



## BOOK SUMMARY

### *The Excuse Factory* By Walter Olson

When the Excuse Factory was published in 1997 it created quite a stir amongst professionals in the employment law field. If you will recall, a number of years ago Olson also wrote *The Litigation Explosion*, which also created much press. Olson makes no bones about his liberation belief systems. To a larger degree Olson and his cohorts at the Manhattan institute take the position that “no law is a good law”.

No matter your political beliefs, the Excuse Factory is a must reading for lawyers, human resources, insurance and risk management professionals. When going through this material, constantly ask, “What is the real problem? What is the solution? And what are the strategies and tools we need to solve the problem and exploit the opportunity.” Olson has taken the bold first step of identifying and clarifying many of the issues facing this field. It is up to each one of us to build solutions so that there are no losers, only winners.

Note: Items in [brackets] are my independent thoughts, comments, etc.

#### **INTRODUCTION:**

Traditional disabled groups, the deaf, blind and paraplegic, combine for only a small share of ADA job complaints.

Employee claims are by far the leading source of legal trouble for members of non-profit boards, a survey finds.

The employment law field is expanding by 10% to 15% per year, which implies that it will double every five years or so.

According to its 1996 Career Guide, U.S. News and World Report lists employment law among its 20 hot job tracks.

Little can be observed of its actual results. Olson criticized the content of employee rights such as “Sue Your Boss”, “Every Employee’s Guide to the Law”, etc.

Olson states that managers and supervisors themselves typically make out best in employment suits. They sue more often and they win more often when they sue, and they get more money when they win than rank and file employees.

As the management of working relationships falls into the hands of lawyers on both sides, it does not become more humane and harmonious, but becomes more artificial and adversarial.

## **CHAPTER ONE: HIRING HELL**

In this chapter, Olson goes through the difficulties managers face hiring employees. They can't ask the questions, can't get references, can't hire through the grapevine, can't be concerned about their customer's preferences, can't ask about drug abuse, alcohol abuse or criminal backgrounds, he claims that as it turns out, when it comes to hiring law, the less employers know about those they propose to employ the better. Olson states that as a result, common sense has been "hermetically excluded" from the law of hiring.

## **CHAPTER TWO: TENURE TRAP**

Law school articles began appearing in the late 60's suggesting protection against firing without good cause.

"We don't sue enough." "Suing is good for America." – Harvard Professor Alan Dershowitz

Employment is no longer a voluntary and freely entered agreement on both sides. In 1980, the Michigan Supreme Court, in the case of Toussaint v. Blue Cross and Blue Shield upheld the concept of termination only for a good cause. By 1990, the opinion was followed in at least 38 different states, prompting thousands of lawsuits. Olson reviews the expansion of other tort remedies, including the intentional infliction of emotional distress, the duty of good faith and fair dealing, violation of public policy and defamation. By 1983, plaintiff's lawyer Cliff Palefsky declared at a Bar Association speech that "At will employment is dead in the big picture."

## **CHAPTER THREE: ALL PROTECTED NOW**

This chapter begins with a review of the type of insane cases being decided in the disability area. Olson states that as the volume and states of litigation have mounted, compliance efforts have become, if anything, more frantic. He discusses how the courts have uniformly granted attorney's fees to plaintiffs' counsel while all but denying them to prevailing employers.

In 1993, the Supreme Court's formula for discrimination was announced in the McDonald Douglas decision. Olson points out how the courts have tried to eliminate subjective judgement in the workplace, including traits such as temperament, habits, demeanor, manner, maturity, drive leadership ability, personal appearance, stability, cooperativeness, dependability, adaptability, industry, work habits, attitude towards details and interest in the job. As Olson

states, “one wonders what is left.” Olson points out that by now, just about everyone is protected, except for the few middle age white males.

A perfect example of the law’s absurdity is the debate over “medically vs. morally fat” issue. If obesity is a “voluntary” condition, then it is not considered a disability under the ADA. If it is the result of some form of metabolic imbalance, then it is.

Olson points out that the court give little preference to economic considerations, exactly because it is the belief in the almighty dollar that people discriminate. [What about Debbie’s pain? What about my pain? I’m a person too, don’t I count for something? My pain, my pain, my pain (scene from “Adams Family Values”)]. It appears that the EEOC isn’t just engaging in male-bashing. According to Olson, the EEOC was unmoved when more than 10,000 of the Women’s Workout World health club chain signed petitions protesting it’s efforts to force the chain to hire male attendants. [How could he not mentions Hooters?]

