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Message from the Chair

Mairead E. Connor

This Fall promises to be an exciting time for developments in the law and for our Section. We celebrated the Section's 35th Anniversary at the spectacular venue of Longboat Key, Florida, between October 31 and November 3. The CLE programs that our CLE co-chairs, Stephanie Roebuck and Ron Dunn, put together were truly outstanding. I am extremely pleased to announce that our keynote speaker at the celebration banquet was Mark Gaston Pearce, now a member of the National Labor Relations Board and former LEL Section District Representative and Executive Committee member. Of course, the Fall meeting also offered plenty of time to enjoy the beach, scenery, and activities offered by the Longboat Key Club and extra activities for families.

Our Section's Diversity Fellowship program has selected a new group of Fellows for 2010-2011. Congratulations to Molly Thomas-Jensen, a law clerk to The Honorable Judge Robert Patterson of the Southern District of New York; Charles F. Coleman, Jr., a trial attorney for the EEOC; and Vicki R. Walcott-Edim, an attorney with Jones Day. Each of these attorneys has expressed strong interest in joining a Section committee and will be attending the Fall meeting. Let's reach out and welcome them to the Section! But, just as importantly, let's learn from them

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NYSBA

their ideas how to make our Section more appealing and responsive to the needs of a wide range of diverse attorneys and practitioners in our field of labor and employment law.

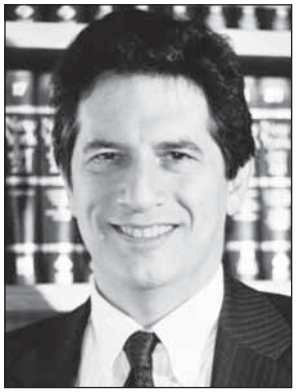
The NYSBA Fall membership drive is well underway. Our Section is heading toward our goal of 10% more new members, but we have a way to go yet. As of this writing, we need about 165 more new members. If you have any partners or associates who have been on the fence about joining, or just putting it off, NOW is the time to get them to do it. The dues are minimal and the value great.

Frank Nemia, Chair Emeritus, is heading up the Past Chairs Advisory Committee, which will be of great value to the Section. Frank graciously has agreed to gather some of the past chairs together on smaller subcommittees to examine various Section policies, structures, and other suggestions from those who have been there and done that. I am very grateful to Frank and all the past chairs who have agreed to donate their valuable time to continue the vitality of the Section.

Many of our committees have been putting in extra time of late. Special thanks go to the new co-chairs of the Legislation Committee: Sharon Stiller, Vivian Berger, Jonathan Weinberger, and the veteran Tim Taylor (maybe I should call them the "quad-squad"). They have been putting together a new agenda for the Section's participation in legislation and gathering the information we used to enjoy about new labor and employment laws in New York. Also, special thanks to Natalie Holder-Winfield for her hard work on the Diversity Fellowships, which involves a lot of her time networking and recruiting.

Mairead E. Connor
Chair

From the Editor



Philip L. Maier

I would like to express my thanks to the authors for sharing their expertise with the labor and employment law community. With the end of the year approaching, I thought that this would be an appropriate edition to include a round-up of decisions on both the State and Federal level. Accordingly, I would like to thank Seth Greenberg and Evan White, respectively, for their updates on the decisions issued by the United States Supreme Court and Second Circuit United States Court of Appeals. Michael Israel has addressed in detail the *New Process Steel* decisions, and Steven DeCosta has provided a review of recent developments at the New York City Office of Collective Bargaining. I have added an article setting for the recent decisions of the New York State Public Employment Relations Board. Stephen Bergstein's article gives a detailed review of the development in the Second Circuit of employment discrimination cases since the U.S. Supreme Court's decision in *Reeves v. Sanderson Plumbing Products* addressed the role "pretext" in those cases. John Gaal and Donald Dowling have again contributed to our knowledge of ethics and international employment issues by their regular columns. I would also like to offer my congratulations to Dayna Tann for capturing third in the Emanuel and Kenneth Stein Memorial Writing Competition. Her article addresses recent developments in arbitration fee-splitting provisions.

March 25, 2011 marks the 100th anniversary of the Triangle Shirtwaist factory fire, an incident which was a turning point in this country's labor and employment history. I have included an article by Leigh Benin which discusses the Triangle Fire and the results which flowed from that tragic event. The context in which we live and conduct our business has a history and this event should serve as a reminder of where we in this country have been. As Justice Homes said, "A page of history is worth a pound of logic."

Philip L. Maier

Philip Maier is the Regional Director of the New York State Public Employment Relations Board's New York City Office, and serves as both an Administrative Law Judge and Mediator.

Global Equal Employment Opportunity Toolkit: How to Draft and Launch Cross-Border Policies and Initiatives on Discrimination, Harassment and Diversity

By Donald C. Dowling, Jr.

Equal employment opportunity initiatives such as policies, procedures and code of conduct provisions on discrimination, harassment and diversity have long been vital to domestic American employers. Now, with the global economy, the equal employment issue has grown more international than ever before. As U.S.-based multinationals globally align an increasing list of their human resources policies and "offerings," cross-border efforts at ensuring equal employment opportunities become increasingly vital.

But America's laws on employment discrimination, harassment and diversity are unique in the world. This means that American employers' domestic U.S. EEO programs, tools and code of conduct provisions can seem out of step with the local discrimination-related initiatives of local employers in most jurisdictions outside the U.S.

This article is a toolkit for a U.S.-based multinational headquarters that needs to expand or improve its EEO (discrimination, harassment, diversity) initiatives regionally or worldwide. In part 1 we address global *discrimination* programs generally and we then cover two particularly troublesome discrimination sub-topics—global age discrimination issues and global pay discrimination issues. In part 2 we address global initiatives for combating workplace *harassment*. Finally, in part 3, we address global workplace initiatives regarding *diversity*.

Part 1: Cross-Border Discrimination Initiatives

Discrimination law is more evolved in the United States than in any other jurisdiction. By now—decades after America's tough workplace discrimination laws came into force—discrimination jurisprudence under U.S. case law has refined such esoterica as, for example: "gender stereotyping"; "third party retaliation"; "sex plus" discrimination against a protected "sub-class"; "differential," "single-group," and "situational" validity in statistical adverse impact analysis; and a requirement of a causal connection between an adverse employment action and a claim of "retaliatory animus."

In response to increasingly intricate discrimination rules, American employers have engineered sophisticated tools for stamping out discrimination. Best practices include, for example: imposing tough work rules against discrimination; offering comprehensive discrimination training; implementing detailed reporting mechanisms; running statistical adverse impact analyses; and pursuing thorough internal investigations into specific allegations and incidents. U.S. anti-discrimination tools have become so important domestically that an American multinational might assume its anti-discrimination tools are state-of-the-art, ready for export to workplaces abroad. After all, most countries now impose some laws against workplace discrimination. Surely a well-developed, robust American-style approach against discrimination must be a good practice everywhere—right?

Perhaps not. Prohibiting illegal discrimination is a vital and valid objective everywhere. Common-law countries, in particular, impose anti-discrimination regimes reminiscent of the U.S. approach. Even so, outside the U.S., discrimination laws and cultural perspectives differ enough that a U.S.-crafted discrimination initiative can seem divisive, even legally suspect. U.S.-honed anti-discrimination tools need retrofitting for use abroad. Adapt them for four issues: Context, protected status, "extraterritorial effect" and affirmative action.

Context. The first step in internationalizing any U.S.-centric approach to fighting discrimination is to contain it within a context where it may play a smaller role. Discrimination looms especially large in the U.S., as compared to elsewhere, for three reasons:

- **Employment-at-will**. As the world's only major employment-at-will jurisdiction, the U.S. gener-

ally does not offer unfairly fired workers a cause of action for wrongful discharge (outside the contractual and union contexts and outside the state of Montana). Employment-at-will is a legal vacuum, but nature abhors a vacuum. What has rushed in to fill this one is American discrimination laws, which now amount to a sort of de facto U.S. wrongful termination regime.

- **Demographics**. America's especially heterogeneous population means broad racial diversity in U.S. job applicant pools and workplaces. Demographic diversity makes laws against racial and ethnic discrimination more vital stateside than in the many (albeit not all) other countries with more homogeneous populations.

- **History.** America's unusually troubled history of overt racial and ethnic discrimination—slavery, lynchings, displacements and massacres of indigenous people—sparked the U.S. civil rights movement and spawned American employment discrimination laws. American history is unique to the U.S.

To the extent that these three factors are less significant abroad, foreign discrimination laws carry correspondingly less baggage. Outside the U.S. context, a workplace discrimination policy, while important, may play less outsize a role in human resources administration. Adjust accordingly.

