Civil Rights Attorney Vernon Jordan

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filibuster of the MLK Holiday bill but then finally voted for it in exchange for Congress' approval of his tobacco bill. Despite this opposition, the bipartisan vote in favor of the bill handily won the day, possibly because many Republicans may have believed they needed to show the public their support for civil rights.

And did you know, or do you recall that Dr. King died before he even reached the age of forty, having been assassinated in Memphis, Tennessee on April 4 of 1968 when he was in the midst of preparing to lead a protest march in support of the City's striking sanitation workers? Yet in his short lifetime, Dr. Martin Luther King accomplished the unimaginable, especially for a black man from the South and one advocating for peaceful integration. Thus, this year, as in every previous year the holiday has been observed, people all over our country—and beyond—will pay homage to this great man, preacher, and acknowledged leader of the civil rights movement in America that has defined for generations what our country must acknowledge and address in order to <u>eliminate racism</u> in our society. Moreover, due to an enhanced focus during the Pandemic on making serious and substantial progress on addressing problems related to long ignored, even embedded, patterns of racial inequality across all modes of society, we may see more attention paid to the barriers to racial equality that remain despite Dr. King's significant efforts to obtain civil rights for ALL.

Dr. King's Early and Relevant Education

Even before he stepped onto the national 'stage' and ignited a widespread movement for peace, justice and racial equality through his electrifying voice and powerful words invoking hope for the dreamers in his audiences, Dr. King had achieved many impressive goals. At an early age, and in short order, Dr. King proved the belief that he was bright, articulate and driven by earning a B.A. in Sociology from Atlanta's Morehouse College when he was only nineteen, a B.A. in Divinity just three years later, and then, in 1955, a Doctorate in Systematic Theology from Boston University. Those studies and his degrees both reflected his interest in canonical teachings and grounded him in the power of oratory of a spiritual nature that would engage his listeners and move them to action.

How Rosa Parks' Courage Helped Inspire Dr. King's Early Activism and Advocacy for the Oppressed and Dispossessed

Also in 1955, Dr. King was chosen by local civil rights activists to lead a one-day boycott of the buses in Montgomery, Alabama. Their protest was spurred by area residents upset when Rosa Parks, a black woman, was arrested and fined on the bus she was taking home from work for violating the City's segregation laws. Parks had refused the order of the bus driver to give up her seat to a white man who had been standing on the crowded bus. Under local law governing public accommodations, he was entitled to preferential seating because of his race. That single day turned into a year which is how long it took Montgomery to desegregate the buses.

By persisting in its defense of racial segregation within its public transportation system, the City not only faced legal and financial challenges, but it also, perhaps unwittingly, simply stoked the flames of a significant and growing national civil rights movement. That movement, which engendered many other battles for racial equality, was borne of one black woman's using her <u>**voice**</u> to demand equal access to public services. Ms. Parks later explained that she claimed her seat that fateful day, not because she was physically tired but because she was "tired of giving in". For more about Rosa Parks, who was lauded for her courage, wrote two compelling memoirs, and lived into her nineties, see https://www.biography.com/people/rosa-parks.

Etched Forever in Our Collective Memories: Dr. King's Compelling Words

Events in the sixties related to Dr. Martin Luther King, Jr. are forever etched in our memories and in America's history. On August 28, 1963, King delivered perhaps his most stirring and memorable speech, one that has come to be known as the "I Have a Dream" speech. To the 250,000 participants in that day's organized march to D. C., King pronounced: "***I have a dream that one day this nation will rise up and live out the true meaning of its creed, 'We hold these truths to be self-evident: that all men are created equal'.***" In that same speech he made the

dream personal when he stated: "***I have a dream that my four children will one day live in a nation where they will not be judged by the colour of their skin, but by the content of their character.***" The theme of non-judgmental equality and respect for human rights and opportunity for all without regard to color resonated with many individuals besides the marchers, which is what King intended: that his message of hope would take hold across the nation and trigger needed changes in the law.

