

LABOR PERSPECTIVES

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BEWARE OF ELIGIBLE “SPECIAL PAYMENTS” MADE IN CONNECTION WITH FULL, TEMPORARY OR PARTIAL CLOSING OF OPERATIONS, IN LIGHT OF RECENT AMENDMENT TO PUERTO RICO’S UNJUST DISMISSAL ACT

The Governor of Puerto Rico recently signed into law Act No. 278 of August 15, 2008 (“Act 278”). This is the most recent amendment to Puerto Rico’s Unjust Dismissal Act, Act No. 80 of May 30, 1976 (“Act 80”).

In a nutshell, Act 278 provides that any amount received by an employee who is separated from his or her employment due to the liquidation or closing of a business, will be considered a tax-free “special payment” and, therefore, not subject to Puerto Rico income tax withholding, to the extent the termination of employment is due to any of the “just cause” reasons or circumstances set forth in subsections (d), (e) or (f) of Article 2 of Act 80.

These are:

- (d) a full, temporary or partial closing of operations of the establishment;
- (e) technological or reorganization changes, as well as changes of style, design or the nature of the product made or handled by the establishment, and changes in the services rendered to the public; or

- (f) reduction in employment made necessary by a reduction in the anticipated or prevailing volume of production, sales or profits at the time of the discharge.¹

Act 278 further provides that “special payments” may be subject to those deductions and/or withholdings agreed upon by the employer and the employee.

The language of Act 278 seems to be inherently contradictory because on the one hand it states that a payment made due to the termination of employment will be considered a tax-free “special payment” if it is the result of a discharge stemming from the reasons or circumstances set forth in subsections (d), (e) or (f) of Article 2 of Act 80; on the other hand, it also states that the payment must be made on account of the liquidation or closing of a business. This language would seem to suggest that the tax-free benefits would be applicable exclusively to special payments made in connection with the full, temporary or partial closing of operations of an establishment. However, in

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Administrative Determination 08-13 (“AD 08-13”) issued on October 31, 2008, the Puerto Rico Department of Treasury has clarified that the tax-free benefits would be applicable to all special payments made as a result of a discharge for reasons or circumstances set forth in subsections (d), (e) or (f) of Article 2 of Act 80. In addition, AD 08-13 provides as follows:

- “Special payments” do not include the payment of wages for services rendered, vacation and bonuses (including Christmas Bonus). Accordingly, such payments are taxable and subject to applicable income tax withholding.
- The employer is required to provide an itemized list of all payments made to the discharged employee so that the “special payment” may be easily determined in case of a tax audit.
- There must be an actual separation from employment in order for the “special payment” to be tax-free. That is, if the employee remains rendering the same or other services as an employee or as an independent contractor the “special payment” would be taxable.
- Tax free “special payments” must be reported for Puerto Rico income tax purposes in box number 6 of Form 480.6D, Informative Return - Exempt Income.

It is important to note and clarify that, Act 278 does not modify the nature of severance payments for unjust dismissal made pursuant to Act 80 (“Mesada”). While Mesada payments are not subject to Puerto Rico income tax withholding, they are subject to taxation as income of the employee for Puerto Rico income tax purposes. “Special payments” must not be confused with Mesada payments made pursuant to Act 80.

Moreover, Act 278 also provides that amounts received by a discharged employee from an employer’s profit

sharing plan would be considered a tax-free “special payment” if distributed as a result of a discharge for reasons or circumstances set forth in subsections (d), (e) or (f) of Article 2 of Act 80. Only eligible distributions from profit sharing plans qualified under Section 1165(a) of the Puerto Rico Internal Revenue Code of 1994, as amended (the “PR Code”), are tax exempt. Distributions from defined benefit, 401(k)/1165(e) and non-qualified plans are taxable, as provided under the applicable provisions of the PR Code. Eligible tax-free distributions from profit sharing plans must be reported in Form 480.7C, Informative Return - Retirement Plans and Annuities.

It is worth mentioning, that “special payments” are subject to FICA tax and must be reported for FICA tax purposes in a Form 499R-2/W-2PR, Withholding Statement.