Protected status. Well-drafted U.S. discrimination provisions list the specific traits against which the employer does not tolerate discrimination—gender, race, religion, national origin, age, disability, veteran status, etc. Listing each trait makes excellent sense in the U.S. context: Failing to list traits would result either in an over-broad policy that prohibits discrimination on every conceivable ground or in an inscrutable policy that forces workers to research what categories are "protected by applicable law." As to a *cross-jurisdictional* policy, however, the logic behind listing protected traits gets murkier, because countries' lists of protected traits differ radically from jurisdiction to jurisdiction: Gender and race are protected in most countries; sexual preference is increasingly common; "political opinion" and part-time status are protected in Europe; "traveler" status is protected in Ireland; HIV-positive status is protected in South Africa; caste is protected in India; and some jurisdictions protect family status, language, even "social origin" or "wealth." Which traits merit mention in a multinational's global policy and which should be excluded? A common approach among U.S.-based multinationals is for a global discrimination policy to list the U.S. protected groups and then to add the catch-all clause "*and any other category protected by applicable law*." But this "catch-all clause" approach, in the global policy context, arguably suffers from three shortcomings:

- It arguably is *vague, impractical and insensitive*—this approach in the global policy context forces workers to research "applicable" law and it signals the employer's lack of interest in local practices.

- It arguably does *not go far enough*—this approach in the global policy context demotes the unnamed protected groups (those falling under the catch-all) to a second-class tier of protection. Under the canon of construction *inclusio unius est exclusio alterius* (to include one thing is to exclude another), a court could assume the employer protects the unnamed protected traits less. Imagine, for example, an age discrimination lawsuit against a U.S. employer whose policy prohibited only discrimination on the grounds of "gender, race, disability, religion or any other ground protected by applicable law."

- It at the same time arguably *goes too far*—this approach in the global policy context extends the named protected groups into jurisdictions where they are not otherwise protected or even appropriate. For example, U.S. multinationals commonly list "veteran status," but that category makes no sense to protect outside the U.S. And listing "age" raises real problems in jurisdictions where an employer imposes mandatory retirement. *See* part 1(a), below.

There is no "magic bullet" here. One approach is to list protected groups separately for each jurisdiction—but that requires separate local discrimination policies or at least separate riders and so undercuts the advantage of a single global policy. Another approach is to keep the global policy silent as to protected groups and simply prohibit "illegal" discrimination that violates "applicable law"—but, again, that is vague and it forces workers to do legal research.

"Extraterritorial effect." The major U.S. federal (and some state) discrimination statutes reach abroad, to a limited extent: They prohibit a U.S. "controlled" employer from discriminating against *U.S. citizens* who work outside the U.S., be they local hires or posted expatriates. U.S. multinationals need to factor this mandate into any global discrimination strategy. But this issue is deceptively narrow. Most multinationals knowingly employ relatively few U.S. citizens overseas, rarely more than three percent of their outside-U.S. workforces and often closer to zero percent. Extending a full-blown U.S.-style anti-discrimination policy to everyone outside the U.S. only to reach a tiny percentage of U.S. citizens is overkill. Consider a customized approach focused on complying with U.S. discrimination laws targeted to U.S. citizens.

Affirmative action. Some global discrimination programs address affirmative action, known in Europe as "positive discrimination." There are indeed compelling reasons to promote affirmative action internationally:

U.S. federal government contractors bear affirmative action obligations; South Africa requires affirmative action plans; some European jurisdictions impose quotas of women on boards of directors; and jurisdictions from India to Brazil to Germany impose limited affirmative action obligations, such as regarding the disabled. However, in certain jurisdictions affirmative action can be illegal discrimination, to the extent that favoring minorities requires disfavoring the majority. The best solution here is to confine affirmative action to local efforts. A multi-jurisdictional discrimination policy should stay open-ended on affirmative action, either omitting references to it entirely or else mentioning local "positive discrimination" initiatives "consistent with applicable law."

a. Special age discrimination issues

One particularly difficult aspect of cross-jurisdictional discrimination prohibitions regards *age discrimination*. U.S.-based multinationals' cross-jurisdictional discrimination policies and discrimination provisions in global codes of conduct (and diversity programs) tend to declare that the multinational tolerates no discrimination or harassment based on specific traits protected under U.S. law, such as race, national origin, religion, gender, disability—and *age*. However, a "little secret" in global human resources is that, outside the U.S., multinationals often impose mandatory retirement and even age caps in help-wanted ads. Therefore, "age" clauses in global discrimination policies raise special problems.

A German employment lawyer has estimated that over 90 percent of American companies in Germany write mandatory retirement clauses into their German employment contracts—a practice possibly even more widespread in countries like India. Meanwhile, countless subsidiaries of multinationals in Latin America, Asia and Africa pay newspapers and websites to post job ads along the lines of "*Wanted: Brand Manager age 30–35*," or "*Seeking trainees up to age 25*." But under the very U.S. laws that spawned American multinationals' discrimination policies, forced retirement and job-ad age caps generally constitute age discrimination.

Outside the U.S., locals often argue that there is absolutely nothing wrong with forcing retirements in nations where this is customary, expected and perfectly legal. They argue that where social security's replacement rate of final average pay is a lot higher than in the U.S., workers anticipate the day their social security benefits vest and they can leave the workforce. Outside the U.S., labor unions have actually negotiated mandatory retirement *into* collective agreements. For these reasons, countries outside the U.S. did not traditionally ban age discrimination and for these reasons forced retirement remains perfectly legal today—even in most countries that have recently passed age discrimination laws (chiefly common law countries like Australia, Canada and New Zealand plus the member states of the European Union that have adopted or "transposed" Directive 2000/78, the EU directive that outlawed discrimination on age and other grounds). As such, the compliance issue here is less a matter of adhering to local law than it is a question of compliance with employers' own internal discrimination policies with global reach.

But even as a matter of compliance with internal policy, there is real liability exposure here. Overseas, outside America's employment-at-will environment, global human resources policies tend to be enforceable as part of the overall employment contract. Forced retirees and rejected job applicants might sue in local courts alleging a breach of these policies. In one such lawsuit, a group of Chinese forced retirees alleged to a Chinese labor court that while their dismissals may not have otherwise violated Chinese statutes, their firings breached their employer's global discrimination policy.

Completely separately, imposing mandatory retirement and age caps abroad in violation of a global age discrimination prohibition could trigger problems in a *U.S. domestic age* discrimination trial. A U.S. age discrimination plaintiff trying to prove systemic age bias (such as in a class action) may seek to convince an American judge to permit discovery, or to admit evidence, on the employer's practices overseas under the theory that an employer openly discriminating against older workers abroad in violation of its own global discrimination policy more likely harbors an ageist animus.

In short, any U.S. multinational with an unqualified global policy against discrimination based on "age" likely violates its own rules if, outside the U.S., either it fires people when they celebrate a certain birthday or it imposes age caps in help-wanted ads. To get into compliance, take four steps:

- **Step 1: Assess noncompliant practices abroad.** Many HR professionals and employment lawyers at U.S. headquarters may be unaware that their own organization's overseas affiliates currently impose mandatory retirement or job-ad age caps. Find out what really goes on overseas.
- **Step 2: Align global prohibition with actual practices.** Where a multinational learns its global policy against age discrimination is actively being violated abroad, there are five possible compliance strategies. Choose one:
  - Stamp out mandatory retirement and age-capped job ads worldwide
  - Write an express exception into the global discrimination prohibition excluding mandatory retirement and/or job-ad age caps, where legal
  - Remove (from the list of protected traits in the global discrimination prohibition) the express reference to "age"

- Remove the entire list of protected traits (including the reference to "age") and replace it with a general statement saying the organization will tolerate no illegal discrimination or harassment under any applicable law in any jurisdiction where it operates around the world
- Replace the global policy with tailored local policies

- **Step 3: Police outsource partners**. Many multinationals have contractually bound their overseas suppliers and outsource service providers to a supplier code of conduct. Check that code. If it expressly prohibits "age" discrimination, then monitor whether outsource partners impose mandatory retirement or age caps in their job ads. They very likely do and if so are in violation of the supplier code.
- **Step 4: Ensure practices abroad comply with local age discrimination laws**. A completely separate global age discrimination compliance challenge regards the emerging foreign age discrimination laws overseas, such as those in the EU: These laws tend to define "age discrimination" more broadly than under the U.S. Age Discrimination in Employment Act: They tend to protect people of all ages—not just those over 40—and they tend to insulate the young against policies favoring the old. This means that many ADEA-compliant practices common in the U.S. raise compliance problems abroad (for example: experience minimums in recruiting; lockstep and seniority-linked compensation and vacation benefits; and voluntary early retirement incentives for older workers). Ensure practices comply with local laws.

b. Special pay and benefits discrimination issues

In addition to age discrimination, a second particularly difficult aspect to cross-jurisdictional discrimination compliance regards discrimination in the context of pay and benefits.