In the face of many threats to him, his family and all his detractors, Dr. King receives the Nobel Peace Prize in 1964

The era of the sixties was also witness to the award of the Nobel Peace Prize to Dr. King—in 1964. In the presentation to King, Nobel Committee Chairman Gunnar Jahn described the Reverend as an "undaunted champion of peace" who had distinguished himself by showing that "a struggle can be waged without violence". Mr. Jahn also praised Dr. King for never abandoning his faith despite his having been subjected to numerous imprisonments and bomb threats, as well as repeated death threats against him and his family. Although detractors continued to attack Dr. King's teachings, much progress had been made toward the goals of equality, justice and peace that King was preaching. As notable examples, in the middle of the sixties, Little Rock High School and the University of Mississippi were integrated, Congress enacted the 24th Amendment to the U. S. Constitution, and President Lyndon Johnson signed the Civil Rights Act of 1964.

Dr. King's Assassination: A Dark Day for All, and Its Aftermath

Sadly, as we all know, that decade didn't end well. Dr. King's good fortune, and possibly the momentum toward a more civil and just society, took a tragic turn on **April 4, 1968,** when Dr. King was assassinated in Memphis, Tennessee and it seemed the world had come to a stop. By that time, many who questioned his motives and his means to achieving peace and equality had begun to appreciate the import of his messages and his work on the ground toward implementation of his mission—even though some believed Dr. King was espousing more aggressive actions to bring about the change he wanted. While his death left a terrible void, his legacy as a 'champion of peace' has continued to move us forward toward a more just society, even if slowly and with 'bumps' in the road in recent years. Still, we all need to keep vigilant to make sure we don't lapse in our efforts or allow prejudice, anger and distorted perspectives to further divide us as a nation into separate and unequal factions. And this is where Vernon Jordan enters the scene and shares a somewhat different and thus refreshing view of how to best honor the work done and progress achieved by Dr. King.

Vernon Jordan's Characteristic 'Call to Action' as a Means to Change

Vernon Jordan, who is African-American, graduated from Howard University Law School in 1960 and joined the firm of a prominent civil rights attorney in Atlanta as a law clerk earning $35 a week, eventually becoming a well-known civil rights advocate in his own right. As a new lawyer, Jordan was part of an NAACP team representing a young black man who, in a mere 48 hours, had been arrested, arraigned, indicted, tried, convicted and sentenced to death by electrocution. That was a time when 'colored' people had to find outlying black-only motels when transacting business in the courts—or anywhere. And because they were banned from restaurants, they had to buy food at a grocery store and eat in their car.

Mr. Jordan's firm, which included Constance Motley,[1] sued the University of Georgia in Federal Court, alleging that its restrictive admission policies constituted racial discrimination. Despite challenges and a stay that was reversed, the case concluded successfully for the plaintiffs in 1961 with the Court Order directing that the two named African American plaintiffs be admitted to the University. (See *Holmes v. Danner*, 191 F. Supp. 394 (M. D. Ga. 1961.) In 1970, having left his firm, Jordan became the executive director of the United Negro College Fund, and in 1971 he assumed the presidency of the National Urban League, a position he held until 1981 when he resigned to become legal counsel in the Washington, D.C. law office of a Texas firm.

Aside from serving as a presidential advisor and a consultant to other high level government officials, and in demand for appointment to the boards of multiple corporations, Jordan has recently held the position of senior managing director for an investment banking firm. He has also authored two books, most recently (2008) *Make It Plain: Standing Up and Speaking Out*, a collection of his public speeches with commentary. The title certainly makes plain what Jordan has fought for all of his life and career. This indefatigable humanitarian has continuously used his legal and oratory skills and his talent for advocacy to help move the dial forward on the task of eliminating racial injustice.