Lastly, employers must also be aware of another apparent contradiction in the language of Act 278. While Act 80 considers the reasons set forth in Article 2, subsections (d), (e) and (f) of the statute as constitutive of “just cause” for termination of employment, Act 278 provides that the receipt by an employee

of a “special payment” as a result of a termination stemming from the reasons or circumstances described in Article 2, subsections (d), (e) and (f) would not otherwise affect the employee’s right to file a claim under Act 80 in order to collect the Mesada payment owed as a result of an alleged unjust dismissal. Hence, special consideration must be paid to the nature of the payments made, the reasons behind the making of such payments and the language to be incorporated into potential separation agreements and/or packages related to special payments.

Act 278 applies to eligible “special payments” made on or after August 15, 2008 (regardless of the actual termination date). Should you have any questions regarding the applicability of Act 278 or need assistance with the preparation of separation agreements for terminations, please contact any of the attorneys in McConnell Valdés LLC’s Labor and Employment Law Practice Group. If your inquiry is related to the tax consequences of the “special payment,” please contact any of the attorneys in our Tax Practice Group. **M&V**

¹P.R. Laws Ann. tit. 29, §185b(d)-(f).

LEGISLATIVE UPDATE

In the Summer 2008 Edition of *Labor Perspectives*, we included an article regarding the ADA Amendments Act of 2008 titled “Proposed Federal Legislation Would Broaden the Scope of Protection Under the ADA.” The aforementioned article addressed the ADA Amendments Act of 2008 (“ADAAA”) as it passed in the U.S. House of Representatives on June 25, 2008. As part of our effort to keep our readers updated, we wish to inform you that on September 25, 2008, President Bush signed the ADA Amendments Act of 2008 (“ADAAA”). The statute becomes effective on January 1,

2009. The one major difference between the previous version of the ADAAA which passed in the House in June and the final version signed by the President is that the previous version defined the term “substantially limits” as “materially restricts,” while the final version does not provide a definition for the term “substantially limits.”

If you have any questions, or wish additional information regarding this matter, please contact any of the attorneys of the Labor and Employment Law Practice Group of McConnell Valdés LLC. **M&V**



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NLRB DECIDES THAT EMPLOYEES DO NOT HAVE A STATUTORY RIGHT TO USE AN EMPLOYER'S E-MAIL SYSTEM FOR SECTION 7 MATTERS

In *The Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 NLRB 70 (2007) ("Register Guard"), the National Labor Relations Board ("the Board"), decided that employees do not have a statutory right to use an employer's e-mail system in the exercise of their organizational rights under Section 7 of the National Labor Relations Act ("the Act"). This was a case of first impression.

On May 1, 2000, the Company's Managing Editor sent an e-mail to employees informing them that they should try to leave work early because the police notified him that there were going to be anarchists in a union rally scheduled for that day. Employee Bill Bishop ("Bishop") sent a reply e-mail to the Managing Editor and other employees. It implied that the Managing Editor's e-mail was untruthful; Bishop claimed that the police had informed him that it was the Company who told the police that there were going to be anarchists in the rally. On May 4, 2000, Suzy Prozanski ("Prozanski"), a unit employee and the Union's president, sent an unauthorized e-mail titled "setting it straight" to all the employees. In it she clarified the information related to the anarchists and the police. Prozanski's clarification e-mail resulted in a first written warning for using the Company's e-mail system for union business. On August 12, 2000, Prozanski sent another unauthorized e-mail urging employees to wear green to support the Union's position in the ongoing negotiations. Four days later, Prozanski sent a third unauthorized e-mail asking employees to participate with the Union in an upcoming town parade. Prozanski was given a second written warning for the same reason as before. This warning quoted the Company's e-mail policy prohibiting the use of the Company's e-mail system to solicit or proselytize for commercial ventures, religious or political causes, outside organizations or other non-job-related solicitation. Subsequently, the Union

filed an unfair labor practice charge before the Board alleging that the Company violated Sections 8(a)(1) and (3) of the Act by enforcing a discriminatory e-mail policy.