Olson points out that many times the very managers responsible for hiring a woman or a minority applicant are later the same ones sued for discriminating against them. He asks why would they hire them to then turn around and discriminate against them and fire them? [Actually, a number of cases have begun to agree with that argument, indicating that there is an inference of no discrimination.]

Because the court allows plaintiffs a private right to sue under the Civil Rights Act, EEOC conciliation efforts turned into nothing more than paperwork turnstile; an administrative task on the way to filing a civil lawsuit. “Now, as always, the termination process is full of arbitrary and oafish bosses, backstabbing office politics and perceived unfairness of every kind. Discrimination law offers a remedy provided a worker agrees to see a link between his ill treatment and his protected-group status.” Olson shows that plaintiffs’ lawyers are feasting off the laws, and are actually encouraging the filing of lawsuits. He says it’s gone so far that some have even suggested the concept of “universal discrimination”, which can be interpreted as “based on any qualities that are not job related”.

## **CHAPTER FOUR: FEAR OF FLIRTING**

Olson starts pointing out how the law of sexes drastically changes once you enter the workplace door. [Show all the images and jokes that would be inappropriate at work that you pass on the way to work or read in the newspaper, etc. Bikini model poster at bus stop vs. one in a lobby store vs. one in the newspaper – Creates a hostile environment in the workplace, does that mean it creates a hostile work environment at the bus stop or the newspaper stand? Should someone be able to file for wrongful interference with an enjoyable bus ride should they see a poster if a scantily clad woman in the bus?]

Olson reviews the “cleansing of the workplace”, including everything on a visual and verbal level. He also points out that we’ve come to the place that because of the “reasonable person standard”, offensiveness in the workplace is defined by the victim, leading to the rule that is someone feels they have been sexually harassed, then they have been passed. He also points

out that in the spirit of the times, the courts jumped in and began regulating sex in the workplace by themselves, without any legislative go-ahead. He points out that harassment lawsuits fall miles short of the ruling standards for obscenity. In fact, they fall short of standards prevailing on radio, television and print media.

According to the EEOC, only an estimated 5% of sex harassment lawsuits involved quid pro quo harassment. The remaining charges are of hostile work environment. [Not my experience]

According to a New York Times account, male employees of the largely female Jenny Craig diet company complained of being excluded from the office chitchat about pregnancy and menstrual periods.

[This is what I term mental gravity. Are we slowly being programmed to behave? Is there any evidence that things are getting better?] In one case, University of Nebraska ordered a grad student to remove a 5x7" bikini shot from his desk of his wife. [It means that we can have no nude paintings in any environment if it is deemed offensive by anyone] Olson points out that sexual harassment complaints that prove erroneous must not be subjected to any sort of penalty or even reprimand, since this would hint at discouragement and retaliation. [It am amazed he has said nothing about the same-sex harassment cases] Male workers will often conclude after sensitivity training that the only way to stay out of trouble is to avoid women. Higher sensitivity created by these cases eliminates any legitimate dating that may go on in the workplace, as well as any one-on-one situations that involve a manager/subordinate relationship.

Olson concludes that perhaps the whole sexual harassment issue is about power. [Perhaps it is about lust and stupidity as well.]

## **CHAPTER FIVE: MISTAKEN IDENTITY**

Despite predictions that the ADA will generate annual savings of \$60 billion in government disability benefits, there is no evidence that disabled workers are better off. Moreover, Federal disability program payments continued to rise after the passage of the ADA. Olson points out that the passage of these laws show no clear and consistent effects on the rate in which a group covered by them would be employed.

The ADA was passed in part on the premise that disabled persons in America were victims of oppression that bears a striking resemblance to that practiced against ethnic minorities, women, gay people and the elderly.

Olson talks about how the ADA settled on 43 million as the number of disabled persons in America. According to Olson, only 1.7 million of these people are deaf, 720,00 are wheelchair users, and 400,000 are blind. The number climbs drastically when less unfortunate are included in the equation. The definition of "disability" has become so broad as to be meaningless. Surprisingly the ADA as well as the Civil Rights Act were passed with cooperation from both houses, as well as Republican president. [As we grow older, the numbers will get greater.]

## **CHAPTER SIX: THE AGE OF ACCOMODATION**

In this chapter, Olson discusses the general attitude of agencies that accommodation is somewhat right. Olson describes the changing of the physical work environment and then of the employee. Olson poses the question “If the disabled can demand high-tech gear, training or job redesign, then why shouldn’t everyone be allowed to demand those things – especially if it made a difference between losing and holding on to a job.” Essentially, Olson leads one to believe that everyone must be accommodated from every thing at any time. In a sense, he asks, “Is the law actually asking us to discriminate in favor of a workers, thereby discriminating all the same?” Olson essentially argues that those who complain the loudest have the greatest opportunity to shape the workplace to fit their needs, preferences and sensibilities.

