

PERSONAL JURISDICTION—NEW JERSEY CONSTITUTION—DEFAMATORY COMMENTS POSTED BY DEFENDANTS IN ONLINE CHATROOM REGARDING RELATED SUIT FILED BY PLAINTIFF IN NEW JERSEY CREATES SUFFICIENT MINIMUM CONTACTS WITH STATE TO ASSERT PERSONAL JURISDICTION OVER DEFENDANTS. *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38 (2000).

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I. INTRODUCTION

Simply stated, personal jurisdiction refers to a state's authority to subject people and things to its own judicial process.¹ Since the case of *Pennoyer v. Neff*,² a state's right to assert such power has been subject to the Due Process Clause of the Fourteenth Amendment, which forbids states from "depriv[ing] any person of life, liberty or property, without due process of law."³ The requirement of due process within the exercise of personal jurisdiction ensures that plaintiffs cannot file suits in any court they choose.⁴ Indeed, the United States Supreme Court developed several tests since the *Pennoyer* decision, which attempted to harmonize the exercise of personal jurisdiction with the requirements of due process.⁵ Historically, the requirements for a state to assert jurisdiction over a defendant have ranged from requiring the actual and physical presence of a defendant within a state, to the current model, which examines the relationship between the defendant, the underlying activities, and the state where the plaintiff filed suit.⁶ The fundamental transformation in the American economy has pro-

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¹ See Restatement (Third) of Foreign Relations Law of the United States § 401(b) (1987).

² 95 U.S. 714 (1877).

³ U.S. CONST. AMEND. XIV, § 1.

⁴ See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064 (2d ed. 1987).

⁵ *Id.* § 1065.

⁶ *Id.*

pelled the Court's refinements of the due process requirement for jurisdiction.⁷

Today, some feel that the courts face a daunting task in applying existing law to the world of the Internet.⁸ In the introduction to his article, *The Internet and Personal Jurisdiction*,⁹ author Michael Lampert, Esq., quotes a court's lament that "attempting to apply established. . . law in the fast developing world of the Internet is somewhat like trying to board a moving bus."¹⁰ This difficulty arises in part from the fundamental debate regarding whether the Internet should be treated as a unique environment that requires a new set of legal rules,¹¹ or whether existing legal schemes can successfully regulate Internet activity.¹²

The problem that the Internet poses for lawmakers comes in large part from the lack of physical space, and therefore lack of geographical boundaries, which make up the landscape of "cyberspace."¹³ According to Johnson & Post, who are among those who believe that the Internet requires a new set of legal rules, cyberspace "radically undermines the relationship between legally significant (on-line) phenomena and physical location."¹⁴ Internet activity, for these scholars, "subverts" the established system of rule making which is based upon borders between physical spaces.¹⁵ Johnson & Post argue that the real participants in Internet transactions should regulate the activities of cyberspace because they are

⁷ World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292-93 (1980).

⁸ See *Bensusan Rest. Corp. v. King*, 126 F.3d 25 (2d Cir. 1997).

⁹ 198 N.J. LAW., August 1999, at 47.

¹⁰ *Id.* (quoting *Bensusan*, 126 F.3d at 25).

¹¹ See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996).

¹² See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1199 (1998).

¹³ See Johnson & Post, *supra* note 11, at 1367. Cyberspace refers to "[a] metaphor for describing the non- physical terrain created by computer systems. Online systems, for example, create a cyberspace within which people can communicate with one another (via e-mail), do research, or simply window shop. Like physical space, cyberspace contains objects (files, mail messages, graphics, etc.) and different modes of transportation and delivery. Unlike real space, though, exploring cyberspace does not require any physical movement other than pressing keys on a keyboard or moving a mouse." WEBOPEDIA, at <http://webodpedia.com> (last visited October 9, 2000).

¹⁴ Johnson & Post, *supra* note 11, at 1370.

¹⁵ *Id.*

the parties most in need of proper notice of the law, which affects on-line transactions.¹⁶

On the other end of this debate, authors like Jack Goldsmith contend that there is no problem applying existing legal regimes to govern Internet activity.¹⁷ For academics like Goldsmith, Internet transactions still involve real people in different physical places with fixed laws and jurisdictions interacting with each other.¹⁸ Even though the entire transaction may take place on-line, Goldsmith argues that the state in which a harm has been committed will feel the effects of that harm, and therefore that state will take an interest in regulating that activity.¹⁹

In *Blakey v. Continental Airlines, Inc.*, the New Jersey Supreme Court confronted this debate head on.²⁰ The novel issue analyzed by the Court concerned personal jurisdiction over a non-corporate defendant²¹ on the Internet.²² *Blakey* presented the Court with the opportunity “to create a new order of jurisdictional analysis adapted to the Internet.”²³ However, a unanimous Court declined that opportunity, and instead continued to utilize the traditional principles of jurisdiction originally announced in *Pennoyer v. Neff*.²⁴

¹⁶ Goldsmith, *supra* note 12, at 1199.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 164 N.J. 38 (2000).

²¹ In his article *The Internet and Personal Jurisdiction*, 198 N.J. LAW., August 1999, at 47, author Michael Lampert discussed New Jersey’s analysis of websites for jurisdictional purposes. Mr. Lampert noted that New Jersey, among other states, analyzed websites along a largely traditional jurisdictional continuum. *Id.* at 49. On one end of the continuum “are webistes with the main purpose of actively soliciting and conducting business via the Internet.” *Id.* Lampert noted that courts will usually exercise jurisdiction over these kinds of websites because they tend to meet the purposeful availment and continuous contacts requirements for personal jurisdiction. *Id.* On the other end of the continuum are those websites “that merely supply information.” *Id.* These websites are less likely to serve as a basis for jurisdiction. *Id.* Lampert explained that courts would likely find a lack of purposeful availment in the forum state by these passive websites and that the assertion of jurisdiction would be both unreasonable and unpredictable. *Id.* at 49.

²² *Blakey*, 164 N.J. at 63.

²³ *Id.* at 64.

²⁴ *Id.* (citing 95 U.S. 714, 733 (1877)).

II. STATEMENT OF THE CASE

Plaintiff Tammy Blakey, a pilot at defendant Continental Airlines ("Continental") since 1984, became Continental's first female pilot in December of 1989 to fly the Airbus, also known as the A300 Aircraft.²⁵ Only five Continental pilots, including Blakey, were qualified to fly the A300.²⁶ Almost immediately after qualifying as an A300 captain, Blakey complained that her male co-employees were sexually harassing her and that they had created a hostile work environment for her through their comments and conduct.²⁷ Blakey claimed that she filed complaints about the harassing behavior by her co-employees with Continental representatives beginning in February of 1991.²⁸ Blakey's complaints focused on pornographic photographs and lewd gender-based comments aimed at her in the workplace, and in particular, in her plane's cockpit.²⁹ During this time period, from 1990 to 1994, Blakey lived in Arlington, Washington but was based in Newark, New Jersey.³⁰

Blakey initially filed suit against Continental in February of 1993 in the district court in Seattle, Washington, claiming that Continental had failed to remedy a hostile work environment.³¹ Continental filed a motion to transfer the suit brought in the district court in Seattle to the district court of New Jersey.³² The court granted the motion in May 1993 since it found that Blakey's allegations concerning Continental's employment practices, as well as the personnel responsible for those actions, rested upon events that took place in New Jersey.³³

²⁵ *Id.* at 47. The Airbus is a 250-passenger twin engine airplane. *Id.*

²⁶ *Id.*

²⁷ *Id.* at 47.

²⁸ *Blakey*, 164 N.J. at 47.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* In addition, Blakey filed a charge against Continental with the Equal Employment Opportunity Commission in Seattle for sexual discrimination and retaliation in violation of Title VII of the Civil Rights Acts of 1964, 42 U.S.C.A. § 2000(a), and the Civil Rights Act of 1991, Civil Rights Act of 1991, § 1 et seq. *Id.*

³² *Id.* at 48.