The Board stated that it had consistently held that there is no statutory right to use an employer's equipment or media for these purposes. However, the restricted use of the equipment may not be discriminatory. The Board made reference to previous cases regarding the use of other employer equipment such as the company's television sets, the bulletin board, the copy machine, the telephone, and the public address systems, and where it decided that the employees had no statutory right to use the employer's equipment or media.

Furthermore, the Board set a new requirement for alleged discriminatory enforcement of employment rules under Section 7 of the Act. It established that "in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or their Section 7-protected status." Thus, employers are allowed to draw lines distinguishing between activities or communications of similar character, permitting the use of company facilities for one but not for others. Some of these distinctions may be between: charitable solicitations and noncharitable solicitations; solicitations of a personal nature and solicitations for the commercial sale of a product; invitations of a personal nature and invitations extended to an organization; mere talk and solicitations; and non-business-related use and business-related use.

The Board held that the Company's e-mail policy did not violate Section 8(a)(1). The Board stated that the policy "on its face does not discriminate against Section 7 activity..."

Furthermore, it stated that employers "may lawfully bar employees' non-work-related use of its e-mail system, unless the employer acts in a manner that discriminates against Section 7 activity."

As to the May 4, 2000 e-mail, the Board found that the employer violated Section 8(a)(1) by enforcing the policy in a discriminatory manner. The e-mail was not a solicitation; it was a clarification of the facts surrounding the Union's rally the previous day. The employer had allowed other e-mails related to jokes, baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking. "The only difference between Prozanski's May 4, 2000, e-mail and the e-mails permitted by the [employer] is that Prozanski's e-mail was union-related." The Board also found that the employer violated Section 8(a)(3) and (1) of the Act by giving Prozanski a written warning for the May 4, 2000 e-mail; even though the employee does not have a right to use an employer's e-mail system, "there is a Section 7 right to be free from discriminatory treatment."

As to the August 14 and 18, 2000, e-mails and the second warning, the Board found that the employer had not violated Section 8(a)(1) or (3) of the Act. There was no evidence that the employer had allowed employees to use the e-mail system to solicit other employees to support any groups or organizations.

The Register Guard case has strengthened employers' property rights over the use of its facilities and communication systems. However, it confirms that employers must be consistent in the way they take disciplinary measures and under what circumstances they allow the use of their e-mail system. Employers should implement policies related to the use of the e-mail; however, they must be consistent and non-discriminatory in the way they impose disciplinary measures for their violation. **M&V**



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EEOC ISSUES NEW ADA GUIDELINES ON THE APPLICATION OF CONDUCT AND PERFORMANCE STANDARDS TO EMPLOYEES WITH DISABILITIES

Employers may often find themselves in a predicament when faced with issues of misconduct and/or poor performance by an ADA disabled employee. For example, should the employer apply to the disabled employee the same conduct and performance standards that it applies to all others in the workplace? Should a disability-caused misconduct and/or performance issue be handled differently than it would be were it not caused by an ADA disability? Is it an ADA duty of reasonable accommodation to relax the conduct and performance standards in such situations? The new EEOC guidelines issued in September of 2008 are an attempt to help employers decipher these difficult and thorny issues that commonly arise under the ADA.

Firstly, the new EEOC guidelines make clear that there are no categorical answers to these questions under the ADA. Once more, it becomes a-case-by case analysis that will provide the right answers in the end. However, the EEOC guidelines prove helpful in delineating general principles that are always applicable and the EEOC illustrates them with specific factual examples, most of which are the result of case law developed during the last 15 years.

Regarding conduct standards, the new EEOC guidelines discuss questions such as: If an employee's disability causes violation of a conduct rule, may an employer discipline the individual? The EEOC's answer is a clear yes, if the conduct rule at issue is job related

and consistent with business necessity, and other employees are held to the same standard. This may seem an easy answer at first. Yet the EEOC guidelines go on to explain that in ADA-covered situations regarding disruptive behavior, for example, determining whether a conduct rule is job related and consistent with business necessity will rest on evaluating a number of factors, such as: the manifestation or symptom that affects the employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment. Therefore, although the general golden rule is that ADA does not insulate emotional or violent outbursts or other misconduct blamed on a disability, certain other disruptive behaviors when examined against these factors may not pass the discipline muster under the ADA; and so the results may differ.

