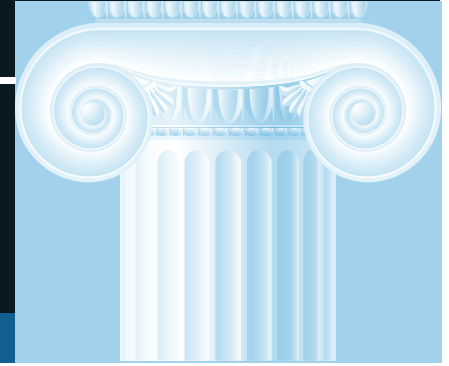


Legal Notes



BURT J. BLUSTEIN
MICHAEL S. BLUSTEIN
RICHARD J. SHAPIRO
RITA G. RICH
GARDINER S. BARONE
JAY R. MYROW

MARCELLO A. CIRIGLIANO
AUSTIN F. DUBOIS
WILLIAM A. FRANK
BRIAN NEWMAN
DIANA PUGLISI
RAYMOND P. RAICHE
JEANINE GARRITANO WADESON

ARTHUR SHAPIRO,
of Counsel
DAVID S. RITTER,
of Counsel

IN THIS ISSUE:

- **SEXUAL HARASSMENT IN THE WORKPLACE: AN OVERVIEW FOR EMPLOYERS & EMPLOYEES (PART 2 OF 2)**
- **YOU HAVE THE RIGHT TO REMAIN SILENT: FIELD SOBRIETY TESTS (PART 2 OF 3)**
- **CONGRATULATIONS! AUSTIN DUBOIS**
- **PACKED HOUSE AT ADVISORS WORKSHOP**
- **YOU PAID OFF YOUR MORTGAGE? CONGRATULATIONS! BUT THERE MAY BE ONE MORE THING YOU NEED TO DO**
- **JOIN US: PLAY HOOKY ON THE HILL**
- **EDUCATIONAL WORKSHOPS**

GOSHEN
10 MATTHEWS STREET
GOSHEN, NY 10924
PHONE: 845.291.0011



WARWICK
21 OAKLAND AVENUE
WARWICK, NY 10990
PHONE: 845.988.1515

WWW.MID-HUDSONLAW.COM

BLUSTEIN, SHAPIRO, RICH & BARONE, LLP

ATTORNEYS AT LAW

SEXUAL HARASSMENT IN THE WORKPLACE: AN OVERVIEW FOR EMPLOYERS & EMPLOYEES

(PART 2 OF 2)

By William A. Frank, J.D.
wfrank@mid-hudsonlaw.com



In Part I of this article, we defined workplace sexual harassment and the steps that an employee should take if he or she believes that they have been victimized by such conduct. In this installment, we will examine the remedies available to employees, as well as preventive and corrective measures that all employers should take to deal with this all too common workplace occurrence.

What should an employer do upon receiving a sexual harassment complaint?

An employer must commence an investigation in a prompt and discrete manner. Interviews of parties and potential witnesses should take place immediately. When necessary to ensure confidentiality, interviews may be conducted off workplace premises, either before or after working hours or during a lunch period. At the request of the employee furnishing information, a female or male interviewer should be arranged by the employer. Any employee within the organization possessing information about workplace sexual harassment, whether directed at the employee, or directed at a co-worker, should be encouraged by the employer to disclose such information known to appropriate management level personnel.

The employer must review any available documentary and/or physical evidence presented during or after the interview process. All information obtained from an employee must not be disclosed except as necessary to investigate and/or resolve a complaint of harassment. Anyone interviewed during an investigation is entitled to be accompanied by a union representative (if the place of employment is a "union shop") or legal counsel of their choice. Anyone participating in the investigative process must be assured that there will be no retaliation for such participation.

Employers must: 1) deal expeditiously and fairly with incidents of sexual harassment and/or sexually oriented conduct which may lead to harassment, whether or not there has been a written or formal complaint, and take corrective action or other action to prevent prohibited conduct from reoccurring; and 2) ensure that an employee who makes a complaint or provides relevant information to an investigation is not the subject of retaliation.

What is appropriate corrective action?

If the employer finds that sexual harassment has occurred, corrective action may include: 1) relief for the complaining employee; 2) disciplinary action against the offending employee; and/or 3) measures to end the conduct, which may include changes in company policy or practice. The employer should meet with the complaining employee to advise whether the complaint was found to be substantiated or

(continued on page 2)

(continued from page 1)

unsubstantiated. If substantiated, the employer should advise the complaining employee of the planned corrective action.