Vernon Jordan's Characteristic 'Call to Action' as a Means to Change

It is on the stage before attentive audiences such as college graduates, that Jordan is most effective. In June of 2015, speaking to Stanford's graduating class at a multi-faith celebration for the students and their families, he minced no words, instead urging the audience to be '**disturbers of the unjust peace**'. Using a question from the prophet Isaiah: "Who will go, and whom shall we send?" as a basis for his message that day, Jordan said he prays the answer is "Here am I. Send me." He continued on: "**Send me to help clear the rubble of racism still strewn across this country. Send me to be one of the bulldozers on behalf of equality and in the cleanup crews against injustice. Send me to 'disrupt' injustice. Send me to 'hack' bias and bigotry. Send me to 'lean in.'"**

And now, 'fast tracking' right to 2018: Vernon Jordan, at 83 years of age, was invited by Dr. Otis Moss III, the young and engaging Senior Pastor of the Trinity United Church of Christ in the Washington Heights Community on Chicago's South Side, to give the guest sermon at the Church's September 30, 2018, Sunday morning service focused on 'Honoring Our Elders'. How did I learn about this meaningful event? Attorney **Juan Thomas**, a member of the ISBA's Standing Committee on Racial and Ethnic

Minorities and the Law, had invited his REM colleagues—which included me—to this special church service, and I decided to attend and with my husband Noel. Besides being quite touched by the warm welcome we received from the congregants that day in a venue where we were two of just a handful of white people in attendance, we were moved by Pastor Moss' sermon and by Mr. Jordan's compelling insights.

The primary message Jordan conveyed is simple: **While it is important to honor MLK Jr. for his accomplishments and celebrate his storied career as a civil rights activist, we cannot, must not, stop there as we often do, assuming it is enough to pay a yearly tribute to Dr. King as our means of supporting racial, ethnic and gender equality. Instead, we have to keep King's DREAM alive by working to achieve the goals he pursued. In other words, we should consider ourselves the heirs of his legacy and take on the tasks he left to us—unfinished—until they are finished.**

What Can We Do to Make a Difference 'Going Forward'?

For us to stay on track toward achieving justice for all, we must have strong leadership in our local, state and federal governments and in the private sector, as well as great teachers in our schools. It is through the polls at each election and, of course, through our political discourse and educational systems, that we can encourage each new generation to attain a better understanding as to the positive outcomes when diverse communities live and work together in mutual respect for their differences. (http://diversity.uchicago.edu/.) We must also do what we can to assure that equal opportunities for achievement are available to all. Part of this equation is having **the will to speak up** when we see imbalances and inequities. It is especially important that, as lawyers, we also use our knowledge, our words, and our penchant for persuasion to convince others to join the movement and commit to action toward a more fair and just treatment of those groups in our communities who have no voice, no advocates, and waning hope.

Meanwhile, let's not forget the upcoming Martin Luther King, Jr. Holiday to be observed in this Nation on Monday, January 17, 2022. We hope you will join in the tributes likely taking place all over Chicago—especially in our public schools and in other public arenas, perhaps some remotely if COVID-19 Protocol is being observed, as Chicago is a City that particularly and warmly embraced King and to which he had many close ties. Between 1956 and 1966 Dr. King gave three speeches at the University of Chicago's well-known Rockefeller Chapel, all of which became famous for his inspiring messages and brought him to the attention of the public.

Resources for learning more: If you wish to read more about Dr. Martin Luther King Jr. and his legacy, check out the University of Chicago's website at http://mlk.uchicago.edu/ which offers significant material about the subject and identifies meaningful volunteer activities for commemorating the Holiday on every day of the week of observance, from January 17 to January 23. The University is also hosting a Virtual Week of Service to engage the community in activities relevant to honoring MLK's legacy of diversity, inclusion, and respect for all. In addition, much historic detail is available on the website for the National Park Service's Martin Luther King, Jr. Memorial located in Washington, D.C. That site, and the story behind the MLK Memorial, "Out of the Mountain of Despair, a Stone of Hope", is accessible at: https://www.nps.gov/mlkm/index.htm. Teachers will also find many resources for observing the Holiday at www.MLKDay.gov. For the young and older, participating in a 'Day of Service' as part of the MLK, Jr. Holiday is a way to help preserve Dr. King's legacy and keep the torch of equality burning and the work to undo inequities ongoing.