For example, the guidelines illustrate the case of an employee with a psychiatric condition who complies with his job, but is seen frequently talking to himself. The employee cannot control this behavior which is caused by an ADA-covered condition. The employee does not work with the public or in close proximity to other co-workers. This odd behavior makes some employees uncomfortable and they complain; so the employer transfers the employee to a night shift where he is more isolated and has less opportunity of advancement. In this case, the EEOC states that the conduct in this particular employment context is not so disruptive as to justify the measure

taken. In other words, application of the company's conduct standards to the disabled employee in this example is not job related or consistent with business necessity and therefore it may be discriminatory under the ADA. On the other hand, the EEOC guidelines provide additional factual scenarios of disability-caused misconduct where the discipline and/or termination measure applied to the disabled employee is considered job related and consistent with business necessity.

As to employer reasonable accommodation duties and discipline, the EEOC guidelines clarify that, as a general rule, the employer may discipline an employee for disability caused misconduct or poor performance in the same way as it would its other employees, and without regard to reasonable accommodation if accommodation was not requested by the employee or its need was not obvious. Also, if the employee's request for accommodation was made for the first time during the disciplinary process, the EEOC guidelines clarify that the employer can still discipline the employee; but it must not refuse to discuss the request or fail to provide a reasonable accommodation as it goes forward, notwithstanding the employee's placement in a Performance Improvement Plan ("PIP") or other disciplinary process. The accommodation should be provided unless it is unreasonable and places an undue hardship on the employer. Also, these guidelines clarify that if the employee requested reasonable

accommodation before the conduct or performance problem arose or became too serious, the employer may need to rescind, or at least postpone, the disciplinary measure if it failed to evaluate the request for reasonable accommodation. It is a must for employers to engage in an interactive process with a disabled employee during these stages of employment discipline, to see if the requested accommodation is reasonable. This way employers can avoid ADA liability issues that may arise in the application of conduct and performance standards to disabled employees.

One example that the EEOC illustrates in the guidelines is the following. What about the case of an employee who suffers from a Bipolar Disorder that is known to the employer, and she was fired because during a performance meeting she became angry with her supervisor, yelled at him, and cursed him when he told her not to leave the meeting? If this employee contends that it was due to her disability that she lost her control, and she apologizes and requests to come back with accommodations; should she be allowed to return to work with accommodation? The EEOC answers that the termination of the disabled employee in this example is appropriate and there is no ADA violation in refusing to consider her request for accommodation because it came after her insubordinate conduct warranted termination.

And what about applying the same time and attendance requirements to disabled employees who incur numerous absences due to disability-related reasons: is it discriminatory under the ADA? In essence, the EEOC guidelines provide that in most jobs the employer can require regular attendance from all its employees and it does not have to accommodate repeated and unpredictable instances of tardiness or absenteeism that occur over a prolonged time notwithstanding

that these are caused by an employee's disability. This answer is based on ample case law establishing that if the ADA-related absences are chronic, frequent, and unpredictable, thus making it impossible for the employer to plan for these absences, there is usually no duty to tolerate them because it is not a reasonable accommodation for any employer. However, employers must always take into account that under Puerto Rico law there are many leaves of

absence and reinstatement rights that may protect employees who become disabled to work regardless of whether they are covered under the ADA. Employees may remain on disability leave up to one year under local law. So, the ADA reasonable accommodation analysis and application of attendance rules should take into account the possible application of other leaves of absence.

Finally, the new EEOC guidelines address confidentiality issues under the ADA and whether the employer can seek medical information when the disabled employee's performance or conduct is at issue. The EEOC's answer to this question is that such medical inquiries can be made "sometimes." That is, an inquiry can be made only if the employer has a reasonable belief, based on objective evidence, that the employee is unable to perform an essential function or will pose a "direct threat" because of a medical condition. If so, the employer may ask the employee to produce medical documentation to certify that she is fit to continue working and/or it may request the employee to undergo a medical examination that is related to the performance and conduct issues. The guidelines clarify also that in such cases the employer can elect to impose discipline and apply its performance and conduct standards without first having to seek a medical exam.