Globalizing the human resources function often begins with globalizing pay and benefits initiatives. A consultant at Norfolk Mobility Benefits, David Bryan, says that as "[t]oday's multinational employer [evolves] into the transnational of tomorrow…[t]here appears to be more centralization of core corporate functions," including "benefits professionals implementing global benefits strategies." Multinationals are increasingly aligning certain aspects of compensation / benefits across borders, such as by implementing: global executive reward initiatives, regional sales incentive programs, broad-based global incentives / bonuses and global stock option / equity awards. In addition, certain one-time events, like a merger, spawn special global offerings like retention bonus plans and severance pay plans.

In their push to launch cross-border rewards, multinationals can too easily overlook pay-related discrimination laws in each affected country. In this context, "discrimination" is a broad concept—pay discrimination laws can encompass not only U.S.-style "protected group" discrimination but also a distinct type of "job category" discrimination unknown in the U.S. We examine both.

"Protected group" pay discrimination. Most jurisdictions impose general employment discrimination laws that protect specified traits or groups, such as gender / race / religion, in hiring, firing and terms of employment. Examples include: Brazil constitution art. 7 items XXX-XXXI; EU Equal Treatment Directives 76 / 207 / EC and 200 / 78 / EC; South Africa Employment Equity Act 55 / 1998; Spain labor code arts. 4.2 (c), 17.1; and U.S. Title VII / ADEA / ADA. Because rewards like pay, benefits and equity grants are vital terms of employment, discrimination in rewarding employees can violate these protected-group employment discrimination laws. Many countries include as illegal discrimination a concept of "adverse impact" (called in Europe "indirect discrimination"), by which a facially neutral compensation system may be held illegal if it disadvantages employees in some protected group.

- **Gender.** In addition to general discrimination laws, many countries impose separate gender discrimination laws specific to the pay / benefits / equity context. Examples include: EU treaty article 141 and EU equal pay directive 75 / 117; the Ontario Pay Equity Act; the UK Equal Pay Act of 1970; and the U.S. Equal Pay Act of 1963. (Plus there are gender discrimination laws like Korea's Gender Equality Employment Act that reach—but are not specific to—compensation.) Some gender pay discrimination laws impose what in the U.S. used to be called "comparable worth" analysis and what in the UK is called "work of equal value." These laws require equalizing pay across job categories traditionally worked by one gender or the other—for example, an employer's janitors might argue they contribute the same "comparable worth / equal value" as its secretaries and therefore deserve the same pay. Gender-pay-discrimination laws can impose real burdens on compensation systems; Ontario's Pay Equity Act requires employers affirmatively to run comparable worth / equal value analyses and Ontario's increasingly proactive Pay Equity Commission launches unannounced enforcement audits.
- **Local citizenship**. Beyond gender, another specific group subject to special protection under some countries' pay-specific discrimination laws is *local citizenship*. Some developing countries prohibit compensating aliens more generously (the policy here is to keep multinationals from rewarding their inbound expatriates more than comparable locals).

For example, Bahrain labor law art. 44 mandates that "wages and remuneration" of "foreign workers" not exceed pay for local "citizens" with "equal skills" and "qualifications" unless necessary for "recruitment," and Brazil labor code art. 358 requires that "salary" of a local citizen not be "smaller" than pay of a "foreign employee perform[ing] an analogous function." Watch for these laws in structuring expatriate packages.

"Job category" pay discrimination. Beyond the standard type of protected group discrimination laws, many countries outside the U.S. impose special "job category" pay discrimination laws by which every employee enjoys a legal right to be rewarded equally to co-workers in equivalent jobs—even if everyone concerned is otherwise in the same protected group. As applied to a single job, these laws are conceptually simple: Two people doing the same work have a right to the same pay, even if both are white Christian men or black Muslim women. Essentially, these laws prohibit discriminating within each category. Where job-category discrimination laws get tricky is where they enter the realm of "comparable worth / equal value"—equating *different job* categories that purportedly contribute equal value to an organization.

For example, France's job-category pay discrimination law allows for comparable worth / equal value theories, subject to employer defenses based on different length of service, performance, responsibilities and affirmative action / "positive discrimination" for nationality. *See 15 Employees v. Renault, Cour de Cassation chamber social* (France) [CCcs] case # 92-42.291 (10 / 29 / 96). In one French case a lawyer won a daily lunch subsidy that his firm had granted only to non-lawyer staff, on the theory that the employer could not favor employees by professional category, even though in that case the employer was favoring lower pay grades. *Meier v. Alain Bensoussan, CCcs* case # 05-45.601 (2 / 20 / 08); *principle affirmed in Pain v. DHL, CCcs* case # 07-42.675 (7 / 1 / 09); *principle expanded in Cour d'appel de Montpellier chamber social case #* 09 / 01816 (equalizing benefits between *cadres* [executive] and *non-cadre* employees). These cases, of course, turn on their facts; one French court ruled that a human resources job is not functionally comparable to—and therefore does not merit the same pay as—positions of project manager and "commercial manager." *Fornasier v. Sermo Montaigu, CCcs* case # 06-46.204 (6 / 26 / 08).

Other countries that impose job category discrimination rules include:

- **Brazil**. Brazil labor code article 461 mandates equal pay among employees who perform "identical" work of the "same value." Article 461 appears to link this mandate to protected group status—"sex, nationality or age"—but Brazilian *courts* completely decouple the equal pay mandate from protected group status. A 2007 case explains that "what is relevant for the purpose of [Brazilian] equal pay [analysis] is whether the identical tasks were performed by the claimant and comparable colleagues with the same quality and productivity," regardless of sex, nationality or age. *Fisch v. Unibanco*, 2d App. Trib. #00530-2007-201-02-00-4.
- **China**. China's recent Employment Contract Law, at articles 11 and 18, mandates that "the principle of equal pay for equal work shall be observed" (absent a union agreement to the contrary) and does not link "equal pay" to gender or other protected group status. Implementing regulations are silent on equal pay; Chinese law on this point remains undeveloped.
- **Finland**. In a June 2009 decision under the Finnish Employment Contracts Act 2001, Finland's Supreme Court mandated equalizing employee benefits across two very different job categories. *See* Finland Sup. Ct. case # *KKO:2009:52*. A construction company had enrolled its clerical workers in a generous healthcare plan but excluded its construction workers. The construction workers and clerical workers belonged to different unions and hence were in different bargaining units. The construction workers sued for the health benefit under a job category (not gender-linked) comparable worth / equal value theory. The employer argued, but failed to prove, that each clerical worker contributed greater value than each construction worker. The court therefore ordered extending the health plan to the construction workers. The employer also lost on the argument that the construction workers' union should have bargained for the premium health benefit, as the clerical workers' union had, and that the construction workers' failure to win the benefit was a mere trade-off or concession in collective bargaining.

A special type of job-category discrimination law addresses irregular—temporary / part-time / contingent—status. European Union member states expressly prohibit pay discrimination on irregular status, meaning that (contrary to a practice widespread across the United States) European employers cannot deny temporary / part-time / contingent workers benefits under insurance and retirement plans. *See* EU directive 97 / 81 / EC. These same laws can also require European employers to credit part-time service as full-time for years-of-service requirements. *Cf. Lapouge v. Assoc. ADAPEI, CCcs* case # 07-40.289 (5 / 7 / 08) (France).

Part 2: Cross-Border Harassment Initiatives

Having addressed discrimination theories internationally, we turn now to the related but very different concept of international workplace *harassment*. Over the past few decades, workplace harassment jurisprudence

in the U.S. has evolved into what is surely the most intricate body of harassment law in the world. Harassment cases in America now construe concepts as esoteric as, for example: a "tangible employment action" requirement for vicarious liability in quid pro quo harassment; an affirmative defense of unreasonable failure to take advantage of "preventive or corrective opportunities"; a "severe and pervasive" requirement for hostile environment harassment; and claims of so-called "implicit" quid pro quo third party harassment.

These rarefied doctrines evolved in court decisions despite the fact that the texts of U.S. statutes tend not to prohibit workplace harassment at all, at least not explicitly: The U.S. federal harassment prohibition is a judge-made extension of statutes that nominally prohibit only discrimination. As a result, workplace harassment in the U.S. tends to be actionable only to the extent it is a form of discrimination. Non-discriminatory harassment, or bullying, tends not to be illegal.