One additional reference is The Martin Luther King, Jr. Center for Nonviolent Social Change in Atlanta, Georgia, which Mrs. Coretta Scott King established in tribute to her husband, not as a 'dead monument' but as a living testimonial that would engage and empower visitors. The King Center includes a Library and an Archive, and it has recently undertaken a project for an "innovative digital strategy and conference series". It also offers a chance to enter your dream and choose up to 5 'themes' to tag it. If your dream is approved after review, it will be posted on the Center's website. Check it all out at http://thekingcenter.org where you will find the focus on "Priorities to Create the Beloved Community." ■

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1. Constance Motley, widely known as an early civil rights activist, was born in 1921, the ninth of twelve children, to parents who emigrated from the West Indies. At the age of 15, having been inspired by reading about civil rights heroes, Motley decided she wanted to be a lawyer—and ultimately became the second black woman to graduate from Columbia Law School where she met Thurgood Marshall, chief counsel for the NAACP Legal Defense Fund where Motley worked while a law student. She later clerked for Supreme Court Justice Marshall, became chief counsel of the NAACP Legal Defense Fund, and wrote the draft complaint for *Brown v. Board of Education*. As a practicing attorney, Motley argued before the Supreme Court, winning nine out of her ten cases. As lead counsel, Motley was also successful in defending protestors arrested in the early sixties for taking part in the Freedom Rides, and for helping James Meredith gain admission to the University of Mississippi in 1962. Ultimately turning to the political arena, Motley became the first black woman to serve in the New York State Senate. In another first for an African American woman, Motley became a federal judge when President Lyndon Johnson appointed her to the Manhattan Federal District Court in 1966.

Criminal Records Relief

BY BRITTANY SHAW

Whenever a person is arrested, a criminal record is created even if that person is never charged. In Illinois, there are over three million adults with criminal records. The existence of such a record poses many threats to everyday life for the individual who is the subject of the record, including lack of access to better housing, better jobs, and educational opportunities.

In Illinois, there are a few ways to obtain criminal records relief. The two main processes are expungement and sealing. However, another option is a petition to the governor for clemency or a pardon but only a certain number of these petitions are granted each cycle and it can take up to a year or more to receive a decision. Recently, criminal records relief has become an important nationwide topic of conversation with regard to the legalization of marijuana and decriminalization of certain offenses. This article will briefly explain the options available to individuals in Illinois seeking relief from the burden of a criminal record.

Expungement

Illinois law defines the term "expunge" broadly. It reads in part, "[e]xpunge means to physically destroy the records…and to obliterate the petitioner's name from any official public record or both." *20 ILCS 2630/5.2 (a)(1)(E)*. In Illinois, expungements are available only for non-convictions and certain juvenile offenses. A conviction arises when the individual has either plead guilty or is found guilty of an offense by means of a trial and has received a sentence. If an individual has a conviction on his/her/their record, that person must complete a petition for sealing, rather than expungement. In some instances, such as when one has received a sentence of supervision or certain types of probation, a record will be eligible for expungement once the sentence is successfully completed. The waiting period for petitions for expungements ranges from zero days to five years and largely depends on the charge and the sentence received. Certain charges such as reckless driving, DUI, domestic violence, and sex crimes, no matter the sentence, are never eligible for relief via expungement or sealing.

Sealing

When records are sealed, they are not destroyed but are otherwise restricted or protected from public access. However, some law enforcement entities, like the Illinois State Police, other government entities, or employers as provided by law may still have access to the records during a background check. In other words, if one's petition for sealing is granted, the records will be otherwise inaccessible without court order or good cause. The waiting period to file a petition for sealing is three years from the last sentence. That means if you are still within your waiting period for another conviction, no other convictions can be sealed. Nevertheless, in some instances, Illinois will allow an applicant to bypass the waiting period if during the period of the sentence, that individual has obtained a high school diploma or GED, associate's or bachelor's degree, or a certificate from a technical or vocational school. Such an exception may act as an incentive for the applicant to pursue one or more of these degrees which also can assist the applicant in finding employment.