³³ *Id.* at 47. In the same month, Blakey voluntarily transferred from Newark to Houston and in August 1993 took a voluntary unpaid leave of absence in order to alleviate the ongoing stress she experienced in Newark. *Id.*

During the time period the federal litigation was ongoing, other Continental pilots published messages about Blakey which she perceived as harassing and gender-based, or in some instances as false and defamatory.³⁴ These messages were published by numerous male pilots employed by Continental on an on-line computer bulletin board called the Crew Members Forum ("Forum").³⁵ The Forum was available for all Continental pilots and crew member personnel through use of Compuserve, its Internet provider.³⁶

Continental pilots and crew members were required to access Continental's on-line information system, called CMS, in order to obtain their assignments and flight schedules.³⁷ The CMS could be accessed in three ways.³⁸ Employees could access CMS at crew locations through "dumb terminals,"³⁹ by directly dialing from a telephone service, or through Continental's Internet Service Provider ("ISP"), Compuserve.⁴⁰ To access CMS through Compuserve, Continental employees needed a personal computer, a modem,⁴¹ a phone line and a custom-

³⁴ *Blakey*, 164 N.J. at 47.

³⁵ *Id.* A forum is "[a]n online discussion group. Online services and Bulletin board services (BBS's) provide a variety of forums, in which participants with common interests can exchange open messages." WEBOPEDIA, *supra* note 13.

³⁶ *Blakey*, 164 N.J. at 47. The Internet is "[a] global network connecting millions of computers." WEBOPEDIA, *supra* note 13. Contrasted with "online services", which are controlled centrally, the Internet was designed to be decentralized. *Id.* The Internet is accessed through various means, including online services or Internet Service Providers. *Id.*

³⁷ *Blakey*, 164 N.J. at 49. CMS and other information management systems were outsourced by Continental to Electronic Data Systems. *Id.*

³⁸ *Id.*

³⁹ A terminal is "a device that enables you to communicate with a computer. Generally, a terminal is a combination of [a] keyboard and display screen." WEBOPEDIA, *supra* note 13. A dumb terminal is defined as "a display monitor that has no processing capabilities. A dumb terminal is simply an output device that accepts data from the CPU." *Id.*

⁴⁰ *Blakey*, 164 N.J. at 49. An Internet Service Provider, also known as an ISP, is "a company that provides access to the Internet. For a monthly fee, the service provider gives you a software package, username, password, and access to phone number. Equipped with a modem, you can then log on to the Internet and Browse the World Wide Web. . . and receive e-mail." WEBOPEDIA, *supra* note 13.

⁴¹ "A modem is a device or program that enables a computer to transmit data over telephone lines. Computer information is stored digitally, whereas information transmitted over telephone lines is transmitted in the form of analog waves. A modem converts between these two forms." WEBOPEDIA, *supra* note 13.

ized software package provided by Compuserve.⁴² Continental employees were additionally provided access to the Forum by a direct connection between Compuserve and Continental's main computer system for an additional \$5.80 per hour.⁴³ Unlike access to CMS, the Forum was accessible only through Compuserve and it operated like a bulletin board where employees posted "threads"⁴⁴ of messages.⁴⁵ Continental prohibited its management from participating in these threads, however, all chief pilots and assistant chief pilots could access the forum if they signed up for the Compuserve software package.⁴⁶ The technical administration of the Forum was handled by volunteer Continental crew members.⁴⁷

Within the Forum, defendants Donald Jensen, Mark Farrow, Joe Vacca and Kay Riggs posted comments directed at Blakey relating to her ongoing federal lawsuit.⁴⁸ Blakey attempted to amend her federal suit against Continental by including the allegedly defamatory comments posted on the Forum by those defendants in support of her hostile work environment claim against Continental.⁴⁹ The District Court for New Jersey denied Blakey leave to amend her claim, reasoning that she had "other judicial recourse available to pursue her claims."⁵⁰

Blakey filed suit in New Jersey state court in December of 1995 against both Continental and the pilots who posted messages about her in the Forum, alleging defamation, sexual harassment/hostile work environment, business libel, and in-

⁴² *Blakey*, 164 N.J. at 49.

⁴³ *Id.* at 49-50. Continental received three percent of the hourly rate charged by Continental to defray any costs that Continental incurred. *Id.*

⁴⁴ A "thread" is a "series of messages that have been posted as replies to each other. A single forum. . . typically contains many threads covering different subjects. By reading each message in a thread, one after the other, you can see how the discussion has evolved." WEBOPEDIA, *supra* note 13.

⁴⁵ *Blakey*, 164 N.J. 38 at 50.

⁴⁶ *Id.* at 51. At this time, it was uncertain whether knowledge of harassing conduct could be imputed to Continental. *Id.*

⁴⁷ *Id.* at 50. These volunteer members were known as the System Operators. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 54.

⁵⁰ *Id.* (citations omitted).

tentional infliction of emotional distress.⁵¹ Continental moved for partial summary judgment on the defamation, business libel and intentional infliction of emotional distress claims in August 1996, and individual defendants Riggs, Vacca, Abdu, Farrow, Oroxco, and Stivala filed motions to dismiss for lack of personal jurisdiction.⁵² The Superior Court, Law Division, granted both the pilots' motions and Continental's motion in April 1997.⁵³ Continental subsequently filed a motion for summary judgment on the remaining issue which was granted in April 1998.⁵⁴

On appeal, the appellate court framed the issue before it as one of personal jurisdiction of defamation claims based upon electronic communications.⁵⁵ After canvassing the law of defamatory electronic mail, the appellate court agreed with the trial court's conclusion that jurisdiction could be exercised over the individual defendants solely on the basis of their electronic contacts only under very tightly drawn circumstances.⁵⁶ These circumstances arose "only when they [the defendants] specifically direct their activities at the forum, the plaintiff is a resident of the forum, and the brunt of the injury is felt in the forum state."⁵⁷ The appellate court went on to distinguish defamatory statements published in magazines from the publication of the same statements in an electronic medium.⁵⁸ Finally, the appellate court concluded that the individual defendants' connection with New Jersey was too attenuated for the court to sustain personal jurisdiction over them.⁵⁹

⁵¹ *Blakey*, 164 N.J. 38 at 54 (citations omitted).

⁵² *Blakey v. Cont'l Airlines, Inc.*, 322 N.J. Super. 187, 191 (App. Div. 1999). The complaint against Don Jensen was dismissed on July 28, 1997, although he did not file a motion to dismiss with his co-defendants. *Id.*

⁵³ *Id.* at 191. Although the court found that it held personal jurisdiction over defendant Abdi, his statements were not found to be actionable and all claims against him were dismissed in March 1998. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 205.

⁵⁶ *Id.* at 199.

⁵⁷ *Id.* (citations omitted).

⁵⁸ *Blakey*, 322 N.J. Super. at 199. According to the appellate court, the "virtually limitless accessibility of many Internet connections renders this communication medium unique." *Id.*

⁵⁹ *Id.* at 211.

The New Jersey Supreme Court granted certification to determine both whether the Forum could be considered part of the work place for discrimination claims⁶⁰ and whether New Jersey held jurisdiction over the individual defendants who were alleged to have defamed Blakey through their message threads in the Forum.⁶¹ The Court, in a unanimous opinion by Justice O'Hern, held that the Forum could serve as an extension of the workplace and subject Continental to a duty to correct any harassing conduct it was aware of in the Forum.⁶² The Court also held that the individual defendants may have subjected themselves to personal jurisdiction in New Jersey if they were aware of Blakey's state claims.⁶³

III. PRIOR CASE HISTORY

THE EVOLUTION OF PERSONAL JURISDICTION ANALYSIS

The New Jersey Supreme Court decided to analyze whether it held personal jurisdiction over the defendants through conventional jurisdictional standards rather than to create new law governing Internet jurisdiction.⁶⁴ Accordingly, its analysis followed the historical development of personal jurisdiction as decided in the United States Supreme Court, and the case of *Pennoyer v. Neff*⁶⁵ served as the starting point for the analysis.⁶⁶

In *Pennoyer*, the United States Supreme Court established a regime of state jurisdiction based on a notion of power.⁶⁷ The defendant in *Pennoyer* obtained

⁶⁰ *Blakey v. Cont'l Airlines, Inc.*, 164 N.J. 38, 55 (2000).