An employer must promptly take action designed to stop the improper acts and to prevent their reoccurrence. This action should also include measures designed to reduce any impact that the discriminatory conduct may have had on the complaining employee. The offending employee should be subject to appropriate disciplinary action, up to and including termination of employment. Keep in mind that if an allegation of sexual harassment is found to be knowingly baseless, false or misleading, the accusing party may well be subject to disciplinary action by the employer.

Where can employees get help?

If an employee has reported sexual harassment to their employer and believes that appropriate corrective measures have not been promptly taken, they should consult an attorney with experience in employment and labor law who can explain all of the available options.

There are also governmental agencies that may be able to assist employees, depending on the number of employees at the workplace, such as the New York State Office of the Attorney General's Civil Rights Bureau. This agency will investigate and determine whether there is a pattern or practice of sexual harassment affecting a significant number of people at the workplace. They will not sue the employer individually on the employee's behalf. The U.S. Equal Employment Opportunity Commission ("EEOC") also investigates sexual harassment claims against employers with more than 15 employees.

A private lawsuit is necessary for an employee to receive compensation from an employer if a valid complaint has not been properly addressed and/or remedied. Before filing a lawsuit in federal court, the aggrieved employee must first file a complaint with the EEOC. This requirement is not applicable to suing an employer in New York State Court. Time limits apply to filing lawsuits in state and federal courts, so an employee who believes they have been harassed on the job should consult an attorney without delay.

What should employers do to protect themselves against sexual harassment claims and lawsuits?

At a bare minimum, employers should take the following steps:

- Create and update a written document establishing a zero tolerance policy towards sexual harassment. A copy of the document should be provided to each employee, who must acknowledge receipt in writing; and
- Conduct annual sexual harassment training with their entire workforce as well as vendors who have contact with members of the company on a routine basis.

It is critically important to maintain written records that an anti-sexual harassment policy is in place and that all members of the organization have been briefed and annually trained. Such records are vital when the organization has been accused, either by a government agency or within the framework of a lawsuit, of maintaining a culture where sexual harassment goes unchecked or is improperly handled within the workplace. Consult an experienced attorney for assistance in protecting your organization.

YOU HAVE THE RIGHT TO REMAIN SILENT: FIELD SOBRIETY TESTS

(PART 2 OF 3)

By Marcello A. Cirigliano, J.D.
mcirigliano@mid-hudsonlaw.com



You have been pulled over by a New York State trooper, and you are currently standing between the back of your car and the front of the troop car. The trooper has asked you to perform a few tests before he lets you go home. You think to yourself, "What are these tests, and do I need to do them?"

Field Sobriety Tests

Field Sobriety Tests, or FSTs, are a series of tests used by law enforcement to help them determine whether they have reasonable cause (aka "probable" cause) to arrest the driver of a motor vehicle for operating while under the influence of alcohol and/or drugs. For many years police departments used different types of tests, including counting fingers, reciting the alphabet (forward and backwards), and doing math. Many of the tests that were being used by law enforcement, however, were not based on any scientific proof that their results were indicative of the driver's level of intoxication or impairment.

In 1981, the National Highway Transportation Safety Administration (NHTSA) conducted a study in an effort to develop a model system to be used universally and followed by all law enforcement agencies throughout the country. The research resulted in a battery of three tests labeled "The Standardized Field Sobriety Test" (SFST), "administered and evaluated in a standardized manner to obtain validated indicators of impairment and establish probable cause of arrest." *Development of a Standardized Field Sobriety Test, Appendix A, NHTSA.* These three tests consist of the Horizontal Gaze Nystagmus test (HGN), the Walk and Turn, and the One-Leg Stand. Pursuant to the scientific studies, if these tests are administered and interpreted properly, together they have been found to be 91 percent accurate in determining the intoxication of an individual.

Nystagmus is the involuntary jerking of the eyeballs, which occurs naturally in people and is much more distinct and readily apparent in a person who is under the influence of alcohol. During the HGN test, using their eyes only, and not moving their head, the driver follows a stimulus (usually a pen) being held by the officer, as the officer moves it side to side. The officer is watching for three different clues in each eye:

1. Lack of Smooth Pursuit: Is the eye unable to pursue smoothly? Think of a marble rolling across sandpaper.
2. Nystagmus at Maximum Deviation: The pen is held as far to the side as possible. Does the eyeball twitch?
3. Angle of Onset of Nystagmus: Does the jerking begin prior to a 45 degree angle from center? The earlier it begins, the more intoxicated the individual.