Managing performance and conduct issues of disabled employees may prove difficult for employers. The EEOC guidelines are helpful, although they do not provide all the answers. Please contact our attorneys for counsel on specific cases of employees with medical conditions/ impairments that may be covered under ADA. They will provide you with a reasoned analysis of the ADA's legal implications as they may apply to your particular factual context. **M&V**

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EEOC ISSUES COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION

Title VII of the Civil Rights Act of 1964 (“Title VII” or the “Act”) protects workers from employment discrimination on the basis of, among other categories, religion. What exactly is religion for purposes of the Act? What constitutes religious discrimination? To what extent are employers expected to accommodate the religious beliefs of their employees in order to comply with the Act? The new Compliance Manual (“Manual”) issued by the Equal Employment Opportunity Commission (“EEOC”) on July 22, 2008 answers these questions. Moreover, the Manual provides guidance and detailed examples for analyzing charges alleging religious discrimination, as defined by Title VII.

Title VII defines “religion” broadly. Religion, according to the Act, includes all aspects of religious observance and practice as well as belief. In fact, religious beliefs include not only theistic beliefs, but also non-theistic “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” It even includes atheism. So, then, what is considered religious discrimination by Title VII? In general, Title VII prohibits employers, employment agencies, and unions from: (1) treating applicants or employees differently (disparate treatment) based on their religious beliefs in any aspect of employment; (2) harassing (or allowing harassment of) an employee because of his or her religious beliefs; (3) denying a requested reasonable accommodation of an applicant’s or employee’s sincerely held religious belief - if the accommodation will not impose an undue hardship on the conduct of the business; and (4) retaliating against an applicant or employee who has engaged in protected activity regarding religious discrimination. Generally, engaging in any of the above-listed conduct constitutes religious discrimination. What follows is a brief explanation as to each of these prohibitions.

In general, Title VII’s prohibition against disparate treatment based on religion functions is very much like its prohibition against any of the other protected categories (i.e. race, color, sex, or national origin). Disparate treatment works both ways: it violates the statute whether motivated by bias against, or by preference toward, an applicant or employee due to his or her religious beliefs. An employer, therefore, will be considered to be discriminating on the basis of religion for hiring an applicant simply because that applicant shares the employer’s religious beliefs. The employer would be indirectly discriminating against all the other applicants that do not share the employer’s beliefs.

Religious harassment in violation of Title VII occurs when employees are: required or coerced to abandon, alter, or adopt a religious practice as a condition of employment (*quid pro quo*), or subjected to unwelcome statements or conduct that are based on religion that are so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive and there is a basis for holding the employer liable. Offhand or isolated incidents (unless extremely serious) will not rise to the level of illegality. As you may notice, Title VII’s prohibition against religious harassment also functions very much like its prohibition against the other protected categories.

Employers may be held liable for any harassment proven to have taken place in the workplace. Thus, employers need to take the appropriate measures to protect themselves from potential liability. Employers will always be held liable for a supervisor’s harassment if it results in a tangible adverse employment action. On the other hand, if it does not result in a tangible adverse action, the employer may be able to defend itself. In order to do so, the employer must demonstrate that: (1) it exercised reasonable care to prevent and

correct promptly any harassing behavior, and (2) the employee reasonably failed to take advantage of any preventive or corrective opportunities which the employer provided. In cases of harassment by a co-worker or other party over whom the employer had some control, an employer is liable only if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action. An employer can reduce the likelihood that employees will engage in harassing conduct by implementing an anti-harassment policy and an effective procedure for reporting, investigating, and correcting such unlawful conduct.

The prohibition regarding the denial of a requested reasonable accommodation of an applicant’s or employee’s sincerely held religious belief - if the accommodation will not impose an undue hardship on the conduct of the business - is the most unique aspect of the Act. First of all, whether a belief is or is not sincerely held is only relevant to religious accommodation claims, not to claims of disparate treatment or harassment. With respect to disparate treatment and/or harassment claims, what is relevant is the motivation of the discriminating agent, and not the actual beliefs of the individual alleging discrimination, as is the case with claims of reasonable accommodation. Title VII requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief conflicts with a work requirement; the exception to this is where the accommodation would create an undue hardship.