Other Forms of Relief

If expungement and sealing do not appear to be applicable in any given case, Illinois offers other forms of relief to support an individual in his/her/their pathway to a better future. For example, if the individual wishes to work or remain in the healthcare field, he/she/they can obtain a Healthcare waiver which will allow that person to continue working despite the conviction. However, the waiting period for this process ranges from one to 10 years and there is a pretty lengthy list of offenses that can render an individual ineligible. Other forms of relief include a 'certificate of good conduct' and as mentioned above, clemency or a pardon granted by the governor.

Next Steps

If you or someone you know has experienced hardship due to the existence of a criminal record, please reach out or encourage your friend or relative or colleague to reach out to your or his/her/their local legal aid organization or private attorney to discuss your options for criminal records relief. As we continue our important advocacy for increased eligibility and decreased barriers, we look forward to making this process more accessible and less costly to our community members seeking to progress in life despite some bad choices they may have made in their past. ■

The ‘Working Conditions’ That Constitute Race and Gender Discrimination in the Workplace: What Have We Learned, Where Are We Now, and Are Existing Laws Enough?

BY SHARON L. EISEMAN

In the past decades, many legal restraints have been placed upon employers to discourage, even prevent, unlawful acts of discrimination against employees related to their membership in a number of discrete groups. Those groups include ones listed in this article's title as well as other protected groups identified in various statutes, such as sexual identity, religious affiliation, and national origin. Due to the wide scope of protections seemingly offered to such populations, one might believe workplaces are safer now and more equitable than ever. Yet from the news and reports of statistics, and from headline grabbing, detailed coverage of horrific cases of discriminatory treatment by employers, as well as the numbers of complaints filed alleging such illegal treatment, we know that cannot be true. Such regular legal news catches our attention, as lawyers, as persons of various backgrounds and ethnicities, as women, as members of the LGBTQ community, as persons with disabilities or of advanced age, as students and teachers, and as members of the general public. We are affected on both professional and personal levels.

What Suffices to Prove Unequal Working Conditions?

One of the deliberate ways we might at least learn what is happening in certain workplaces, and whether anyone is listening to the victims and granting legitimacy to their claims, is by scouring through the records of the Illinois Human Rights Commission and the U.S. Department of Justice to review the postings of adjudications rendered in administrative proceedings for claims brought before them.[1] On these websites we will also find the legal underpinnings upon which the complainants' claims are based and the hearing officers rely, in combination with the facts presented, for the rulings issued for either party.

Federal and state statutes and regulations prohibiting employment discrimination against persons in protected groups have long been in effect.[2] And particular attention should be paid to CM-613 which covers the “terms, conditions, and privileges of employment” that is the standard relied upon by employers and the judicial system when it becomes necessary to determine whether employees in protected groups are receiving fair and equal treatment in comparison, for example, to their white counterparts or their male counterparts. Also of import is the Equal Pay Act of 1963,[3] which prohibits wage differentials between men and women (or other disparate groups) performing equal work in the same workplace. On the state level, we supposedly can rely upon the Illinois Human Rights Act.[4] Such laws and regulations have become more widely familiar to the general populace, including of course employers, to whom the laws and regulations are directed, yet we know that race, gender, ethnicity, national origin, age, and sexual identity discrimination in the workplace continue, seemingly unabated.