⁶¹ *Id.* at 63.

⁶² *Id.* at 59.

⁶³ *Id.* at 70.

⁶⁴ *Id.* at 64. For discussion on alternative jurisdictional analysis for internet cases, see Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999); John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 912-18 (1999); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); David R. Johnson & David Post, *Laws and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

⁶⁵ 95 U.S. 714 (1877).

⁶⁶ *See Blakey*, 164 N.J. at 65.

⁶⁷ *See Pennoyer*, 95 U.S. at 722. Justice Field explained that there were two principles governing state jurisdiction. *Id.* First, every state held exclusive jurisdiction over persons and

title to a tract of land in Oregon after a state court granted a third party the plaintiff's land as part of a default judgment against the plaintiff.⁶⁸ At issue was the validity of a state court judgment granted against a non-resident plaintiff in his absence and without notice of suit filed against him.⁶⁹ The Supreme Court held that the judgment was invalid,⁷⁰ explaining that a state court's judgment violated the Due Process Clause of the Fourteenth Amendment, and was therefore invalid, unless that state held personal jurisdiction over the parties in the controversy.⁷¹ The jurisdictional analysis under *Pennoyer* was based upon the simple rule of physical presence: either the defendant or her property had to be physically present in the forum state⁷² in order for that state to claim personal jurisdiction over the defendant.⁷³

The physical presence requirement cast by *Pennoyer* began deteriorating soon after the 1877 decision.⁷⁴ The inherent limitations within the physical presence

property within its borders. *Id.* The second principle was that no state could exercise direct jurisdiction over persons or property outside of its borders. *Id.*

⁶⁸ *Id.* at 719. The third party, H. Mitchell, sued to recover three hundred dollars in attorney's fees from Neff, the plaintiff. *Id.*

⁶⁹ *Id.* at 719-20.

⁷⁰ *Id.* at 734.

⁷¹ *Id.* at 733.

⁷² Forum state refers to the state where a party files suit. BLACK'S LAW DICTIONARY 666 (7th ed. 1999).

⁷³ *Pennoyer*, 95 U.S. at 733. The Court alluded to scenarios towards the end of its opinion where the physical presence rule would be difficult to apply strictly, including family law business contacts for out of state businesses. *Id.* at 735.

⁷⁴ In 1882, the Supreme Court introduced the fictional concept of "implied consent" in *St. Clair v. Cox*, 106 U.S. 350 (1882), in order to mesh *Pennoyer's* logic with the jurisdictional problems posed by the corporate entity. The Court in *St. Clair* realized that corporations, as legal fictions, would never satisfy the physical presence requirement for personal jurisdiction. *Id.* at 356. Therefore, the Court announced that corporations in one state could not do business in another state without some form of that state's consent, creating the concept of implied consent. *Id.* Similarly, the United States Supreme Court applied the concept of implied consent in *Hess v. Pawloski*, 274 U.S. 352 (1927), in order to find personal jurisdiction over nonresident motorists involved in accidents with in-state citizens. Until this point, the non-resident motorist involved in an accident with an in-state motorist was able to evade the forum state's jurisdiction by returning to his own state. *Hess*, 274 U.S. at 356. Using the same rationale as in *St. Clair*, the *Hess* Court held that out-of-state motorists using the forum state's roadways had consented to personal jurisdiction for lawsuits in that state. *Hess*, 274 U.S. at 355.

test became more difficult for courts to handle as technological innovations brought people closer together.⁷⁵ Hence in 1945 the Supreme Court announced a new test for personal jurisdiction in the case of *International Shoe Company v. State of Washington*.⁷⁶ In *International Shoe*, the respondent company manufactured and sold shoes and was incorporated in Delaware with its principal place of business in Missouri.⁷⁷ International Shoe's contacts with the state of Washington consisted of eleven to thirteen salesmen who would advertise its shoes within the state and solicit orders that were sent to International Shoe's Missouri office.⁷⁸ At issue was whether International Shoe was considered an employer within Washington State and therefore required to contribute to a state unemployment compensation fund in that state.⁷⁹ International Shoe argued that its activities within Washington were so insignificant that it lacked "presence" within the state and therefore was denied due process when it was subjected to suit in that state.⁸⁰

The Supreme Court found that the state of Washington held personal jurisdiction over International Shoe, and in so doing, created a new standard for determining whether a forum state held personal jurisdiction over non-resident parties.⁸¹ The Court explained that the due process requirement for establishing jurisdiction had two components: (1) that the defendant has sufficient minimum contacts with the forum state and (2) "that the maintenance of the suit does not

⁷⁵ See Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999) (citations omitted). Specifically, Mr. Leitstein points to the innovations of the car, the telephone and the radio as changing the legal landscape significantly since the decision in *Pennoyer*. *Id.*

⁷⁶ 326 U.S. 310.

⁷⁷ *Id.* at 313.

⁷⁸ *Id.* at 314. The company held no office in Washington, did not maintain any inventory in Washington and did not deliver any of its products from within Washington. *Id.* at 313.

⁷⁹ *Id.* at 311. The Washington Supreme Court ruled that International Shoe's presence in the state was sufficient to hold personal jurisdiction over the company and that the company must contribute to the state unemployment compensation fund. *Id.* at 313.

⁸⁰ *Id.* at 315. In support of its contention, International Shoe argued that it was not present within the state at any time and that the mere solicitation of orders within a state, without more, was insufficient to find a "presence" within the state for purposes of personal jurisdiction. *Id.*

⁸¹ See *id.* at 319-20.

offend 'traditional notions of fair play and substantial justice.'"⁸²

Unanswered in *International Shoe* was the nature and quality of minimum contact needed for a forum state to assert personal jurisdiction over a non-resident defendant not physically present within its boundaries. In *McGee v. International Life Insurance Company*,⁸³ the Court expanded the reach of minimum contacts within the context of specific jurisdiction. The plaintiff, a California resident, had originally purchased a life insurance policy from a company in Arizona whose policies subsequently were assumed by the defendant company, located in Texas.⁸⁴ Neither company either held an office or employed an agent in California.⁸⁵ The defendant refused to pay on the proceeds of the policy and the plaintiff obtained a judgment against the defendant in California.⁸⁶ When the plaintiff filed suit in Texas to collect her award, the Texas court refused to enforce the California judgment.⁸⁷ The Texas court held that the California decision violated the defendant's due process rights because service of process on defendant was outside of California, and therefore, California did not hold per-

⁸² *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court in *International Shoe* discussed the minimum contact concept in four contexts. *See id.* at 317-318. First, a defendant was subject to a court's jurisdiction in a forum where its activities were "continuous and systematic" and related to the cause of action of the suit. *See id.* at 317 (citing *St. Clair v. Cox*, 106 U.S. 350, 355 (1882) (service of process on a corporation whose presence in forum state was continuous and systematic)). Second, isolated or causal acts of a corporate agent within a forum state were considered insufficient to subject the corporation to suit for unrelated acts. *See id.* (citing *St. Clair*, 106 U.S. at 360). Third, if a defendant's acts within the forum state were pervasive, those acts would serve as a basis for jurisdiction for suits unrelated to the defendant's conduct in the forum state. *See id.* at 318. Fourth, certain sporadic activity by the defendant in the forum state, including a single act in some circumstances, would render the defendant subject to suit for claims arising out of those activities in the forum state. *See id.* Within the third and fourth categories, the Court formally recognized the distinction between "general" and "specific" jurisdiction", respectively, in *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408 (1984).