The undue hardship definition of the Act is also unique. Title VII’s undue hardship defense is defined very differently than the undue hardship defense for disability accommodation under the Americans with Disabilities Act (“ADA”). Under Title VII, the undue hardship defense to not providing a religious accommodation requires a

showing that the proposed accommodation represents a “more than *de minimis*” cost or burden. This is a far lower standard for an employer to meet than the undue hardship under the ADA; under the ADA, undue hardship is defined in that statute as a “significant difficulty or expense.” For example, an employer may require an employee to participate in a workplace activity that conflicts with the employee’s sincerely held religious belief so long as the employer demonstrates that to accommodate the employee’s request to be excused would impose an undue hardship, as defined by Title VII (that is, a “more than *de minimis*” burden).

Finally, for purposes of accommodation, an employer is entitled to inquire about the religious nature of the belief or practice at issue; the employee is obligated to explain his or her belief without assuming that the employer will already know or understand it. Although it is not mandatory for an employer to conduct a discussion with an employee before denying the employee’s accommodation request, it is highly recommended that the employer do so. Courts have often ruled against employers that have failed to conduct a discussion with employees requesting an accommodation. Courts have also ruled against employees who have refused to cooperate with an employer’s reasonable request for information.

Once it has all the pertinent information, an employer is in a better position to provide a reasonable accommodation. What, then, is a “reasonable” accommodation? According to the Manual, an accommodation is not reasonable if it merely lessens rather than eliminates the conflict between religion and work, provided that eliminating the conflict does not present an undue hardship. In other words, when it is possible to eliminate the conflict without incurring an undue cost or burden, the employer needs to do so and will not be in compliance with the Act if it merely lessens the conflict. On the other hand, when there is more than one reasonable accommodation available that would eliminate the conflict, the employee is not entitled to choose the one that he or she prefers. Of course, whether an accommodation is considered “reasonable” is a case-by-case determination; that cannot be considered in a

vacuum. The Manual provides many examples as to what may be reasonable accommodations.

Lastly, the Act prohibits retaliation because an individual has engaged in protected activity. The EEOC has taken the position that requesting a religious accommodation is a protected activity.

It is true that the number of religious discrimination cases is rather small in

comparison to cases on the basis of any of the other categories protected by Title VII. Nevertheless, the importance of religious discrimination cases should not be underestimated. Over the last 15 years, the number of religious discrimination cases has more than doubled. For more information regarding this matter, you may contact any of the attorneys in the Labor and Employment Law Practice Group. **M&V**

PRACTICE GROUP NEWS

by: *María Antongiorgi*

The Labor and Employment Law Practice Group hosted its second Round Table Seminar of 2008 on October 17. The Seminar was held at McConnell Valdés LLC’s facilities and over 65 of our clients and friends attended the same. The topics discussed were the new amendments to the Americans with Disabilities Act (“ADA”), the Genetic Information Non-Discrimination Act, and the EEOC’s Regulations on Applying Performance and Conduct Standards for Employees with Disabilities. **Anita Montaner, María Antongiorgi, Rafael I. Rodríguez Nevares and Jessica Figueroa** were the speakers during this round table. The Round Table Seminars are provided free of cost to clients and friends of the Firm several times during the year.

Maristella Collazo Soto joined the Labor and Employment Law Practice Group as an associate in October 2008. **Maristella** graduated from the University of Puerto Rico School of Law in May 2008. She obtained a bachelor in Business Administration from the University of Massachusetts at Amherst in 2005. Prior to joining the Labor and Employment Practice Group as an associate, **Maristella** worked with McConnell Valdés during the summers of 2006 and 2007 as a summer intern.

Maggie Correa, a Member of McV’s Labor and Employment Law Practice Group, was awarded the 2008 Bar Member Distinction, “Colegiada del Año,” by the Puerto Rico Bar Association. The award was presented during the Bar Association’s Convention at the Wyndham Rio Mar, on September 11, 2008. This is an important distinction, which is not only a recognition of **Maggie’s** work for the Bar Association, but also of her devotion to the practice of law. It is also a recognition that distinguishes McConnell Valdés LLC for the quality of its professionals.



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