In the Walk and Turn test, the driver is told to walk nine heel-to-toe steps in a straight line, then turn and walk nine heel-to-toe steps in a straight line back. This is a "divided attention test," and the police officer is watching to see if the driver is not only able to physically perform the test, but is also able to follow directions.

CONGRATULATIONS!



We're pleased to announce that our own Austin DuBois has recently been appointed to the Orange County Partnership Board of Directors **and** named vice president of the City of Newburgh Industrial Development Agency!

Both organizations focus on economic development, job creation, and revitalization.

Austin is one of several attorneys at this firm who are active in community service. Be it the Rotary Club, serving as a village justice, or sitting on local charitable boards, we are proud whenever our attorneys find a way to contribute in the community.

The One-Leg Stand test requires the driver to stand on one leg and raise the opposite foot six inches off the ground. The driver is supposed to estimate 30 seconds, and then put their foot down when they are complete. This is another divided attention test; the driver must not only keep their balance, but focus on counting to 30 seconds as well.

For the prosecution to use the evidence derived from these SFSTs effectively, each of these tests must be administered by the police officer in the explicit standardized manner. A knowledgeable defense attorney, who is well versed in the requirements in the administration of the SFSTs, would be able to determine whether the police officer followed each and every required every step, and effectively attack any deficiencies.

Does the driver need to have Miranda rights before SFSTs?

A driver is NOT entitled to be advised of their Miranda rights unless they are about to be subjected to "custodial interrogation." The policies behind the Fifth Amendment's Self-Incrimination Clause "are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government" *Doe v. United States*, 481 U.S. 201, 213, 108 S.Ct. 2341, 101 L.Ed.2d 184. The evidence being provided by the driver must be testimonial and communicative in nature. In *People v. Berg*, 92 N.Y.2d 701, 704-05, 708 N.E.2d 979, 981 (1999), the New York State Court of Appeals held:

Results of field sobriety tests such as the Horizontal Gaze Nystagmus, Walk and Turn, and One-Leg Stand are not deemed testimonial or communicative because they do not reveal a person's subjective knowledge or thought process but, rather, exhibit a person's degree of physical coordination for observation by police officers.

Does a driver have to perform the Field Sobriety Tests?

Although a driver is deemed to have consented to submit to a chemical test to determine intoxication pursuant to New York State VTL §1194(2), Field Sobriety Tests are NOT chemical tests, and there is neither a common law nor a statutory requirement to perform FSTs. However, the prosecutor may attempt to introduce the refusal to perform the tests into evidence.

What evidence do the police need to arrest for DWI?

New York State Criminal Procedure Law §140.10(1)(b) states that a police officer may arrest a person for a crime when there is reasonable cause to believe that such person has committed such crime. CPL §70.10(2) states:

Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that such offense was committed and that such person committed it.

When deciding whether to arrest an individual for DWI, the police officer will use all of the evidence that they have observed collectively, from the manner in which the driver was operating the car, to the statements, odors and observations while the driver was in the car and finally the driver's performance on the FSTs.

Should a driver perform the Field Sobriety Tests?

There is not a definitive YES or NO answer to this question, and it depends on the driver's particular circumstances at the time they are asked. Although, performing the FSTs provides information regarding the driver's coordination that the police would not be able to testify to unless they observed the driver's performance, refusal to perform may be used against the driver by the prosecutor if they are subsequently arrested. However, if a driver does well on the tests and passes them, they should be allowed to drive away, something that may not have happened if they had refused.

In Part III of this series, I will explain the post-arrest issues, along with the various Chemical Tests. Until then, remember **You Have the Right to Remain Silent.**



PACKED HOUSE AT ADVISORS WORKSHOP

Thank you to everyone who joined us on Nov. 21 for our "Estate Planning Update: What Professional Advisors Need to Know" seminar and networking event at The Seligmann Center at The Orange County Citizens Foundation in Sugar Loaf.

Intended for financial planners, attorneys, accountants and CPAs, trust officers, and paralegals, the full house learned about the ways in which recent Supreme Court decisions and tax law changes have altered the landscape for estate planning.