## **CHAPTER SEVEN: ACCOMODATING DEMONS**

In this chapter, Olson relates some rather scary and disturbing stories about people who have been allowed to continue work, under a wide variety of circumstances, some extremely safety or information sensitive, despite the personal demons of alcohol/drug abuse and mental disease.

The EEOC guidelines say disabilities which employers may have to accommodate include deficits in “thinking, concentrating and interacting with other people.” “Troubled persons, it seems, are better at maintaining litigation than at maintaining other things in their lives.” Olson points out because of varying political influences in the drafting of the ADA, its result is a meaningless, arbitrary patchwork of exceptions. “The usual charm bracelet of employment-suit etceteras.” [My problem is your problem. It’s no longer “what’s good for you is good for me.” Now it’s “what good for me is what I demand.] Some judges go so far as to say that the right to relapse into alcohol, drug or mental problems is consistent with the spirit of the ADA. “When poor judgement is a symptom of a mental or psychological disorder, it is defined as an impairment that will qualify as a disability under the ADA.” [The message is: If you want to keep a job, you’re better off being sick] “A job or accommodation demand in a mental health case will commonly be premised on the workers’ promise to stay on medication, just as a drug or alcohol abuser will promise to stay off their medication. [Maybe we’re all crazy.]

Thankfully, Olson cites a few cases where employers win against irrational claims. However, there are enough irrational cases that have ended up in significant employee verdicts that make it hard to ignore the absurdity of the situation.

## **CHAPTER EIGHT: SURPRISE FAREWELLS**

In this chapter, Olson goes over the impact of various laws and legislation over the retirement abilities of older workers. Olson argues that by imposing restrictions on a company’s ability to force retirement as well as offer early retirement packages, the end result has been to make older workers less employable, and more subject to early termination.

The Wall Street Journal has reported that over the past few years, most national firms have quietly but steadily done away with “longevity awards”.

Olson points out how the law is oftentimes a one-way street. It’s hard for a young worker to sue an older boss because of age discrimination.

[Why 40? What magically happens between 39 to 40 that a person deserves special protection in the workplace? We can’t wait to be 10, we become 21, turn 30, push 40, reach 50, make it to 60, hit 70, and from there life goes on day by day.]

Olson states that age discrimination claims are some of the most profitable ones to litigate. These older workers receive special protection despite the fact that as a whole they are the wealthiest and most powerful demographic in the country. Any company that is out for new blood, dynamic or aggressive employees can set itself up for an age discrimination suit. Olson concludes the chapter by pointing out that the ADEA and other protections for older workers suffered from the law of “unintended consequences.” As a result, older workers have less choice and less power than before the passage of the acts. “The morale: When the government tells you it is abolishing rain, run out and get an umbrella.”

## **CHAPTER NINE: THE EXCUSE FACTORY**

According to New Haven School Board Chairperson Patricia McCann-Vissepo, “People don’t accept the consequence for their behavior because there aren’t any.” In this chapter, Olson begins reviewing the history of employee rights under traditional tenure and union environments. The concepts of progressive discipline and arbitration have led to absurd rights of reinstatement, back pay and other damages. [I am sick – so save me.] According to Olson, a study of workers reinstated by arbitrators after alcohol abuse found that only one-quarter improved their performance after reinstatement. This includes everything from pilots to truck drivers to locomotive operators and others.

Olson concludes the chapter by pointing out that court decisions have forced employers to engage in self-protective management, generating elaborate paper trails and exhaustive investigations. Stick to formal procedures and dismissal unswervingly, no matter what common sense reasons are for departing from them. Base their decisions only upon objective evidence, except to bear the burden of proof under all circumstances, and fire only after proceeding after a long series of warnings, deadlines and opportunities to shape up. He claims that no one ever passed a bill in Congress or any state’s legislature providing for such an outcome. [But perhaps intending such an outcome?]

## **CHAPTER TEN: DROPPING THE STRETCHER**

This chapter examines the concept of testing and how I relate to today’s new employment laws.

Experiments by the U.S. Air Force shows that well designed tests are often better at predicting who will succeed in a wide range of tasks over experience, declared interest, interview ratings or school grades. Of course, the best predictor is a combination of these factors.