In recent years, awareness of workplace harassment has spread abroad. Common-law countries, in particular, now impose anti-harassment rules reminiscent of the U.S. approach. And yet as anti-harassment doctrines take root overseas they mutate into different forms. As they grow they can become even broader (if less nuanced) than their counterpart U.S. doctrines. To that extent, state-of-the-art American tools for weeding out the U.S. variety of workplace harassment do not always work well overseas. Fostering a harassment-free workplace internationally requires subtlety, strategy and finesse—not bluntly imposing an American "zero tolerance" approach. Any U.S. multinational pursuing a multijurisdictional approach to eradicating illegal workplace harassment needs to account for the international context in a number of specific respects: alignment, protected status, affirmative mandates, policy drafting, launch logistics, communications / training and investigations. We address each.

- Alignment. Any global approach to eradicating workplace harassment should align with the multinational's own approach to eradicating workplace discrimination and promoting equal employment opportunity. *See* part 1, above.

- Protected status. Because U.S. rules against workplace harassment grow out of statutes that prohibit workplace discrimination, American harassment policies tend to ban only *status-based* harassment linked to membership in a protected group (like sex harassment, race harassment, disability harassment). As yet, few U.S. employers impose tough, enforceable prohibitions against *status-blind* harassment (bullying, pestering, so-called "equal opportunity harassment"). A trend may be emerging at the American state level to combat so-called "abusive work environments," but current American laws and policies against workplace harassment still yoke harassment to protected status. Overseas, though, prohibitions against harassment can be broad *status-blind* doctrines against "bullying," "psycho-social harassment," "mobbing" or simply abusive behavior generally, without regard to protected group. A Belgian law of June 2002 prohibits workplace "pestering," a French law of June 2010 criminalizes "psychological violence," and an emerging doctrine in Brazil imposes damages for "moral" harassment. In theory these status-blind harassment laws are infinitely broader than status-based harassment prohibitions, because they ban *all* abusive behavior while status-based laws merely prohibit those acts of harassment motivated by a handful of specific factors. Accounting for status-blind harassment laws requires significantly broadening any workplace harassment policy or training module. Failing to address this leaves a big hole in any international harassment initiative.

- Affirmative mandates. Every workplace harassment law imposes a negative *prohibition* against committing illegal harassment. In addition, some jurisdictions' laws go farther and impose affirmative employer *duties* as to harassment compliance. For example, a number of countries (including Chile, Costa Rica, India and Japan) affirmatively require employers to issue written sex harassment policies. South Korea and California require employers to offer periodic training on sex harassment. Costa Rica requires employers to institute sex harassment claim procedures and to report each claim to the Ministry of Labor Inspection Department. Any multijurisdictional harassment initiative needs to account for these locally imposed affirmative employer duties with respect to harassment.

- **Policy drafting**. In drafting a harassment policy (or code of conduct provision) to apply across multiple jurisdictions, be sure every provision works locally. Specifically:

  – **Define key terms cross-culturally**. Concepts connected to harassment are particularly susceptible to being misunderstood internationally. For example, the terms "inappropriate behavior" and "improper touching" get interpreted very differently depending on cultural context. Even the term "harassment" itself can take on very different meanings; in Brazil, the word "harassment" itself (*assédio*, in Portuguese) is understood to mean only overt and abusive acts and therefore does not reach "hostile environment" harassment.

  – **Be sure a policy's explicit prohibitions are enforceable in each affected jurisdiction**. Many harassment policies expressly prohibit

on-job "kissing"—a rule unworkable in places like France, where men and women co-workers greet one another each morning with a kiss. And restrictions on co-worker dating can raise serious privacy law and human resources challenges overseas. Even rules that merely require dating co-workers to disclose relationships can be offensive and virtually unenforceable, in jurisdictions like France and Switzerland.

- **Launch logistics**. Be sure to launch a cross-border harassment policy in compliance with applicable procedures for implementing new work rules. Every well-drafted harassment policy (for that matter, every well-drafted *discrimination* policy) imposes a discipline or termination sanction; to that extent, the policy is a work rule which may be subject to mandatory "information and consultation" with works councils or a mandatory subject of bargaining with unions. Any policy provision that imposes a mandatory disclosure rule—such as a rule requiring dating co-workers to disclose their relationship—can trigger employment and data privacy law problems. In Europe, hotline-type reporting provisions in a harassment policy trigger data privacy laws.

- **Communications/training**. After implementing a global harassment policy, a multinational should communicate it to employees and train them on how it works. This step raises unique cultural challenges in places where sex harassment, in particular, remains poorly understood. Foreign workers, men and women alike, have responded derisively to U.S.-generated sex harassment and gender-sensitivity training, although in recent years workers in many countries have grown more sensitive in this regard. Still there remain pockets in the Arab world, Africa, Asia and Latin America where American-style sex harassment training modules may seem inappropriate. Audiences in these places may scoff at training they find too politically correct, too puritanical or too insensitive to their local culture. Therefore, tailor communications and training (live or on-line) for the local audience. Tone down features not likely to play well locally. Explain why harassment is a local problem and how harassment initiatives can work locally.

- **Investigations.** U.S. employers understand the importance of thoroughly investigating credible harassment allegations received through a policy's reporting channels. Indeed, laws in a number of countries (including Chile, Costa Rica, India, Japan, South Africa and Venezuela) affirmatively require employers to investigate specific allegations of sex harassment. Even so, aggressive American-style workplace investigatory practices trigger a number of unexpected legal issues. Be sure harassment investigations comply.

Part 3: Cross-Border Diversity Initiatives

Having addressed both discrimination and harassment law internationally, we turn now to the separate but related concept of international workforce *diversity*.

The U.S. Supreme Court says "[m]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." *Grotter v. Bolliner*, 539 U.S. 306, 330 (2003). Effective initiatives promoting diversity take this broad approach, focusing well beyond the three groups that U.S. government statisticians track via the mandatory employer-diversity-reporting form, the EEO-1—the three EEO-1 groups being gender; race (white, black, native Pacific Islander, Asian, American Indian); and Hispanic/Latino ethnicity.

Indeed, diversity experts speak broadly of "diversity of backgrounds," "diversity of opinions" and "diversity of experiences." These diversity experts recognize that to limit diversity initiatives just to gender, race and Hispanic/Latino ethnicity would be far too confining. Indeed, diversity professionals look beyond EEO-1 categories and cultivate diversity among age groups, sexual orientations, disabilities and other legally protected groups.

Yet the fact remains that in America the *sine qua non* of every successful diversity program actually is rooted in our three EEO-1 categories, gender, race and Hispanic/Latino ethnicity. After all, no one would consider a workplace of all white non-Hispanic men "diverse"—even if the white men came from different places, graduated from different schools, voted for different political parties, cheered for different sports teams and were of different religions and ages, even if the white men were different ages and sexual orientations and even if some were disabled. Like it or not, the EEO-1 metrics of gender, Hispanic/Latino ethnicity and especially race really do lie at the center of U.S. diversity and discrimination analysis. According to the *Yale Journal of International Law* (vol. 35, p. 116 (2010)), "U.S. judges, activists and academics have theorized extensively about how the struggle for African Americans' civil rights shapes U.S. law prohibiting discrimination against other groups."

Meanwhile, diversity grows in importance outside the U.S.. According to a report from the Conference Board (Executive Action Series #175), "demographic changes in Europe, combined with…regulations, are… pressur[ing European] companies to increase the diversity of their workforces." A study by the Lee Hecht Harrison firm found that two-thirds of employers *worldwide* see a diversity program as a key retention tool. Increasingly, countries mandate certain diversity initia-

tives. South Africa requires workplace diversity plans, for example, and Brazil and Germany require affirmative action for the disabled. India imposes some diversity rules, as well.

In response, U.S.-based multinationals are now extending their diversity initiatives abroad. But there is a tension here. Outside the U.S., diversity initiatives rooted in the three U.S. EEO-1 categories make little sense, because EEO-1 metrics are so intrinsically American. Consider:

- The "Hispanic/Latino" EEO-1 category is meaningless where there are virtually no Hispanics/Latinos (countries from Albania to Zimbabwe) and where there are virtually *nothing but* Hispanics/Latinos (Spanish-speaking Latin America, Spain).
- Concepts of race differ abroad. In England, "Asian" means Indian/Pakistani but rarely includes peoples of the Far East (who are called "Orientals"). South Africa's diversity-promoting EEA-2 form distinguishes "whites" and "blacks" from "Coloureds"—a mixed-blood categorization that tends to be offensive to Americans.
- Labor-pool demographics make racial diversity statistically impossible in many places. The *CIA World Factbook* reports that Japan is 98.5 percent Japanese and over 99.4 percent Asian. Korea is 100 percent Korean ("except for 20,000 Chinese"). Finland is 99 percent Finnish and Swedish. Even the increasingly heterogeneous UK remains 92.1 percent white.
- Our three American EEO-1 categories are too coarse to account for granular demographic distinctions necessary overseas. In India, caste status is legally-protected—but in EEO-1 terms, all Indians are "Asian." In Africa, tribal ancestry is critical—but in EEO-1 terms, all tribal Africans are "black." In Spain, Basques and Catalans speak their own languages and promote separatism—but in EEO-1 terms are "Hispanic/Latino whites." In Canada, French Canadians are culturally distinct—but in EEO-1 terms they are, like most Canadians, "non-Hispanic/Latino whites."
- Even *gender* diversity can be impossible abroad. In Saudi Arabia, just five percent of the workforce is female and the law requires segregating women workers from men.