Given this strong framework, what should we know about the outcomes of these cases and how they may and should influence future conduct, and provide guidance concerning what kinds of training employers/employees may still need? In one particular area—that being complaints of unequal or discriminatory working conditions—it appears that the bar is extremely high, as recent decisions have dismissed, as insufficient, claims that rely upon one or two incidents, or that balance discriminatory actions inflicted by employers or supervisors upon those they supervise against the benefits the employer may be granting to the complainant. These decisions find, seemingly, that it is “ok” to sexually harass or mistreat on the basis of race if that employee otherwise is doing well at the company. When such employee claims are dismissed as such, employers everywhere may get the message that some forms of discrimination or otherwise prohibited harassment are NOT illegal. They take from these decisions that they can ignore employee complaints and not worry about their responsibility to treat all employees equally. Employers may feel no need to refrain from adverse actions against such individuals and groups based upon their status in any of the protected groups, or any need to provide some form of “Know Your Rights” training for employees. In essence, employers may feel no need to assure, to the best of their abilities, that working conditions in their workplaces do not impose greater burdens upon one or more protected groups than upon others and/or that working conditions in their workplaces are in accordance with prevailing law.

One Incident Could/Should Be Enough

To give some substance to my generalities, let me introduce you to a recent memorandum opinion and order issued by a federal judge in the Northern District of Illinois in January 2021.[5] In this opinion, the Court ruled on a four-count complaint brought by Taryn Fernandes, a former first-year medical student employed as a resident by Rosalind Franklin University. The underlying factual allegations involve a group of nurses and attending staff accessing Ms. Fernandes' personal Gmail and Google Photos accounts, and then ‘sexting’ nude photos of Fernandes to a wide range of hospital employees, all without the knowledge or permission of Fernandes, but in a manner that gave the appearance that Fernandes herself had shared them with that staff. Reports to her supervisor regarding

the incident were not appropriately and fully addressed. The defendant employer filed a motion to dismiss, seeking dismissal of two of the four counts pertaining to allegations of intentional infliction of emotional distress and sexual harassment. In its order, the court denied the defendant's motion to dismiss Count 1 and granted dismissal of Count IV, which was unopposed.

What is encouraging in the order is that Judge Iain Johnston took care to note for Plaintiff Fernandes' benefit those factors that she needed to specifically address in order to ultimately prove her claim of sexual harassment, and also to note that for now: "The Court sets aside what strikes it as a classic example of victim shaming." Moreover, in response to certain arguments the defendant made in its motion to dismiss, the court states that sexual harassment, to be proven, need not be both 'severe and pervasive' and that one incident, depending upon its impact, can be sufficient to support such a claim, especially since, in this case, the unauthorized access into plaintiff's personal accounts and the widespread distribution of the personal photos "in one evening's fell swoop" can be enough due to its severity and/or its pervasiveness. In its analysis, the court also cited a case in which a federal appeals court asserted it was error for the district court to opine that sex-based harassment can never be actionable unless it is repeated. See *Smith v. Shehan*, 189 F.3d. 529, 533 (7th Cir. 1999). Nor is a claim defeated by the fact that the complainant was not present when the challenged act of sexual harassment occurred. What counts is what everyone saw and knew about the complainant as a direct result of the actions of the complainant's co-workers.

Recent examples concerning incidents of sexual discrimination and harassment in the legal workplace have been shared and we also have a new model for sexual harassment training on this issue from the Illinois Human Rights Act (IHRA) as overseen by the Illinois Human Rights Commission (see www.illinois.gov/dhr/training and PA 101-0221 which includes the Workplace Transparency Act), that all employers in the legal profession must provide annually to their employees.[6] Such training is intended to inform all employees in their respective law firms and other legal workplaces as to what kinds of behaviors, whether in words or actions, and from whom, constitute prohibited misconduct, what rights they have as employees to report such misconduct they have experienced or observed and to whom, and what protections are afforded to protect those who report misconduct from retaliation. Yet we do continue to learn more about how to face the issue and take steps to combat this illegal conduct from the case rulings, whether we agree or not with the courts' interpretations of the evidence and the applicable law or the ultimate rulings presumably based upon that framework. And some of them do or continue to address the issue of "working conditions," what type of conduct or behaviors belong in that category, what the degree of proof should be to conclude that sexual discrimination or harassment has occurred, and if certain actions should be taken against the offender, with recompense made to the plaintiff.