⁸³ 355 U.S. 220 (1957).

⁸⁴ *Id.* at 221.

⁸⁵ *Id.* at 222.

⁸⁶ *See id.* at 221. "The California court based its jurisdiction upon a state which subject[ed] foreign corporations to suit in California [for] insurance contracts" even if those corporations could not be served with process within the state. *Id.* (citing CAL. INS. CODE §§ 1610-1620 (1953)).

⁸⁷ *Id.*

sonal jurisdiction over the defendant.⁸⁸ In reversing the Texas decision, the Supreme Court of the United States held that the due process rights of the defendant were not violated because the suit “was based on a contract which had substantial connection with that State.”⁸⁹ The Court reasoned that minimum contacts had been established by the defendant life insurance company when it solicited an insurance contract with a resident of the forum state even though the defendant was not physically present within the forum state.⁹⁰

The Supreme Court halted the expansion of minimum contacts in *Hanson v. Denckla*, where it introduced the volitional act or purposeful availment requirement into the minimum contacts analysis.⁹¹ The dispute in *Hanson* focused on a trust instrument that was executed in Delaware by a Pennsylvania domiciliary, Mrs. Donner, with a Delaware trustee.⁹² Mrs. Donner’s trust gave her the power during her lifetime to name the beneficiaries of her trust account.⁹³ After moving to Florida, Mrs. Donner exercised her power over the trust and created two separate trusts in Delaware for the benefit of her grandchildren.⁹⁴

Upon Mrs. Donner’s death, the beneficiaries under her will brought suit in a Florida state court to nullify the creation of the two trusts in Delaware and return the money from those trusts into the estate.⁹⁵ Although the Florida court held that it lacked personal jurisdiction over some of the defendants, the court did assert personal jurisdiction over the Delaware trustee and ultimately invalidated Mrs. Donner’s will under Florida law.⁹⁶ Before final judgment in the Florida case, the executrix of Mrs. Donner’s will filed suit in Delaware, seeking a declaratory judgment in opposition to the Florida judgment to determine who

⁸⁸ *Id.*

⁸⁹ *McGee*, 355 U.S. at 223.

⁹⁰ *Id.* at 223.

⁹¹ 357 U.S. 235 (1958).

⁹² *Id.* at 238.

⁹³ *Id.* at 239.

⁹⁴ *Id.* at 240.

⁹⁵ *Id.* at 240-41. The legatees were unable to deliver service of process upon some of the defendants in the Florida action. *Id.* at 241. Instead, the Delaware defendants were served with a copy of the pleadings and a notice to appear via regular mail, and notice was published in local Florida newspapers pursuant to Florida law. *Id.*

⁹⁶ *Id.* at 242.

would receive the assets from the trust assets in Delaware.⁹⁷ The Delaware court ruled that both the trust itself and Mrs. Donner's actions were valid under Delaware law.⁹⁸

The United States Supreme Court held in *Hanson* that the Delaware trust company did not establish sufficient minimum contacts with the state of Florida in order to be subject to personal jurisdiction in the state.⁹⁹ Even though Mrs. Donner and most of the appointees and beneficiaries involved in the litigation were located in Florida, the Court found insufficient contacts for the Florida court to hold jurisdiction over the Delaware trustee.¹⁰⁰ Instead, the Court ruled that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."¹⁰¹ The Court supported its conclusion from the fact that the trust company did not have an office or transact or solicit any business in the state of Florida.¹⁰² Additionally, the trust assets at issue were not located in Florida. Finally, the Court noted that the cause of action in Florida did not arise out of any acts or transactions within that state, but instead concerned an agreement that had no connection with the state.¹⁰³

Having announced that a defendant must purposefully avail itself of the privileges of a forum state to satisfy the minimum contacts requirement of personal jurisdiction, the Court next set out to define the boundaries of purposeful

⁹⁷ *Hanson*, 357 U.S. at 242. The parties were essentially the same as in the Florida suit, and the non-resident defendants were notified via registered mail. *Id.*

⁹⁸ *Id.* The legatees, plaintiffs in the Florida case, attempted to introduce the Florida judgment in the Delaware court as res judicata of the Delaware suit, but the Delaware court refused to recognize the Florida case as controlling the Delaware dispute. *Id.*

⁹⁹ *Id.* at 251.

¹⁰⁰ *Id.* at 254.

¹⁰¹ *Id.* at 253.

¹⁰² *Id.* at 251.

¹⁰³ *Hanson*, 357 U.S. at 252. The Court distinguished the facts in *Hanson* from the issue in *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957). The dispute in *McGee* centered on one insurance contract solicited within the state of California. *McGee*, 355 U.S. at 221. The Court found that California held personal jurisdiction over the defendant corporation in that case because California had a legitimate interest in providing redress for its residents from nonresident and nonpaying insurers from outside the state. *Id.* at 252.

availment. In *World-Wide Volkswagen Corp. v. Woodson*,¹⁰⁴ the Supreme Court noted that the minimum contacts analysis served two purposes: to protect defendants from litigation in distant forums and to prevent states from encroaching upon the interests of other states.¹⁰⁵ The plaintiffs in *World-Wide* filed a products liability suit in Oklahoma for personal injuries they sustained in Oklahoma while driving a car they purchased while living in New York.¹⁰⁶ The defendants, from New York, were the automobile's manufacturer, importer, distributor and retail dealer.¹⁰⁷ Two of the defendants, the retailer and the distributor of the automobile, filed a motion to dismiss for lack of personal jurisdiction, which the Oklahoma trial court denied.¹⁰⁸ To prevent the trial court from exercising personal jurisdiction over them, the defendants petitioned the Supreme Court of Oklahoma for a writ of prohibition.¹⁰⁹ The Oklahoma Supreme Court denied the motion and held that Oklahoma's long-arm statute conferred jurisdiction over the defendants.¹¹⁰ The Oklahoma Supreme Court reasoned that the defendants derived substantial income from the sale of their automobiles and could foresee the use of their automobiles in Oklahoma.¹¹¹

The United States Supreme Court reversed the Oklahoma Supreme Court, finding a "total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction."¹¹² Although the Court identified both purposes of the minimum contacts analysis in reaching its deci-

¹⁰⁴ 444 U.S. 286 (1980).

¹⁰⁵ *Id.* at 291-92.

¹⁰⁶ *Id.* at 288.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 289.

¹⁰⁹ *Id.* at 289.

¹¹⁰ *World-Wide*, 444 U.S. at 289-90 (1980) (citations omitted).

¹¹¹ *Id.* at 290-91. In a previous case, *Gray v. American Radiator*, 176 N.E.2d 761 (1961), the Illinois Supreme Court asserted jurisdiction over a Pennsylvania defendant who manufactured a valve in Ohio that was incorporated into a hot water heater and sold to an Illinois resident in the course of commerce. This theory of jurisdiction based upon economic benefit became known as the "stream of commerce theory," and was an early attempt to solve the purposeful availment problem. Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, (1999) (citations omitted).