American concepts of race and ethnicity are so distinct to our society that our U.S. Census struggles with slotting recent immigrants into our distinct American categories. According to the *New York Times* (January 22, 2010):

> The pattern of race reporting [to the U.S. Census] for foreign-born Americans is markedly different than for native-born Americans… For example… a majority born in the Dominican Republic and El Salvador, who are newer immigrants, described themselves as neither black nor white… Among all who identified themselves as Asian-Americans, which is often understood to mean born [in the U.S.], 67 percent were, in fact, foreign born… [According to] Elizabeth M. Grieco, Chief of the Census Bureau's immigration statistics staff,… "it's a part of not knowing where they fit into *how we define race in the United States*."

The disconnect between what Elizabeth Grieco calls "how we define race in the United States" and how other countries define it explains why diversity programs hatched from U.S. EEO-1 metrics fail when transplanted abroad. According to *HR Magazine* (Nov. 2003), U.S. "HR directors are finding that one-size-fits-all [diversity] programs will not work and might not even be understood" abroad. Andrés Tapia, Chief Diversity Officer at Hewitt Associates, has said that "we're beginning to see an increasingly resentful backlash against the American version of diversity abroad." Outside the U.S., the complaint Tapia hears most often is that "this diversity thing is an American thing."

Rather than transplant a U.S. approach, a multinational needs to redesign any global diversity initiative using internationally appropriate metrics. There are at least three appropriate alternate designs for transforming a U.S.-centric diversity initiative into a viable international one: (1) cross-cultural understanding, (2) gender inclusion and (3) local racial/ethnic diversity.

Cross-cultural understanding. Project teams with members from different countries can run into problems because of deep-rooted cultural differences. Even within a small region like Europe, work styles and underlying assumptions and attitudes will differ greatly across, say, a team of Britons, French, Germans and Italians. Cross-cultural initiatives can address these problems, but these initiatives are so distinct from American-style "diversity" programs that the "diversity" label may be disingenuous—these initiatives tend to be *training focused on understanding* (attitudes) as opposed to *action plans focused on inclusion* (recruiting/retention). One human resources manager, Suzanne Bell of Toyota Financial Services, has suggested keeping the distinction here clear by labeling these as "Global Cultural Competence" or "Global Cultural Awareness" programs, eschewing the word "diversity" entirely.

Gender inclusion. Women are underrepresented, especially in leadership roles, in so many overseas workforces. Homogeneous racial demographics in many overseas markets may block efforts at racial diversity, but *gender equity* is good virtually everywhere (except in Saudi Arabia, where in some respects it is illegal). Therefore,

some multinationals concentrate their outside-U.S. diversity efforts on promoting gender inclusion, reserving race and ethnicity for their domestic U.S. diversity initiatives. According to an article in *HR Magazine* (Nov. 2003), as early as the early 2000s Chubb, DuPont, Eastman Kodak, Ford and J.P. Morgan had all boasted sophisticated *gender diversity* programs in Latin America.

Local racial/ethnic diversity. Ambitious multinationals that take diversity seriously enough to acknowledge the limits of EEO-1 categories outside the U.S. can promote racial / ethnic inclusion by tailoring diversity metrics to the very different "core diversity dimensions" overseas. The challenge becomes implementing meaningful benchmarking on a local-country basis: Does your Mexico City executive suite reflect Mexico's Indian / Mestizo majority? Is your Brussels facility equally inclusive of both Flemish and Walloons? Does your Zurich branch welcome Switzerland's French- and Italian-speaking minorities? Do local taboos (and privacy laws) prevent you from learning the status quo, taking action and measuring success? Going beyond racial / ethnic categories, how can a global diversity program cultivate diversity among age groups, sexual orientations and disabilities? These are all tough challenges, ones that few multinationals have yet to confront.

Conclusion

Equal employment opportunity plays a bigger role in U.S. human resources administration and U.S. employment law compliance than it plays in perhaps any other country, particularly outside the common law world. Accordingly, American-based multinationals often place more emphasis on EEO issues than do multinationals headquartered elsewhere.

There are excellent reasons why all multinationals should vigilantly protect the equality of employment opportunity across their workforces worldwide. But how, specifically, can headquarters control this on a *cross-jurisdictional* basis? U.S. EEO tools that were originally developed in the atypical and rarefied legal environment of U.S. discrimination, harassment and diversity laws will not work abroad, without modification.

Any multinational launching cross-jurisdictional work rules, international HR policies, global code of conduct provisions or other multiple-country initiatives addressing discrimination, harassment or diversity should modify policies and offerings carefully, accounting for the special context of the global workforce.

Donald C. Dowling, Jr. is International Employment Counsel at the New York City office of the international law firm White & Case LLP, where he leads a team of lawyers advising U.S.-based multinationals on headquarters-driven outbound international employment law projects. He and his practice are ranked as one of the two top international employment law practices in the U.S. by *PLC Which Lawyer?*, and he is ranked as one of the top 35 employment lawyers in New York City by Chambers, Legal 500, and ABA/IBA *Who's Who Legal*. He has published dozens of book chapters and articles on cross-border employment topics, including in law journals of Cornell and Northwestern Universities, the ABA, and the IBA.

Pretext-Plus in the Second Circuit: Where It's Been, Where It's Going

By Stephen Bergstein

Plaintiffs' employment discrimination lawyers in the Second Circuit welcomed the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products*.[1] A unanimous Court in *Reeves* held that, in most employment discrimination cases, the plaintiff may prevail at trial with a *prima facie* case of discrimination and evidence that the employer's articulated reason for the adverse employment action was false. The Court framed the issue as follows:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.[2]

Reeves left open the possibility that, in some cases, even a *prima facie* case and evidence of pretext may not carry the plaintiff's burden. But the Court made it clear this was the exception to the rule:

> For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.[3]

Justice Ginsburg emphasized this in her concurrence: "I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon."[4]

Reeves made sense to plaintiffs' lawyers. While the *prima facie* burden may be a minimal, it exists for a reason. Under the *prima facie* model, the plaintiff must prove that he or she (1) belongs to a protected class, (2) was qualified for the position and (3) was terminated or demoted (4) under circumstances creating an inference of discrimination.[5] Indeed, by definition, the fourth element of the *prima facie* inquiry—circumstances creating an inference of discrimination—distinguishes the case from those job actions that do not implicate the employment discrimination laws. As the Second Circuit has held, "If the plaintiff successfully proves a *prima facie* case, a presumption of unlawful discrimination arises."[6]

Under the *McDonnell-Douglas* model, if the plaintiff makes out a *prima facie* case of discrimination, the employer must articulate a neutral reason for the adverse action. A false reason, combined with the *prima facie* case, makes the inference of discriminatory intent plausible. Under *Reeves*, evidence that the employer's justification is false does not entitle the plaintiff to victory; it entitles the plaintiff to a trial.

Reeves was good news for plaintiffs' lawyers. Three years earlier, the Second Circuit had issued an *en banc* ruling that made it harder for plaintiffs to prevail at trial. In *Fisher v. Vassar College*,[7] the Court of Appeals held that a *prima facie* case and evidence of pretext was not necessarily enough to prevail. *Fisher* was a tenure discrimination case that reversed the district court's findings for the plaintiff after a bench trial, awarding her over $600,000 in damages. The *en banc* majority ruled that

> a finding of discrimination is reviewed for clear error like any other factual determination, and thus may be reversed—even if there is a sustainable finding of pretext—if the evidence, considered in the aggregate, will not support a finding by the district court that the reason for the adverse employment action was intentional discrimination.[8]

The Court of Appeals went on to reason,

> [W]hile a *prima facie* case and a finding of pretext may in some cases powerfully show discrimination, neither one necessarily gives plaintiff much support in discharging his obligation to prove

> that he was the victim of discrimination. Indeed, the combined effect of both may have little capacity to prove what the plaintiff has the ultimate burden of proving. Thus, a finding of pretext, together with the evidence comprising a *prima facie* case, is not always sufficient to sustain an ultimate finding of intentional discrimination.[9]

In *Fisher*, the Second Circuit adopted what scholars call the pretext-plus model of employment discrimination. This was a significant departure from prior Second Circuit practice. Only a few years earlier, the Court of Appeals was routinely vacating summary judgment upon a finding of pretext, applying the Supreme Court's language in *St. Mary's Honor Center v. Hicks*,[10] which stated:

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required." *Id.* at 511.