The EEOC has decreed that all tests have to be validated. This means that in order to pass, a score would have to be set at a level of mediocrity or worse. Moreover, it had to be graded on a pass/fail basis. As stated in a leading textbook, “When courts have applied the EEOC guidelines in detail, the tests have generally failed to survive. Olson goes through how the EEOC and the courts have struck down tests for agility, strength, stamina and other physical tests. As a result, on the job injuries, workers’ compensation and disability claims have soared. Olson concludes that things have become so ridiculous that perhaps flipping a coin is the only legal method of employee selection. [As an employer I’d rather fight the hiring claim any day.]

## **CHAPTER ELEVEN: THE MEANING OF COMPETENCE**

Olson begins the chapter by discussing the rapid rise of reverse preference and affirmative action programs. He quotes a defense department memo which specifies “special permission will be required for the promotion of all white men without disabilities.” The U.S. Forest Service achieved a formulation that was even harder to improve on: “Only unqualified applicants will be considered.” Olson goes on to show that employers are handcuffed when it comes to looking past indications of criminal activity, safety violations, workers’ compensation claims and other indications of competence. Language requirements, physical requirements and other limitations have drastically changed the meaning of competence. “The Americans with Disabilities Act has the potential to force the rethinking and watering down of every imaginable standard of competence, whether of mind, body or character.”

## **CHAPTER TWELVE: KID GLOVES AND BRASS KNUCKLES**

One of the more interesting insights in this chapter is the fact that America has reversed its legal treatment of employment and matrimony. We have made it easier to get divorced, yet harder to get fired. Olson talks about constructive discharge claims, retaliation claims, reference claims, etc. Olson points out that street-smart workers and their lawyers take advantage of the employment laws to create job security that they would not otherwise be entitled to. Things have become so sensitive that employers are concerned about even criticizing an employee’s job performance. Legal self-help books encourage both employers and employees to constantly document, document, document.

The scope of the new employment law continues to expand. Courts are now awarding front pay, managers are being sued in their individual capacity [only for sexual harassment] and the list goes on. Olson points out that the self-help literature for disgruntled employees is rather skimpy on warnings about the downside of the employment law process. Nobody tells them about the time cost, expense and emotion associated with bringing these lawsuits. No one tells the people about how hard it is to move forward with their lives while they’re involved with

these lawsuits. [Nobody tells them what it's like to put their life on hold for years, only to lose close to half the time.]

He notes that the six weeks televised harassment trial arising from Rena Week's short stint with Barker McKenzie went on longer than the job itself. [And as a result in a seven million dollar verdict.]

## **CHAPTER THIRTEEN: WHY BUSINESS WILL MISS UNIONS**

In this chapter, Olson points out how union, grievance and arbitration systems, while themselves sometimes arbitrary, are a whole lot better than the lawsuit lottery. The use of trained decision makers as opposed to jurors leads to greater stability and expectation of outcome. [It also results in a larger % of employee awards but at a drastically lower rate – i.e., reinstatement with back pay.]

## **CHAPTER FOURTEEN: WORKPLACE CLEANSING**

An Editorial in the daily Hartford Courant didn't see where the concept of hostile environment would end, speculating that Muslims could get jobs in liquor stores and demand that the entire stock be eliminated. Olson goes over repeated efforts by women to cleanse previously male dominated workplaces of their character, in the process turning free speech on its head. Olson reviews cases which are Orwellian in their outcome, further restricting the right to free speech and right to assembly. The bottom line is, in today's workplace, the second you open your mouth, you do so at a great risk. [Toca la boca] he also points out that many times the very act of putting employees through sensitivity training creates greater divisiveness than existed beforehand. He questions why people should not be allowed to speak as freely in the workplace as they do outside [perhaps that's because you can't just simply remove yourself from the speech at work]. In the book The Nine to Five Guide, it notes that while jokes about the "powerless" are to be condemned, jokes about those "in power" are fine. Olson concludes that according to the National Labor Relations Board protected speech cannot constitute an unfair labor practice, and cannot be introduced as evidence of such. He argues it is time to introduce a similar principle into harassment and discrimination laws.

## **CHAPTER FIFTEEN: SCOFFLAW BOSSES**

Olson begins by pointing out the catch –22's many employers face. They get sued if they give a bad reference, and they get sued if they fail to warn. They get sued if they turn down a job applicant with a violent or criminal past, and sued if they didn't and he ends up hurting someone. Olson argues that the new employment law is not as simple as asking or requiring the workforce to behave properly. No degree of good faith can keep employers from being taken to court, and sometimes losing, nor can they insure victory by sinking a fortune into compliance efforts, although this does not keep them from trying. [One survey found that Federal personnel managers were bound by 850 pages of directly pertinent law and 1,300 pages of regulations, as

well as rooms full of commentary and case law.] For most managers, they have to act first, and then find out later on whether they acted lawfully. It has become a game of legal jeopardy.