In the cases filed by employees asserting discrimination against their employers which are indeed grounded in claims of unequal working conditions, it appears such an allegation is difficult to prove for any plaintiff, perhaps because the statutory wording does not provide examples, although examples can be found on the sites of the IHRC and the DOJ. Yet no one could possibly offer a comprehensive listing of all the ways in which savvy or perhaps ignorant employers can find creative ways to treat members of a minority group differently based upon their race, gender, ethnicity, sexual identity, etc., or to articulate a rationale for doing so.

When Differential Race Discrimination Fails to Qualify

We see an example of such differential treatment related to working conditions in the case of *Peterson v. Linear Controls Inc.*, No. 16-cv-00725, and a later ruling in 18-cv-1401 (W. D. La.). Here, the Plaintiff, David Peterson, sued his employer Linear Controls Inc. due to the differential treatment of a group of black crew members to which he, as an African American, was assigned, and a group of their Caucasian counterparts. Both of these groups were working on the same special project that required each of the separate crews to be in a different location, one outside in the blazing heat and one inside in an air-conditioned space. The white workers' crew was stationed indoors while the black workers' crew was stationed outside and not allowed to come indoors, even to get a glass of water or use the toilet. Reading this set of facts almost made me sick, as did learning what the court ruled on Peterson's claims.

In this matter, the magistrate judge who heard the case ruled in favor of Linear Controls Inc. on the defendant employer's motion for summary judgment, finding that Peterson failed to allege an adverse employment action, to adequately identify a similarly situated comparator, or get beyond circumstantial evidence to support his assertion of racial discrimination as required by the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Plaintiff Peterson appealed this ruling to the U.S. Court of Appeals for the Fifth Circuit, which affirmed in full the lower court ruling. And last but not least, Peterson filed a petition for a writ of certiorari to the U.S. Supreme Court.[7] It seemed an encouraging development when the Supreme Court asked the Department of Justice for input on the scope of Title VII, which might indicate the Justices, perhaps aware of divergent interpretations by many courts at different levels of review as to what qualifies as racial or sexual discrimination, may have decided it would be necessary to do a "deep dive" into the statutory framework to learn what forms of conduct, by whom, and how severe or intense or frequent it needs to be to constitute illegal harassment. Unfortunately, the *Peterson* case never made its way upstairs. Instead, the case record shows that Peterson withdrew his Petition for Supreme Court review. Popular speculation is that the employer, Linear Controls Inc., decided to settle with Peterson rather than face the very public view of the alleged discrimination in such a public domain as the highest Court in the land. Likely we will never know if such an outcome might have occurred, and doubtless the settlement included a confidentiality clause.

SO…do you think you have reached the end of this exceptionally long article? Absolutely NOT. I have another case to present to you which I hope you find as interesting as I did.

The High Bar for Proving Gender Discrimination in Sports

Most recently, we also learned through multiple news 'flashes' about the status of the court case brought by the U.S. Senior Women's National Soccer Team (WNT) against the U.S. Soccer Federation (USSF) which claimed gender discrimination in the wages and the working conditions of the Team's members in comparison to the wages and working conditions of the members of the Men's National Soccer Team (MNT). Such disparities became public when several members of the Women's Team filed a wage discrimination complaint with the federal Equal Employment Opportunity Commission in 2016. The filing stated that the gender imbalance was pervasive, including in the amounts of bonuses and appearance fees paid to the female soccer players compared to what the male players received, the kind of turf on which they had to play, the quality of travel conditions and hotel accommodations when on tour, as well as other support services provided for them, which the WNT alleged were inferior to those same services available to the MNT members or not paid for at all by the Federation. After three years passed without any progress at the EEOC, the WNT took their case to the U.S. District Court for the Central District of California in *Alex Morgan et al. v. U.S. Soccer Federation, Inc*. (2:19-cv-01717/filed 3/8/19 in U.S. District Court, Central Dist. of California, Western Division) citing gender discrimination in wages and unequal working conditions.