Speakers included BSR&B's own Richard J. Shapiro and Austin F. DuBois, and special guest Randall H. Borkus, a nationally recognized attorney who mentors and trains professionals in the areas of asset protection, business succession, and philanthropic and wealth transfer planning specific to the ultra-high net worth market.

Following the seminar, guests were treated to beer and wine tastings generously provided by the Newburgh Brewing Company and Magnanini Winery. Hors d'oeuvres were also served, thanks to Goshen's own Delancey's Bar & Restaurant.



YOU PAID OFF YOUR MORTGAGE? CONGRATULATIONS! BUT THERE MAY BE ONE MORE THING YOU NEED TO DO



By Jeanine Garritano Wadeson, J.D., jwadeson@mid-hudsonlaw.com

It is often said that the purchase of a home is the single most significant financial transaction an individual will ever undertake. It naturally follows, then, that paying off the mortgage on one's home is cause for celebration. But don't burn those mortgage papers the bank sends you too quickly; you may find you are not as finished as you think.

The financing of any parcel of real property is accomplished primarily with two documents, each of which achieves a different, albeit vital, function.

The first document is a Note. When you buy a home and sign a Note at your closing, you are making a promise to the lender that you will repay the debt evidenced by the Note. **When you have completed making your payments after 30 years or so, your bank typically will send you a letter advising that your loan has been paid in full.** They also will return to you your original Note, marked "Paid" or "Cancelled." This is proof that you have repaid the debt and fulfilled your promise to the bank.

The Note, however, is only half the package. In and of itself, the Note is a contract: you agree to repay the debt and, if you don't, the bank has the right to seek a personal judgment against you. If there was only a Note between you and the bank, all the bank would have is your promise to repay. And, while the bank may think you're a really swell guy, they want a little more protection for lending you a large amount of money. So, they have you sign a Mortgage.

The Mortgage is the document in which you pledge the property you are purchasing as collateral for repayment of the debt evidenced by the Note. With the Mortgage in place, if you fail to meet your obligations under the Note (i.e. making your payments), the lender now has the additional remedy of foreclosing on your property.

At your closing, the original Mortgage you sign is delivered to the clerk of the county in which your property is located to be recorded. After recording, the mortgage becomes a public record of your debt to the bank. **The mere cancellation of your debt with the delivery of the Note marked "Paid" is not sufficient to clear the lien against your property that occurs when a Mortgage gets filed.** This can only occur when a document called a Satisfaction of Mortgage is filed. The Satisfaction of Mortgage effectively cancels the recorded mortgage from the public record.

So how do you get a Satisfaction of Mortgage, and, once you get one, what do you do with it? Different lenders handle this in different ways. Some will automatically prepare the Satisfaction and send it, along with the recording fee, directly to the county clerk for recording. The county clerk files the document and returns it to you with evidence of filing. Other lenders, however, will send the original Satisfaction to

you with your cancelled Note, and the responsibility becomes yours to file it. If you receive this document and stick it in your file or – even worse – use it as fuel at your "burn party," when you go to sell your property, you will have the unpleasant surprise of a Mortgage that is still open of record.

Most people don't understand the significance of the Satisfaction, and think that, as long as they have proof that the loan was paid off, they are in the clear. **But if your mortgage has not been cancelled with the county clerk, you will not be able to convey title free and clear of encumbrances.** This can result in many headaches, including possibly a delayed closing, as well as a frantic search through boxes packed up in anticipation of moving.

So, read your letter from your bank carefully. If in doubt, seek your attorney's advice. Once he or she gives you the green light, pop the cork on the champagne and strike up the match!

Join us
THURSDAY, FEBRUARY 5, 2015

All proceeds from this event will go to benefit
BOYS & GIRLS CLUBS
OF NORTHERN ORANGE & SULLIVAN COUNTIES

RESERVE YOUR SPACE TODAY! Seating is limited.
To RSVP, visit www.give.bgcorange.org/f/hooky2015, or
call the Town of Wallkill Boys & Girls Clubs at 845-342-8833.

FREE EDUCATIONAL WORKSHOPS:

Estate Plans That Work™

Feb. 10, 2015 3:00 p.m. to 6:00 p.m.

March 10, 2015 3:00 p.m. to 6:00 p.m.

The above workshops will be held at the
BSR&B Education Center (1st floor)
10 Matthews Street, Goshen, NY

RESERVE YOUR PLACE TODAY! SEATING IS LIMITED.

Call **845.291.0011 x242** or
email receptionist@mid-hudsonlaw.com.