¹¹² *Id.* at 295.

sion,¹¹³ the Court focused its attention on the second function, the protection of the sovereignty of each state court.¹¹⁴ Because the defendants in *World-Wide* did not solicit sales from Oklahoma, transact any sales, or provide any services in Oklahoma, the Court determined that the defendants did not avail themselves of the privileges and benefits of Oklahoma law.¹¹⁵ Finding no business contacts between the defendants and the forum state, the Court rejected the argument that the defendants could foresee a suit arising in Oklahoma because of the mobility of an automobile.¹¹⁶

The Court shifted the focus of the minimum contacts analysis again in *Burger King Corp. v. Rudzewicz*.¹¹⁷ In *Burger King*, the Supreme Court held that a franchise agreement between a corporate Florida plaintiff and a Michigan defendant constituted a contact for the forum state to assert jurisdiction over the defendant.¹¹⁸ The defendant, a Michigan businessman, entered into a twenty-year agreement with the plaintiff, a Florida corporation with its headquarters office in Miami, in order to operate a Burger King franchise restaurant in Michigan.¹¹⁹ The contract obligated the defendant personally to make over one million dollars in payments to the plaintiff over twenty years.¹²⁰ Plaintiff filed suit in Florida under the Florida long arm statute,¹²¹ which authorized jurisdiction for breach of

¹¹³ *Id.* at 292.

¹¹⁴ *Id.* at 293. The Court acknowledged that technological advances over the years served to increase the flow of commerce between the states and the need for jurisdiction over non-resident defendants. *Id.* at 294 (citing *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1945)).

¹¹⁵ *Id.* at 295.

¹¹⁶ *World-Wide* at 295-96. The Court argued that if foreseeability were a factor for personal jurisdiction, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *Id.* at 296.

¹¹⁷ 471 U.S. 462 (1985).

¹¹⁸ *Id.* at 478.

¹¹⁹ *Id.* at 466. Defendants agreed to pay Burger King \$40,000 as an initial franchise fee followed by monthly royalties, sales and promotion fees, and rent. *Id.* at 465. Additionally, all franchises under this agreement were required to conform to Burger King's strict standards in appearance and operation. *Id.* Provisions within the agreement established that Florida law would govern and that all payments by the defendant went to the Miami office. *Id.* at 465-66.

¹²⁰ *Id.* at 467.

¹²¹ Fla. Stat. Ann. § 48.193(1)(g) (West 1984). Plaintiff alleged breach of contract and trademark infringement. *Burger King*, 471 U.S. at 468.

contract after the defendant fell behind in his payments.¹²² The Florida district court found for Burger King and ruled that it had jurisdiction over the defendant pursuant to the Florida long-arm statute.¹²³ The Court of Appeals for the Eleventh Circuit reversed and reasoned that the circumstances surrounding the contract negotiations left the defendant without notice of the possibility of suit in Florida and at a financial disadvantage.¹²⁴ The Supreme Court then reversed the Eleventh Circuit, holding that the defendant had satisfied the minimum contacts requirement of due process for personal jurisdiction.¹²⁵ The Court's decision centered on a two-step minimum contacts analysis.¹²⁶

The first step of the analysis determined whether the defendant had intentionally established minimum contacts with the forum state.¹²⁷ The Court explained that this step essentially asked whether the defendant would reasonably anticipate out-of-state litigation based upon the defendant's conduct and connection with the forum state.¹²⁸ If sufficient contacts were found between the defendant and the forum state, then jurisdiction over the defendant based upon those contacts would be presumptively reasonable.¹²⁹ The second step analyzed the defendant's contacts with the forum state "in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice."¹³⁰ The factors listed by the Court which were to be weighed

¹²² *Burger King*, 471 U.S. at 468.

¹²³ *Id.* at 469. The district court reasoned that the defendant was subject to personal jurisdiction in Florida in actions arising out of the franchise agreement, and that the defendant's failure to pay was in breach of the agreement. *Id.*

¹²⁴ *Id.* at 470. In reversing the trial court, the Eleventh Circuit held that Florida jurisdiction over the defendant violated the fairness requirement of due process. *Id.*

¹²⁵ *Id.* at 471.

¹²⁶ *Id.* at 474-76.

¹²⁷ *Id.* at 474. The factors listed in this contract analysis included the parties' prior negotiations, the contemplated future consequences of the relationship, the terms of the contract, and the course of dealing with the parties. *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)).

¹²⁸ *Burger King*, 471 U.S. at 474. The Court stressed that the "purposefully directed" acts of a defendant towards residents of the forum state would not be defeated by a lack of physical presence for purposes of asserting personal jurisdiction. *Id.* at 476.

¹²⁹ *Id.* If no minimum contacts were found in the first step of the analysis, then the analysis would not move on to the second step. *Id.*

¹³⁰ *Id.* at 476 (quoting *Int'l Shoe Co. v. Washington*, 325 U.S. 310, 320 (1945)).

against a finding of minimum contacts between the defendant and the forum state included the burden on the defendant, the interest of the forum state in handling the dispute, the interest of the plaintiff in obtaining relief, the efficient resolution of controversies within the interstate system and the “shared interest of the several States in furthering fundamental substantive social policies.”¹³¹

Applying this framework to the facts, the Court found that although the defendant had no physical connection with Florida and conducted most of his business with the Michigan branch office of the plaintiff’s corporation, he “deliberately reached out and beyond Michigan and negotiated with a Florida corporation” for a twenty year agreement with continuing contacts.¹³² Therefore, the Court concluded that the defendant’s connections with the forum state were sufficient to find minimum contacts.¹³³ The Court then examined the second prong, the reasonableness of the forum, to find that the defendant had sufficient notice that he was doing business with a Florida corporation¹³⁴ and further, that the agreement itself included a Florida choice of law provision.¹³⁵ Since the defendant could not produce evidence of any other considerations which would make jurisdiction in Florida unreasonable,¹³⁶ the Court ruled that jurisdiction

¹³¹ *Id.* at 476-77. The Court explained that the two step analysis worked like a sliding scale. *Id.* at 477. Where the contacts were minimal in the first step, but the interest in litigating in the forum state were strong, the interests within the second step would establish the reasonableness of jurisdiction in the forum state. *Id.* Conversely, where the defendant purposefully directed its activities at the forum state and the contacts were strong in the first step, the defendant would need to make a “compelling case” that some factor or factors in the second step of the analysis would make jurisdiction in the forum state unreasonable. *Id.*

¹³² *Id.* at 479-80.

¹³³ *Id.* at 480.

¹³⁴ *Burger King*, 471 U.S. at 480. The Court noted that the franchise agreement between the parties indicated that all operations were conducted and supervised from Miami. *Id.* Additionally, the record showed that the disputes between the parties leading up to the litigation were channeled through the Miami office. *Id.* at 481.

¹³⁵ *Id.* The Court clarified the meaning of the statement in *Hanson v. Denckla*, 357 U.S. 235, 254 (1958), that “the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction.” *Id.* A choice-of-law analysis, the Court explained, focused on the elements of a transaction and not merely a defendant’s conduct. *Burger King*, 471 U.S. at 481-82. In contrast, the minimum contacts analysis focused “solely on the defendant’s purposeful connection to the forum” as a threshold matter. *Burger King*, 471 U.S. at 482. The Court explained that a choice-of-law provision would probably not establish minimum contacts alone, but when taken together with the twenty-year relationship between the parties, served to reinforce the defendant’s reaching out to the forum state. *Burger King*, 471 U.S. at 482.

was proper.¹³⁷

The Court's development of personal jurisdiction to this point tied a defendant's minimum contacts with the forum state to a subjectively reasonable expectation that those contacts would create jurisdiction over the defendant.¹³⁸ In *Calder v. Jones*,¹³⁹ the Court analyzed the effects of an intentional tort committed from outside a forum state on the minimum contacts analysis.¹⁴⁰ The plaintiff was a California resident who filed suit in California state court against Florida defendants for libel, invasion of privacy, and intentional infliction of emotional distress.¹⁴¹ The plaintiff alleged that the defendants, as writers and

¹³⁶ *Burger King*, 471 U.S. at 482-83. The Court found that Florida held an interest in litigating a contract arising out of contacts established in state. *Id.* The defendant argued that the Florida long-arm statute as applied was inconsistent with Michigan's interests. *Id.* at 484, n. 26. However, the record indicated that Burger King was in full compliance with Michigan law, and that the Michigan franchise act did not suggest that Michigan would attempt to assert exclusive jurisdiction over the suit. *Id.*

¹³⁷ *Id.* at 487.