A well-known example of the Second Circuit's mid-1990s approach to summary judgment in employment discrimination cases was *Gallo v. Prudential Residential Services*,[11] an age discrimination case involving a reorganization and reduction-in-force. *Gallo* began its analysis by stating, "[c]onsidering how often we must reverse a grant of summary judgment, the rules for when this provisional remedy may be used apparently need to be repeated."[12] Using language that became ubiquitous over the next several years, the Court of Appeals reiterated that "when deciding whether this drastic provisional remedy should be granted in a discrimination case, additional considerations should be taken into account. A trial court must be cautious about granting summary judgment to an employer when, as here, its intent is at issue."[13]

Consistent with *St. Mary's Honor Center*, the Second Circuit in 1995 reinstated a jury verdict (and reversed the district court's Rule 50 order) in an ADEA claim where the plaintiff established that the employer's reason for terminating his position (and denying him any other available positions) was pretextual. In that case, *Binder v. Long Island Lighting Co.*,[14] the Court of Appeals reasoned, "A trier may thus generally infer discrimination when it finds that the employer's explanation is unworthy of credence."[15] Anticipating the Supreme Court's decision in *Reeves*, *Binder* did hold out the possibility that, in some cases, the employer may prevail if it "explain[s] away the proffer of a pretextual reason for an unfavorable employment decision."[16] However, speculation was not enough to take advantage of that escape hatch. *Binder* rejected the employer's appeal because "[n]o such explanation was offered in the instant matter."[17]

Binder was short-lived. The *en banc* majority in *Fisher* held that "[i]f *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2d Cir.1995), is read as inconsistent with this holding, we expressly reject it."[18]

The Supreme Court's decision in *Reeves* was short-lived in the Second Circuit, as well. In *Schnabel v. Abramson*,[19] the Circuit's first published discrimination decision applying *Reeves*, the Court of Appeals narrowly interpreted that precedent in affirming summary judgment even though the plaintiff made out a *prima facie* case of age discrimination and proffered evidence of pretext in connection with his termination as a Legal Aid investigator. The Second Circuit stated,

> [w]e note that the [*Reeves*] Court did not categorically conclude that a *prima facie* case plus pretext evidence 'permits' a trier of fact to find that a plaintiff has satisfied his ultimate burden; it noted, instead, that such circumstances 'may permit' a trier of fact to conclude that a plaintiff had met his ultimate burden. If *Reeves* had ended here, we would have little choice but to reinstate plaintiff's ADEA claim in the instant case.[20]

Although *Reeves* presumed that evidence of pretext militates against summary judgment, *Schnabel* emphasized the language in *Reeves* that held out a possibility that the employer may prevail despite evidence of pretext. The Court of Appeals framed the inquiry this way: "[W]e hold that the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'"[21] In *Schnabel*, the Court of Appeals expressly repudiated its prior cases to the extent they compelled the denial of summary judgment upon a *prima facie* showing and evidence of pretext.[22]

Schnabel confirmed that *Fisher v. Vassar* was alive and well in the Second Circuit post-*Reeves*. In fact, the Supreme Court had suggested that *Fisher* was inconsistent with its holding in *Reeves*.[23] But how did the Court of Appeals get around the Supreme Court's observation that *Fisher v. Vassar* was inconsistent with *Reeves*? The *Schnabel* panel suggested, "[i]t is arguable that the Supreme Court's reading of *Fisher* was inaccurate. We read *Fisher* as consonant with *Reeves*: Both hold that the quantum of evidence needed to sustain an inference of discrimination

is the same as that needed to sustain the ultimate inference in any other civil case."[24]

Shortly after the Court of Appeals decided *Schnabel*, in *James v. New York Racing Association*, it was more explicit in stating that *Fisher* remained good law despite *Reeves*:

> [U]pon careful study of the *Reeves* opinion, we can find no indication in it that the Supreme Court has rejected what we said in *Fisher*. We believe that both opinions essentially stand for the same propositions—(i) evidence satisfying the minimal *McDonnell Douglas prima facie* case, coupled with evidence of falsity of the employer's explanation, may or may not be sufficient to sustain a finding of discrimination; (ii) once the employer has given an explanation, there is no arbitrary rule or presumption as to sufficiency; (iii) the way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove—particularly discrimination.[25]

As in *Schnabel*, the Court of Appeals affirmed summary judgment in *James* despite a *prima facie* case and evidence of pretext.[26]

Having resurrected *Reeves*, the Court of Appeals began applying it in unpredictable ways. In *McGuinness v. Hall*,[27] the Second Circuit vacated summary judgment in a racial discrimination case because management had granted more generous severance packages to black employees than to white employees like plaintiff. Although the Court of Appeals noted that plaintiff did not produce evidence of discriminatory comments or a corporate history of discrimination against white employees, evidence that similarly situated black employees were treated more favorably was enough to prevail at trial.[28]

However, in *Slattery v. Swiss Reinsurance America Corp.*,[29] the Court of Appeals affirmed summary judgment in an ADEA case even though the plaintiff had produced evidence of pretext as well as the following discriminatory statement from upper-level management in a published interview: "Kielholz has been concerned to dispel the perception of Swiss Re as a multinational collection of grey suits and encourage young dynamic staff to join the company. The average age has dropped significantly over the last few years to 39. Kielholz firmly believes that a younger workforce will be more in tune with the knowledge worker spirit."[30]

Echoing language in *Fisher v. Vassar*, the Second Circuit said, "The problem for Slattery is that the Kielholz statement on which he relies heavily, considered in the context of the case as a whole, and even combined with the possibility that Swiss Re's statements about lack of new business were pretextual, does not in the end carry the burden Slattery bears of showing he was treated adversely for discriminatory reasons."[31] The judges who wrote *Slattery* and *McGuinness* both voted with the majority in *Fisher*.

Zimmermann v. Associates First Capital Corp.[32] illustrates what evidence was necessary for plaintiffs to survive summary judgment. While noting that the plaintiff in *Zimmermann* had "slight" evidence of gender discrimination beyond the *prima facie* case, the Court of Appeals reversed summary judgment because her evidence of pretext was "extremely substantial and the Defendant's effort to meet it is woefully inadequate" in that there was no documentary evidence to support its argument that plaintiff was fired for poor job performance and that management had, in fact, praised her performance.[33] Under *Zimmermann*, mere pretext was not enough. The plaintiff needed substantial pretext.

Judge Newman wrote the opinion in *Zimmermann*. Having dissented from the *en banc* ruling in *Fisher*, in *Zimmermann*, Judge Newman noted that the Second Circuit had narrowly interpreted *Reeves* in contrast to other Circuit Courts:

> Since *Reeves*, the case law has been developing as to what sort of a record will permit a plaintiff who presents evidence of a *prima facie* case and evidence of a pretext to have a jury consider the ultimate issue of discrimination and what sort of record will entitle a defendant to judgment as a matter of law. The Fifth Circuit appears to understand *Reeves* to mean that a *prima facie* case and evidence of pretext take a case to a jury in the absence of "*unusual circumstances* that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII."[34]

However, Judge Newman noted,

> [o]ur Circuit has not read *Reeves* quite so favorably to Title VII plaintiffs. Without insisting on unusual circumstances or evidence precluding a finding of discrimination, as the Fourth and Fifth Circuits have done, we have simply ruled in several cases that a record that included evidence of a *prima facie* case and evidence permitting a finding of pretext did not suffice to permit a finding of discrimination.[35]

For plaintiffs' lawyers, the post-*Fisher* environment reached a low point in a decision in which the Court of Appeals affirmed the district court's Rule 50 order vacating a $400,000 jury verdict in an age discrimination case even though the plaintiff established that the employer's reason was pretextual. In *McCarthy v. New York City Technical College*,[36] the Second Circuit noted,

> That an employer gives a pretextual reason for its action may indeed give support to the inference of prohibited discrimination. Depending on the circumstances, an employer's resort to pretext may give the plaintiff strong support. But, as we explained in *Fisher*, the reasons why an employer may give pretextual reasons to explain an adverse personnel action can be so numerous that the mere fact of a pretextual explanation, without circumstances suggesting that the true motivation was what plaintiff claims, does little to support a plaintiff's case. An employer's assertion of false reasons does not eliminate the requirement that the evidence, considered in its entirety, including any inference reasonably drawn from the falsity of the proffered reasons, must be capable of supporting a reasonable finding that the true reason was the prohibited discrimination plaintiff alleges.[37]