The matter was intensely litigated, with heavy discovery, and involved the Federation's argument that, in accordance with "indisputable science," men are superior to women. This assertion generated from the Women's Team a statement that the Federation's strategy reflected "blatant misogyny." In the early phase of the case, the court dismissed the equal pay claim brought under the Equal Pay Act, finding that, based upon data showing that WNT members, over a certain period of years, were paid more than the men due to their respective collective bargaining agreements and other financial benefits such as bonuses, making their compensation package greater than that of the MNT's package. The dismissal of that claim left the issue of unequal working conditions to be addressed. (This outcome was labeled a "crushing blow" to the WNT in a May 1, 2020 New York Times article.) Although the Federation was surely pleased by the dismissal of the EPA claim, that part of the court's final ruling remains ripe for appeal, as has been noted by the WNT members.

Ultimately, a federal judge in the *Morgan* case issued an opinion in May 2020, finding for the Federation.[8] The ruling affirmed the dismissal of the EPA claim and granted the defendant's motion for summary judgment on the claim that the WNT suffered unequal working conditions. Yet it appears that in the months following the release of that ruling, the two sides were conferring on these still unresolved issues, and at the beginning of December, the WNT and the Federation announced they had reached agreement regarding the long list of working conditions the WNT had challenged. Details of that settlement agreement have not been made public, though the Federation reps stated that the settlement reflected its efforts "to find a new way forward" with the women's team and perhaps an end to the litigation. And that would leave us, the lawyers, and the rest of the public, without a hope that an appeal on that issue, in addition to the EPA claim, might clarify what kinds of actions or lack thereof constitute working conditions that are or might be defined in the gender category as discriminatory.

What Might the Future Hold for Employees Who Are Victims of Illegal Discrimination?

Even though claims against employers continue to be filed, should we or should we not still applaud ourselves for making progress, albeit slowly, towards equality? Or, in light of ongoing workplace issues as identified in the three cases analyzed in this article and their outcomes, should we continue to press on toward a better future? Or both? That future would be one where the numbers of illegal incidents and complaints of discrimination decrease and employers finally "get the picture." And not simply due to the fear of retaliation against the complainant (which though prohibited, does occur) that discourages victims from reporting illegal treatment.

My wish is for us, as lawyers, to continue to be vigilant regarding claims and rulings and independent resolutions concerning illegal discrimination in the workplace, especially in working conditions. We need better descriptors and a broader range of prohibited workplace conditions that employees in protected groups must endure and that even common sense tells us are unfair, cruel, demeaning, even inhumane. This goal must be achieved because employers and often the courts that hear the complaints of the workers seem poised to consider such conditions outside the realm of discrimination because those conditions do not relate to hiring, firing, promotion and other categories, and, unfortunately, they have some legal precedent on which to rely. We also should consider that employers will often argue, in their defense, that even IF such actions occurred, they should be balanced against or even cancelled out by some benefits the employee complainant has received from the employer which is one of the primary arguments made by the defendant employer in the *Peterson v. Linear Controls Inc*. case.

Meanwhile, stay tuned to a follow-up article on RETALIATION, another workplace phenomenon that often and successfully discourages employees from reporting discriminatory conduct against them by their employers and/or illegal actions against them by fellow workers which management tends to ignore or act appropriately upon. When retaliation is reasonably feared and reporting is ignored, many illegal actions against employees in protected groups have room to proceed, since those who are victimized will not report the abuse.■

1. https://www2.illinois.gov/sites/ihrc/Decision/Pages/Default.aspx.
2. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, et. seq. or (Pub. L. 88-352) (Title VII) 78 Stat.241 as amended, Vol. 42 Sec.2000e, et. seq.).
3. 29 U.S.C. §206(d).
4. 775 ILCS §5.
5. *Fernandes v. Rosalind Franklin Univ. of Med. & Sci.*, No. 19 CV 50337, (N.D. Ill. Jan. 27, 2021).
6. https://www2.illinois.gov/dhr/Training/Pages/State-of-Illinois-Sexual-Harassment-Prevention-Training-Model.aspx.
7. Case No. 17-30790, https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public%5C18-1401.html
8. ECF No. 250, Case No. 19-cv-01717.