¹³⁸ See *Int'l Shoe Corp. v. Washington*, 326 U.S. 310 (1945) (sales agents operating within state served as minimum contacts); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (act of soliciting one life insurance policy from outside the forum state served as sufficient minimum contact in forum state); *Hanson v. Denckla*, 357 U.S. 235 (1958) (trustee who solicited no business in Florida but received call from that state in order to change trust did not establish minimum contacts in that state); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (defendant car dealer, retailer and manufacturer did not create minimum contacts with forum state where automobile sold through them was involved in an accident, despite foreseeability that the automobile would enter the stream of commerce); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) (act of signing one twenty year agreement with personal obligation of more than one million dollars governed by Florida law, in addition to negotiations through forum state sufficient to subject Michigan defendant to Florida jurisdiction).

¹³⁹ 465 U.S. 783 (1984).

¹⁴⁰ A tort is defined as intentional "if the actor brings about that harm either purposefully or knowingly." RESTATEMENT (THIRD) OF TORTS § 1 (1999). The elements of an intentional tort differ significantly from the elements of the causes of actions discussed in *supra*, note 138. For example, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Supreme Court examined the stream of commerce theory, which stated that a forum state may exercise personal jurisdiction over "a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide*, 444 U.S. at 297-98 (citing *Gray v. American Radiator*, 176 N.E. 2d 761 (Ill. 1961)). The stream of commerce theory held that "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring).

¹⁴¹ *Calder*, 465 U.S. at 784.

editors for the National Enquirer magazine, published a libelous article concerning the plaintiff's lifestyle in California.¹⁴² The defendants performed substantially all of the research and editing of the article while in Florida and traveled to California periodically on business.¹⁴³ The trial court granted the defendants' motion to dismiss for lack of jurisdiction, holding that the "chilling effects" on the First Amendment outweighed the plaintiff's interest in obtaining relief in California.¹⁴⁴ The court of appeals reversed, ruling that the court held jurisdiction over the defendants on the theory that the defendants intended to cause tortious injury to the plaintiff in California.¹⁴⁵ The United States Supreme Court affirmed, holding that California was "the focal point both of the story and of the harm suffered."¹⁴⁶ In reaching its conclusion, the Court applied an "effects" test to find jurisdiction over the defendants.¹⁴⁷ The opinion noted that the acts of the defendants were not characterized as "untargeted negligence", but rather as intentional and tortious acts "expressly aimed" at the forum state.¹⁴⁸

¹⁴² *Id.* at 785. The story concerned the plaintiff's California activities, and alleged that she drank so heavily that she could not fulfill her professional obligations. *Id.* at 789, n. 9.

¹⁴³ *Id.* at 785-86.

¹⁴⁴ *Id.* at 786. The trial court reasoned that the "chilling effect" would arise out of the need for reporters to appear in far flung jurisdictions to respond to issues regarding the content of their work. *Id.*

¹⁴⁵ *Id.* The court also held that the defendants' contacts alone would be insufficient to assert jurisdiction on unrelated causes of action. *Id.*

¹⁴⁶ *Id.* at 789.

¹⁴⁷ *Calder*, 465 U.S. at 789. The "effects" test was found with different wording in *Burger King v. Rudzewicz*, 471 U.S. 462, 479 (1985), where the Court announced, "[i]t is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." In his article, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999), Todd Leitstein suggested that the phrase "contemplated future consequences" used by the Court had the same meaning as foreseeable effects. The "effects" test, according to Leitstein, has been applied explicitly only to defamation cases. *Id.* (citations omitted).

¹⁴⁸ *Calder*, 465 U.S. at 789. Decided on the same day as *Calder*, *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) took the next step and held that a plaintiff was not required to have minimum contacts with a forum state in order for that state to assert personal jurisdiction over a nonresident defendant. *Id.* at 779. In *Keeton*, a New York plaintiff filed a libel suit in the federal court of New Hampshire against an Ohio defendant. *Id.* at 772. The plaintiff alleged that she was libeled by the defendant, Hustler magazine, while working as an editor. *Id.* The plaintiff's only contact with New Hampshire was the publication of the defendant's magazine, which had a statewide circulation of ten to fifteen thousand copies per month. *Id.* at

IV. BLAKEY V. CONTINENTAL AIRLINES: THE UNANIMOUS OPINION

The New Jersey Supreme Court, in a unanimous opinion by Justice O'Hern,¹⁴⁹ began its analysis of whether Continental's on-line Crew Member's Forum could be considered part of the workplace for Blakey's hostile work environment claim against Continental by noting that business enterprises, in general, received workplace benefits from having their employees connected to the Internet.¹⁵⁰ The Court further acknowledged that the "problems that developed in our fathers' offices are likely to develop in the offices of the future."¹⁵¹ The record

772. Additionally, New Hampshire's six-year statute of limitations for libel actions made New Hampshire the only state in which plaintiff could file her claim. *Id.* at 773. The United States Supreme Court held that the defendant's purposeful act of circulating magazines monthly in New Hampshire sufficiently established minimum contacts for the state to exercise personal jurisdiction over the defendant. *Id.* at 773-74. The Court explained that the minimum contacts analysis would focus on a combination of the relationship between the defendant, the state where the case was filed, and the nature of the litigation. *Id.* at 775. Regarding the plaintiff's limited contacts with New Hampshire, the Court explained that none of its decisions required the plaintiff to establish minimum contacts with the forum state in order for the state to assert personal jurisdiction over a nonresident defendant. *Id.* at 779. The Court observed that the defendant was carrying on part of its regular business in New Hampshire and that the plaintiff's cause of action arose out of those acts. *Id.* at 780. Therefore, the Court held that New Hampshire could exercise jurisdiction over the defendant. *Id.*

¹⁴⁹ *Blakey v. Cont'l Airlines, Inc.*, 164 N.J. 38 (2000). Justice O'Hern's unanimous opinion was joined by Chief Justice Poritz and Justices Stein, Coleman, Long, Verniero and LaVecchia. *Id.*

¹⁵⁰ *Id.* at 57. The Court analogized the Crew Member's Forum with a hypothetical lounge that would have existed on the television series *Wings*. *Id.* at 56 (citing NBC television broadcast, April 1990 through May 1997. The series dealt with a small airline and its pilots, maintenance people and ground crew. *Id.* Justice O'Hern reasoned that if a bulletin board existed within that hypothetical lounge where employees posted their comments, and if management had notice of those messages, then the airline "would not be entirely free to disregard" messages that created an "intimidating, hostile, or offensive working environment[]." *Id.* (quoting *Lehman v. Toys 'R' Us, Inc.*, 132 N.J. 587, 592 (1993)).