In his concurring opinion in *McCarthy*, Judge Newman wrote that he would have preferred to uphold the jury verdict in this case but that he was bound by *Fisher*'s rejection of the literal language in *St. Mary's Honor Center* that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and…no additional proof is required."[38]

These cases confirm that the Second Circuit's interpretation of *Reeves* is difficult to apply. The case-by-case approach outlined in *Schnabel* means that the likelihood of summary judgment in discrimination cases without direct evidence may depend on the panel of judges hearing the case. At times, a panel will articulate language that sets aside the pretext-plus model. Collecting recent cases on the issue, the Court of Appeals in 2004 observed, "[T]o meet his or her ultimate burden, the plaintiff may, depending on how strong it is, rely upon the same evidence that comprised her *prima facie* case, without more. … And unless the defendants' proffered nondiscriminatory reason is 'dispositive and forecloses any issue of material fact,' summary judgment is inappropriate."[39]

Yet, this language was not always necessary for plaintiffs to prevail on appeal from the grant of summary judgment. In cases in which the Second Circuit reversed summary judgment, decision makers made sexist or ageist comments that permitted a direct inference of discrimination without mere reliance on pretext.[40]

Over the last several years, however, the Court of Appeals has been emphasizing the pretext-plus model less frequently. We can only speculate about the reasons for this development. One explanation may be that some of the judges who voted with the *en banc* majority in *Fisher v. Vassar* are no longer on the court or have taken senior status, and that their replacements would not have adopted the majority reasoning in that case.

An example of the Second Circuit's current reliance on pretext alone in reversing summary judgment is *D'Cunha v. Genovese/Eckerd Corp.*,[41] holding that the district court improperly granted summary judgment in this ADEA case where a 50-year-old was denied a position with a pharmacy even though he performed well during the interview and said he could work any shift at any location, including weekends. Although the job posting said no experience was necessary, management offered the position to a 47-year-old and a 42-year-old and claimed that it needed an experienced pharmacist. Plaintiff made out a *prima facie* case even though he was only eight years older than one of the individuals who was offered the position. The Court of Appeals stated, "This difference in age—though not large—is significant enough to support an inference in D'Cunha's favor."[42]

The Court of Appeals in *D'Cunha* further held that a jury could find that the defendant's articulated reasons were pretext for discrimination. While Eckerd asserted that the selectee had 25 years of pharmacy managerial experience, the job sought by D'Cunha did not require any experience. While Eckerd asserted that there were no full-time jobs for plaintiff, there were eight full-time positions available. While Eckerd maintained that D'Cunha only wanted full-time work near public transportation, a position accessible by public transportation was in fact available.[43] *D'Cunha* is striking in its reliance on a strong showing of pretext alone in vacating summary judgment. *Fisher*'s focus on requiring the plaintiff to specifically show a "pretext *for discrimination*" is nowhere to be found in *D'Cunha*.

D'Cunha foreshadowed a later opinion in which the Second Circuit vacated summary judgment in an age discrimination case. In *Medieros v. Pratt & Whitney Power Systems*,[44] the Court reversed summary judgment solely on the basis of defendant's pretextual reasons for plaintiff's termination. Although *Medieros* is an unpublished opinion with limited precedential value, this case is significant in that the Court of Appeals was taken aback at the grant of summary judgment without the kind of evidence that it had required in *Fisher v. Vassar*. The opinion does not refer to any direct evidence or age-related comments in the context of the decision making. Instead, the Court of Appeals stated that summary judgment was

"inexplicably" granted where the district court noted that defendant may have offered a pretext for the termination. *Id.* at 80. In *Medieros*, the Second Circuit stated,

> the District Court's conclusion conflicts with the guidance of the Supreme Court that '[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.' *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). Here, in granting summary judgment, the District Court improperly substituted its own assessment of the evidence of pretext for that of a reasonable jury. We have previously vacated a grant of summary judgment in such circumstances. *See*, e.g., *D'Cunha v. Genovese/Eckerd Corp.*, 479 F.3d 193, 196 (2d Cir. 2007) (vacating a district court's grant of summary judgment in favor of an employer where the employee had proffered evidence that arguably undermined employer's reasons for failing to hire employee).[45]

The Court of Appeals in October 2009 again vacated summary judgment in a gender discrimination case solely on the basis of pretext. In *DeMarco v. Stony Brook Clinical Practice Medical Plan*,[46] the plaintiff claimed she was denied a job because of her pregnancy and also in retaliation for having brought a prior discrimination case against a different employer. The Second Circuit's brief opinion does not suggest that management cited her pregnancy or prior lawsuit or any other "smoking gun" (such as a sexist comment during the job interview) that would expressly support a discrimination claim. Instead, the Court held that a jury could find that management was not telling the truth in claiming that she was denied the position because she had falsified her job history. The fact that the Court of Appeals vacated summary judgment in a non-published opinion suggests that some judges on the Court deem it an unremarkable proposition that pretext alone is enough for trial. However, other recent summary orders do emphasize *Fisher*'s emphasis on the need for evidence of both pretext *and* discrimination.[47]

In any event, the case-by-case analysis continues, even as the Second Circuit moves away from *Fisher* in its published rulings. In fall 2009, the Second Circuit vacated summary judgment on a strong showing of pretext in *Leibowitz v. Cornell University*.[48] Margaret Leibowitz was a non-tenured Senior Extension Associate, teaching in the program's extension facilities in New York City (the program is based in Ithaca). In 2002, citing budgetary exigencies, the school did not renew Leibowitz's contract, though it allowed her to teach in 2002-03. She elected to retire in December 2002. When Cornell decided to terminate Leibowitz's employment, the parties were in the middle of a dispute over the reimbursement of her travel expenses stemming from her commute to Ithaca.

As its articulated reason for denying the contract extension, Cornell cited "anticipated budget cuts and the expense of maintaining her travel allowance." But Cornell may have been masking its discriminatory intent, the Court of Appeals said, because: (1) the budgetary concerns in 2002 had diminished over 2002-03 and by 2003 the school was in good financial shape; (2) the school's Extension Division had enough money to hire 12 new employees during the relevant time period; and (3) although the school laid off six employees, these employees were all older women. In addition, (4) although positions became vacant after Cornell decided not to renew her contract, the school did not consider her for any of them. In fact, the Long Island branch wanted Leibowitz on the faculty and someone was actually fired for making her an offer; (5) a younger male was hired to fill a vacant teaching position in NYC in 2002 and (6) Leibowitz was not considered for a position that opened up in 2003.[49]

While Cornell said it also denied Leibowitz the extension because of personality conflicts with the New York office, there was evidence that the personality conflicts in that office had dissipated by 2002 and "similar past conflicts did not deter defendants from planning to place a male employee in that office." Finally, Cornell said it let Leibowitz go because of her large travel reimbursement (New York City to Ithaca). This may also be pretextual, the Court said, because "it was a common practice amongst male Extension Division faculty members to negotiate for compensation as she did, and that none of these employees' contracts were terminated or not renewed. Plaintiff submits that, if her requests were so onerous that granting them made her continued employment unsustainable, defendants were free to simply deny them."[50]

Leibowitz prevailed on appeal because of the sheer volume of pretext evidence suggesting the employer's justification for not renewing her contract was false and offered in bad faith. Prior to *Fisher v. Vassar*, this evidence alone would have warranted a trial. The *Leibowitz* decision makes passing reference to unequal treatment among male and female instructors as well as older employees let go by Cornell, but the Court of Appeals does not emphasize the gender- and age-specific evidence in its analysis. Nor does the Court employ anything resembling the strict language in *Fisher v. Vassar* and its progeny about the need for plaintiffs to show that the employer's articulated reason was pretext for discrimination as opposed to pretext for an innocent reason.