Olson points out that the demand for conformity and uniformity creates perverse results. Fear of the leniency for one, leniency for all rule leads some companies to discipline or even fire workers they would rather have retained. [See “Seinfeld” verdict where manager terminated for sexual harassment received a 26 million dollar wrongful termination verdict against Miller Brewing.] Olson reviews the job description mentality of the ADA, and how it is out of alignment with today’s rapidly changing flexibility driven workplace. [See Tom Peters] He also points to the reality that many companies seek out younger employees for specific legitimate reasons, yet may expose themselves to age discrimination suits. For example, should NBC be allowed to hire young people to program shows in their age group? [In the same way, should there be any prohibition from hiring Chinese waiters in a Chinese restaurant, or scantily clad waitresses in Hooters?]

In one of the most briefly developed areas, Olson points out the many absurdity that some of this nation’s biggest law firms have not only been sued repeatedly by their employees, but have paid large amounts in a long series of notable settlements and verdicts. [Many insurers don’t insure them against employment law claims and that’s who they rely on to protect their insured.] All of these firms are known for representing large institutional clients, and some are famous for their employment law defense departments. He also shows how Federal and state agencies, as well as organizations as the NAACP and the ACLU fine themselves hit repeatedly with bias and discrimination suits. As he states, “If the enforcers and experts can’t stay out of legal trouble, what can the rest of us expect?” He concludes by arguing, it’s not the compliance, but the non-compliance that the regulators and attorneys are looking for. [You get what you focus on.].

## **CHAPTER SIXTEEN: SECURE IN WHAT?**

Olson begins by discussing the trend towards outsourcing and layoffs over the past 10 years. He contrasts this with the concept of tenure in Europe. He pints out that the laws have a detrimental affect in the growth of businesses ad the hiring of employees. Companies will purposely stay small to avoid coming within the jurisdictional limits of the various acts. They’ll avoid hiring women and minorities because it's cheaper to fight a hiring lawsuit than a termination lawsuit. As a result, discrimination law has become a deterrent to hiring protected group members for high pressure and high turnover jobs. [In a interesting paradox, the greater the rate of business failure in a community, the greater the rate of business creation. Similarly, it can be argued that the greater rate of job failure, the greater rate of job creation.] Studies also point out that it ends up being the employees who absorb a large part of the expense of the employment law system. If put to a vote, many employees would rather not pay for the expense of this elaborate protection. Unlike unemployment and worker’s compensation programs, the new employment law completely lacks the certainty. Moreover, employers have a difficult time contracting with their employees to waive the right jury or extensive damage awards or to contract with them on an independent contractor basis.

## CHAPTER SEVENTEEN: THE TERMS OF COOPERATION

Before concluding, Olson revisits the regulators and experts and points out how their own personnel practices are non-too glowing. “The new employment law makes scarcely a single promise it does not break...though it pretends to insure a dignified, respectful and humanized work place, it in fact, leaves one that is divided, bureaucratic and adversarial.” Olson concludes that the law actually undermines the concept of diversity as well as liberty. He concludes that “Free association was considered the crowning glory of a liberal and civilized society. It can be again.”

### SOME FINAL COMMENTS

1. It is a well researched and well written book.
2. It is necessarily one-sided, and therefore focuses on the downside of the new employment laws without looking for any of their benefits. Is it possible that perhaps there aren't any?
3. Very little is suggested by way of alternatives other than simply eliminating these laws. Olson could have spent more time focused on what type of system short of elimination would work best in managing these laws. Should we follow the NLRB example or that of our European brethren? Should we have just one catchall category of unfair termination or universal discrimination? Maybe that's his next book.
4. Olson also spends very little time forecasting the future of the new employment laws. What effort will the new demographics and technological trends have on the workplace litigation?
5. If you're searching for solutions, you won't get any. If you're looking to find out just how bad things are, then this book is for you. It is a parade of horrors.
6. Equally one-sided books have recently been published, included “Corporate Abuse” and others. Olson reinforces my belief that this system has gotten entirely too complex to be manageable, and therefore it is ineffective and dangerous.
7. It would be a interesting if there could be some form of comparison with other tort type verdicts and their associated expenses, as well as a little greater discussion on recent legal developments in the area of misrepresentation and fraud, same-sex harassment, etc.
8. There was very little statistical analysis re: where and why lawsuits are filed. What is the most litigious state? Why?