¹⁵¹ *Blakey*, 164 N.J. at 60-61. In his article *The 21st Century Office. . It's Not Your Father's Office Any More*, 14-Feb. PROB. & PROP. 9, Dennis Greenwald argued that the availability of inexpensive communication devices like mobile phones, laptop computers, home faxes and handheld e-mail devices have dramatically reduced the need for office space. However, In the realm of defamation, Diana McKenzie argued that "[s]ince every transmission over a computer network can be deemed a communication of some sort, the exposure to defamation liability in cyberspace is ever-present." Diana J.P. McKenzie, *Information Technology Policies: Practical Protection in Cyberspace*, 3 STAN. J.L. BUS. & FIN. 84, 92 (1997). A corporation, under principles of respondeat superior, could be held liable for its employees' actions where those employees use the facilities of the employer for improper purposes. McKen-

was insufficient for the Court to make a decision regarding Continental's liability for Blakey's hostile work environment claim, and was therefore remanded to the trial court to make further determinations.¹⁵²

The Court next analyzed the issue of personal jurisdiction over the individual defendant pilots.¹⁵³ Justice O'Hern viewed the case as presenting "novel issues of Internet jurisdiction",¹⁵⁴ and briefly discussed the legal debate surrounding Internet law and jurisdiction specifically.¹⁵⁵ The Court declined to take the opportunity "to create a new order of jurisdictional analysis adopted to the Internet" and announced that it would instead follow the settled law of personal jurisdiction.¹⁵⁶

The Court turned briefly to the substantive law to be applied in the case.¹⁵⁷

zie, 3 STAN. J.L. BUS. & FIN. at 93. Citing the RESTATEMENT (SECOND) OF AGENCY §§228-237, 244-248, McKenzie argued "[i]f the employee's conduct is foreseeable and the company took no steps to prevent the behavior, a jury could find the company liable for malicious and intentional behavior on the part of the employee." McKenzie, 3 STAN. J.L. BUS. & FIN. at 93. McKenzie suggested that employers should incorporate training in Internet etiquette with their employees, explaining that e-mail and casual conversation are distinct forms of conversation in that e-mail leaves a permanent record. McKenzie, 3 STAN. J.L. BUS. & FIN. at 93. Finally, McKenzie suggested that employers' information technologies should require that all employees "include disclaimers in all personal Internet postings making it clear that they speak only for themselves and not on behalf of their employer." McKenzie, 3 STAN. J.L. BUS. & FIN. at 94.

¹⁵² *Blakey*, 164 N.J. at 60. The Court noted that harassment by a supervisor outside the workplace was actionable in New Jersey because the "conduct nevertheless would have arisen out of the employment relationship between [the plaintiff and defendant corporation]." *Id.* at 57 (quoting *American Motorists Ins. Co. v. L-C-A Sales Co.*, 155 N.J. 29, 42 (1998)). The Court ordered the trial court to first determine whether Continental "derived a substantial workplace benefit from the overall relationship among Compuserve, the Forum and Continental." *Id.* at 60. Second, the Court ordered the trial court to determine whether Continental had notice of the individual defendants' conduct on the Forum. *Id.* at 72. Finally, the trial court needed to determine whether the individual defendants' conduct, which Blakey complained of, altered the working environment sufficiently to create a hostile environment. *Id.*

¹⁵³ *Id.* at 63. Blakey's claim was filed under the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-1*. The issue was whether the Court could exercise personal jurisdiction over the individual defendants under these facts. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 64.

Justice O' Hern reviewed the case of *International Shoe Co. v. Washington*,¹⁵⁸ which held that the due process requirement of jurisdictional analysis required that the defendant in a suit have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."¹⁵⁹

Citing *McCluney v. Jos. Schlitz Brewing Co.*,¹⁶⁰ Justice O'Hern reasoned that the same principles guiding judicial jurisdiction would guide the state's use of substantive law.¹⁶¹ Additionally, the New Jersey Supreme Court noted that in *Allstate Insurance Co. v. Hague*,¹⁶² the United States Supreme Court announced that "for a State's law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹⁶³ From these two cases, Justice O'Hern inferred that states could permissibly regulate out of state conduct if the effects of that conduct were felt within state borders.¹⁶⁴ As an example of this territorial jurisdiction, Justice O'Hern explained that in the criminal context, states possessed the power to make either certain conduct or the result of that conduct a crime where the conduct itself or the effects of that conduct were felt within state borders.¹⁶⁵ The Court noted that New Jersey's Code of Criminal Justice was based upon the same notion of territorial jurisdiction, explaining that the in-state effects of a person's conduct from outside the state would serve as grounds to convict that person of a crime in New Jersey.¹⁶⁶ After establishing that New Jersey law comports with a territorial theory of jurisdiction, the Court held that the due process

¹⁵⁸ 326 U.S. 310 (1945)

¹⁵⁹ *Blakey*, 164 N.J. at 65 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹⁶⁰ 649 F.2d 578 (8th Cir.), aff'd 454 U.S. 1071 (1981). In *McCluney*, Court of Appeals for the Eighth Circuit held that a Missouri statute was inapplicable in an employment action where the employment acts leading to the suit took place between the states of North Carolina and Wisconsin. *Id.* at 583.

¹⁶¹ *Blakey*, 164 N.J. at 65.

¹⁶² 449 U.S. 302 (1981).

¹⁶³ *Id.* at 312-13.

¹⁶⁴ *Blakey*, 164 N.J. at 66.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

requirements announced in *International Shoe* “govern every foray into the realm of long-arm jurisdiction over non-residents.”¹⁶⁷

Justice O’Hern proceeded with the Court’s personal jurisdiction analysis under the first prong of the *International Shoe* test: whether the defendants established sufficient “minimum contacts” with New Jersey.¹⁶⁸ The Court first noted that a defendant’s minimum contacts were evaluated on a case-by-case basis.¹⁶⁹ Based upon the facts of the case,¹⁷⁰ Justice O’Hern explained that the issue would be examined in the context of specific jurisdiction.¹⁷¹ Within that context, the Court focused its inquiry on “the relationship among the defendant, the forum, and the litigation.”¹⁷² Justice O’Hern briefly outlined three situations illustrating this relationship within the context of specific jurisdiction.¹⁷³ The Court first noted that the mere presence of a defendant’s property in the forum state, though unrelated to the litigation, was insufficient to establish personal jurisdiction over a defendant.¹⁷⁴ Next, the Court explained that the regular circulation of

¹⁶⁷ *Id.* (quoting *Jacobs v. Walt Disney World, Co.*, 309 N.J. Super. 443, 452 (App. Div. 1998)).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (citing *Waste Management v. Admiral Ins. Co.*, 138 N.J. 106, 122 (1994)).

¹⁷⁰ Although the Court did not explicitly review of the facts in determining the subset of personal jurisdiction to be applied, it noted earlier that each individual defendant submitted a certification in support of motion to dismiss for lack of personal jurisdiction. *Blakey*, 164 N.J. at 63, n.12.

[Defendant] Joe Vacca stated that he lived in Colorado, but was based out of Newark from March 1994 to May 1994 and reassigned there again in June 1996. [Defendant] Mark Farrow stated that he lived in Colorado and had worked in Texas from 1991. [Defendant] Kaye Riggs lived in California for most of his life, worked in Houston, and only worked in New Jersey when assigned to the Newark base during an employee shortage in June 1995 and May to June 1996. [Defendants] Thomas Stivala and Dave Orozco had lived and worked in Texas since the early to mid 1990’s. [Defendant] Donald Jensen certified in 1997 that he had lived in Texas for the previous nine years and had never lived or worked in New Jersey. *Id.*

¹⁷¹ Implicit in the Court’s reasoning was that the plaintiff’s suit specifically arose out of the defendants’ acts in New Jersey, as opposed to a suit where a plaintiff’s cause of action against the defendants was unrelated to the contacts the defendants may have had with the forum state. See *supra*, note 82.

¹⁷² *Blakey*, 164 N.J. at 67 (quoting *Shaffer v. Heitner*, 433 U.S. 187, 204 (1977)).

¹⁷³ *Id.*

¹⁷⁴ *Id.* (citing *Shaffner v. Heitner*, 433 U.S. 187 (1977)).

a defendant's magazine in the forum state would confer personal jurisdiction over the defendant in a libel action.¹⁷⁵ Finally, the Court established that a defendant would be subject to personal jurisdiction in the forum state "solely on alleged intentional and libelous conduct" committed outside the state but directed to the forum state.¹⁷⁶

Justice O'Hern moved on to the next step in the Court's analysis and asked whether the defendants' contacts with New Jersey resulted from their purposeful conduct or whether their contacts arose from the plaintiff's unilateral activities.¹⁷⁷ The Court explained that the purposeful conduct or purposeful availment requirement served to prevent the defendants from being haled into court from merely attenuated or random contacts with New Jersey.¹⁷⁸ Justice O'Hern phrased this inquiry as whether the defendants' connection and contacts with New Jersey were of a nature and quality that the defendants would expect to defend their actions there.¹⁷⁹ Quoting *Waste Management, Inc. v. Admiral Ins. Co.*,¹⁸⁰ the Court explained that "[a]n intentional act calculated to create an actionable event in a forum state will give that state jurisdiction over the actor."¹⁸¹

Justice O'Hern opined that the question before the Court was whether the defendants' alleged harassment constituted an intentional act that was calculated to create an actionable event in New Jersey.¹⁸² The Court first hypothetically analyzed the defendants' statements as if they were published in the press rather than on the Internet.¹⁸³ Justice O'Hern opined that if the defendants' alleged harassment was printed in the *New York Times* or in *U.S.A. Today* with the expectation or intent that it would adversely affect the plaintiff's case in New Jer-

¹⁷⁵ *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)).

¹⁷⁶ *Id.* (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984)).

¹⁷⁷ *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)).

¹⁷⁸ *Blakey*, 164 N.J. at 67 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

¹⁷⁹ *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297(1980)).

¹⁸⁰ 138 N.J. 106, 126 (1994), *cert. denied sub nom.* (citation omitted).

¹⁸¹ *Blakey*, 164 N.J. at 67 (quoting *Waste Management*, 138 N.J. 106, 126).

¹⁸² *Id.*

¹⁸³ *Id.* at 68.

sey, the Court would have had no difficulty in exercising jurisdiction over the defamatory comments.¹⁸⁴ Justice O'Hern reasoned that a claimant seeking to vindicate her claim in New Jersey would have certainly felt the effects of those statements within the forum state.¹⁸⁵ In light of this analogy, the Court felt that "[i]t would be a paradox if electronic communications, with their instantaneous messaging, would lessen the jurisdictional power of a state."¹⁸⁶

Justice O'Hern narrowed the focus of the Court's inquiry into the nature of the defendants' contacts with New Jersey, explaining that the quality of the defendants' contacts were more important than the means by which their messages were communicated.¹⁸⁷ According to the Court, the critical factor in its analysis was the nature of the contact established by the defendants in the forum state.¹⁸⁸ The Court noted, however, that under certain circumstances the means by which a message was communicated into the forum state would become an important consideration.¹⁸⁹ However, Justice O'Hern concluded that the defendants may have created sufficient minimum contacts with New Jersey if their statements on the Continental electronic bulletin board were capable of defamatory meaning and published with knowledge or purpose of adversely affecting the plaintiff's New Jersey lawsuit.¹⁹⁰

Having established that the defendants' harassment, if proven, constituted an intentional act creating sufficient minimum contacts with New Jersey, the Court's analysis progressed to the second prong of its jurisdictional test.¹⁹¹ The

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Blakey, 164 N.J. at 68.

¹⁸⁸ *Id.* (citing *Baron & Co. v. Bank of N.J.*, 497 F.Supp. 1047, 1049 (E.D. Pa. 1980)). In *Baron*, the federal court for the Eastern District of Pennsylvania held that the plaintiff's unilateral activities, which included meetings, phone calls and document preparation in Pennsylvania for the purpose of doing business with the New Jersey based defendant, did not subject the defendant to personal jurisdiction in Pennsylvania. *Baron*, 497 F.Supp at 537.

¹⁸⁹ *Id.* According to the Court, "when a merchant uses the instrumentalities of commerce to tap an interstate market for its product, such wire and mail communications are relevant contacts to be considered." *Id.* (citing *United Coal Co. v. Land Use Corp.*, 575 F. Supp. 1148, 1157 (W.D. Va. 1983)).

¹⁹⁰ *Id.* at 69.

¹⁹¹ *Id.*

next question before the Court, according to Justice O'Hern, was whether the assertion of jurisdiction over the defendants would "affect traditional notions of fair play and substantial justice."¹⁹² The Court explained that the "fairness" element of the question was examined in terms of several factors, which included the burden on the defendants in litigating in New Jersey, the plaintiff's interest in obtaining relief, and the interests of the interstate judicial system in efficient dispute resolution.¹⁹³ Justice O'Hern reasoned that this inquiry was the "flip-side of the purposeful availment doctrine",¹⁹⁴ and asked whether the defendants reasonably anticipated that New Jersey would have had a substantial interest in vindicating the plaintiff's rights.¹⁹⁵ The Court noted that the jurisdictional focus in cases concerning the enforcement of anti-discrimination laws was the forum where the effects of alleged discrimination occurred.¹⁹⁶ Since the plaintiff had alleged defamation as part of the alleged harassment by the defendants, Justice O'Hern held that jurisdiction should lie where the effects of the alleged harassing conduct took place.¹⁹⁷ The Court noted that Continental, in the plaintiff's federal case, claimed that "the evidence of a hostile environment in locations other than Newark [was] irrelevant to Plaintiff's claim."¹⁹⁸ The Court concluded that the "center of gravity" of the dispute was Newark, New Jersey, and therefore held that no unfairness would result if New Jersey exercised jurisdiction over the defendants.¹⁹⁹ However, the Court noted that the record before it was incomplete and ordered that the case be remanded for further factual findings.²⁰⁰ Justice O'Hern held that the lower court needed to resolve certain questions before the Court could assert jurisdiction over the defendants, including whether the individual defendants knew that the plaintiff had filed suit in New Jersey, and

¹⁹² *Id.*

¹⁹³ *Blakey*, 164 N.J. at 69.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (citing *McDonnell v. State of Ill.*, 163 N.J. 298 (2000)).

¹⁹⁷ *Id.* at 69-70.

¹⁹⁸ *Id.* (quoting *Blakey v. Cont'l Airlines, Inc.*, 1995 WL 464477, at 4 (D.N.J. June 16, 1995)).

¹⁹⁹ *Blakey*, 164 N.J. at 70.

²⁰⁰ *Id.* As of the date of the decision, no discovery had been taken from the individual defendants. *Id.*

whether they knew that the messages would be published in New Jersey.²⁰¹

V. CONCLUSION

The New Jersey Supreme Court ruled that the individual defendants in *Blakey v. Continental Airlines, Inc.* may be subject to personal jurisdiction in New Jersey for posting comments about the plaintiff in an online chat room, which may have affected the plaintiff in a related case filed in New Jersey.²⁰² In reaching its conclusion, the Court made two important decisions. First, the Court chose to apply the traditional jurisdictional framework rather than adopt an analysis catered to the Internet to decide whether New Jersey could exercise personal jurisdiction over the individual defendants.²⁰³ Second, the Court recognized that the defendants' statements on an online chatroom would be treated no differently from a jurisdictional standpoint than if they were published in a widely circulated newspaper.²⁰⁴

By adhering to the traditional jurisdictional framework, the New Jersey Supreme Court prudently avoided the prospect of creating new law in an area defined by constant change. If the Court had decided to cater its jurisdictional analysis to the Internet in its present state of development, the holding might have forced the Court into a very awkward position. The Court would have faced the possibility of having created law, which would be outdated in only a few years, or alternatively a body of law that would become riddled with exceptions and modification.

Similarly, the Court's analogy between the defendants' comments in the chatroom and a publication in a major newspaper reflects the Court's understanding of the significance of the Internet in everyday life. By comparing the chatroom comments with a publication in a widely known newspaper, the Court recognized the Internet's impact on society as a significant medium of communication.

²⁰¹ *Id.* Specifically, the Court outlined a schedule for the trial court to follow in order to approach the jurisdictional issue in this case. *Id.* The lower court was ordered to sort through the comments posted by the individual defendant in the Forum and determine which, if any were capable of defamatory meaning. *Id.* If any comments were capable of defamatory meaning, the plaintiff was ordered to plead "with specificity the factual basis of her jurisdictional claims as we have outlined the law." *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 63.

²⁰⁴ *Id.* at 68.