While *Leibowitz* does cite *Schnabel* for the general proposition that plaintiff must "present sufficient evidence for a reasonable jury to conclude that defendants discriminated against him,[51] *Leibowitz* further states

that "[t]o carry this burden, the plaintiff may rely on the evidence presented to establish her *prima facie* case, without more."[52] In support of this proposition, the Second Circuit cited, *inter alia*, a pre-*Fisher* case, *Cronin v. Aetna*,[53] a precedent from the mid-1990s, when the Second Circuit was routinely vacating summary judgment in employment discrimination cases. Elsewhere in the opinion, *Leibowitz* cites favorable language to the effect that "[U]nless the defendants' proffered nondiscriminatory reason is 'dispositive and forecloses any issue of material fact,' summary judgment is inappropriate."[54]

More recently, in *Gorzynski v. Jet Blue Airways*,[55] the Court of Appeals vacated summary judgment in an age discrimination claim. In framing the inquiry, the Court stated, "[w]e must…determine, by looking at the evidence she has proffered and the counter-evidence JetBlue has presented, whether Gorzynski has raised sufficient evidence upon which a reasonable jury could conclude by a preponderance of the evidence that her age was a 'but for' cause of JetBlue's decision to fire her. In this respect it is important to consider whether the explanations that JetBlue gave for Gorzynski's firing were pretextual."[56] In holding that plaintiff made a strong showing of pretext, the Court emphasized that some of the false reasons for Gorzynski's termination were inherently discriminatory in that, for example, the supervisor who was accused of being responsible for much of the discrimination was the same person who wrote up plaintiff's negative performance review.[57] And, while another supervisor relied on a co-worker's complaint about plaintiff's performance, that supervisor only raised this issue after plaintiff had complained about discrimination.[58] The Court in *Gorzynski* also noted that younger employees were not disciplined for committing the same infractions for which older employees like plaintiff were disciplined.[59] It is difficult to say whether Gorzynski could have repelled summary judgment in the Court of Appeals solely on the basis of non-discriminatory pretext.

For plaintiffs' lawyers, it is wishful thinking to say that pretext-plus is dead. However, after rigidly applying the principles set forth in *Fisher v. Vassar*, over time, the Supreme Court's language in *Reeves* has taken on greater prominence in Second Circuit decisions. The Court is less frequently using language from *Fisher* to the effect that pretext by itself is not enough to prevail at trial. However, depending on the panel, the Court of Appeals may affirm summary judgment in applying the "case by case" language set forth in *Schnabel* and other post-*Reeves* decisions. Other panels will apply the reasoning set forth in the more recent *D'Cunha*, which seems to turn on pretext alone. In opposing summary judgment and defending jury verdicts, plaintiffs' lawyers should be aware of *D'Cunha* and the Second Circuit's recent de-emphasis on the pretext-plus model, and urge district courts to remain faithful to *Reeves* and its simple rule that, in most cases, a *prima facie* case and evidence of pretext is enough to prevail at trial. In pursuing summary judgment, defendants' counsel should focus on the Second Circuit's emphasis on both pretext *and* evidence of discrimination, as highlighted in *Schnabel* and more recent cases like *Leibowitz* and *Gorzynski*.

Endnotes

1. 530 U.S. 133 (2000).
2. *Id.* at 147-48.
3. *Id.* at 148.
4. *Id.* at 154.
5. *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 2006).
6. *Id.*
7. 114 F.3d 1332 (2d Cir. 1997).
8. *Id.* at 1334-35.
9. *Id.* at 1338. *See also*, *id.* at 1339 ("[a]ccordingly, a Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext for discrimination, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction—or both").
10. 509 U.S. 502 (1993).
11. 22 F.3d 1219 (2d Cir. 1994).
12. *Id.* at 1223.
13. *Id.* at 1224.
14. 57 F.3d 193 (2d Cir. 1995).
15. *Id.* at 200.
16. *Id.*
17. *Id.*
18. *Fisher*, 114 F.3d at 1340.
19. 232 F.3d 83 (2d Cir. 2000).
20. *Id.* at 90.
21. *Id.*
22. *Id.*
23. Westlaw's KeyCite service regards *Fisher* as having been abrogated by *Reeves*. In *Reeves*, the Supreme Court stated that it "granted certiorari…to resolve a conflict among the Courts of Appeals as to whether a plaintiff's *prima facie* case of discrimination…combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." 530 U.S. at 140. By way of example, the Court contrasted, *inter alia*, *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997) (*prima facie* case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated) with *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination)."
24. 232 F.3d at 89 n.5.
25. 233 F.3d 149, 156-57 (2d Cir. 2000).
26. *Id.* at 157.
27. 263 F.3d 49 (2d Cir. 2001).
28. *Id.* at 55-56.
29. 248 F.3d 87 (2d Cir. 2001).
30. *Id.* at 89.
31. *Id.* at 94.

32. 251 F.3d 376 (2d Cir. 2001).
33. *Id.* at 382-83.
34. *Id.* at 381-82 (emphasis in original).
35. *Id.* at 382.
36. 202 F.3d 161 (2d Cir. 2000).
37. *Id.* at 166.
38. *Id.* at 168.
39. *Back v. Hastings-on-Hudson Union Free School Dist*., 365 F.3d 107, 123-24 (2d Cir. 2004) (citing *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 135 (2d Cir. 2000) and *Holtz v. Rockefeller & Co.*, 258 F.3d 63, 79 (2d Cir. 2001) (noting that the issue of pretext "is ordinarily for the jury to decide at trial rather than for the court to determine on a motion for summary judgment").
40. *See*, e.g., *Back*, 365 F.3d at 124; *Carlton*, 202 F.3d at 136 ("Carlton also alleges that Baldari suggested, during the meeting regarding his termination, that he should 'retire,' and that this constitutes additional evidence of age discrimination. Although evidence of one stray comment by itself is usually not sufficient proof to show age discrimination, that stray comment may 'bear a more ominous significance' when considered within the totality of all the evidence.").
41. 479 F.3d 193 (2d Cir. 2007).
42. *Id.* at 195.
43. *Id.* at 196.
44. 272 Fed. Appx. 78 (2d Cir. 2008).
45. *Id.* at 80.
46. 348 Fed. Appx. 651 (2d Cir. 2009).
47. *See*, e.g., *Clayborne v. OCE Business Services*, 2010 WL 2465184, at *2 (2d Cir. June 18, 2010); *Gertskis v. NYC D.O.H.M.H.*, 2010 WL 1731825, at *1 (2d Cir. April 30, 2010); *Tori v. Marist College*, 344 Fed. Appx. 697, 699 (2d Cir. 2009).
48. 584 F.3d 487 (2d Cir. 2009).
49. *Id.* at 504-05.
50. *Id.* at 505.
51. *Id.* at 504.
52. *Id.*
53. 46 F.3d 196, 203 (2d Cir. 1995).
54. *Id.* at 506 (citing *Carlton v. Mystic Transportation*, 201 F.3d 129, 135 (2d Cir. 2000)).
55. 596 F.3d 93 (2d Cir. 2010).
56. *Id.* at 107.
57. *Id.* at 107-08.
58. *Id.* at 107.
59. *Id.* at 108.

Stephen Bergstein, Esq., is a partner in Bergstein & Ullrich, LLP, a law firm located in Chester, N.Y., that handles civil rights and employment discrimination cases. He tracks the Second Circuit's decision in the "Wait A Second!" blog, located at www.secondcircuit-civilrights.blogspot.com.

The Supreme Court's *New Process Steel* Decision and Its Aftermath—Good Intentions Are Not Enough

By Michael J. Israel

Background

The National Labor Relations Board, by statute, is comprised of five members, appointed by the President of the United States. See National Labor Relations Act, as amended, 29 U. S. C. § 153(a). In late 2007, the Board had four members, Wilma Liebman, Peter Schaumber, Peter Kirsanow and Dennis Walsh, and one vacancy. Members Kirsanow's and Walsh's terms as recess appointees were set to expire at the adjournment of that term of Congress in December 2007, which would leave the Board with two members, a number insufficient to constitute a quorum under Section 3(b) of the NLRA. Section 3(b) provides:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise…. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. 29 U.S.C. § 153(b).

In anticipation of a reduction of the Board from four to two members, the four Board members, in late December 2007, delegated all of the Board's powers to Members Liebman, Schaumber and Kirsanow, as a three-member group, to be effective December 28, 2007. The Board relied on the statutory language Section 3(b), as well as a 2003 opinion issued by the Office of Legal Counsel (OLC) of the Department of Justice, to conclude that the Board may use this delegation procedure to "issue decisions during periods when three or more of the five seats on the Board are vacant." Thus, the Board expressed the opinion that its action would permit the remaining two members to exercise the powers of the Board "after [the] departure of Members Kirsanow and Walsh, because the remaining Members will constitute a quorum of the three-member group." The 2007 delegation was made by the Board members knowing that the Board would soon be faced with an extraordinary situation of a Board reduced to two members and to provide a means for the Board to continue to function in such circumstances.

On January 1, 2008, Members Liebman and Schaumber became the only members of the Board. They proceeded to issue decisions as a two-member quorum of a three-member group. Members Liebman and Schaumber continued to be the only members of the Board for the following 27 months, until the recess appointments of Members Mark Pearce and Craig Becker in March of this year. During the 27 months in which the Board was comprised of two members, it decided and issued approximately 600 decisions. Remaining cases that the two members could not agree on were held for additional Board members. While there had previously been instances of a two-member Board for periods of one or two months, a two-member Board, extending over two years, was unprecedented in the history of the National Labor Relations Board.

The Supreme Court's Decision

On June 17 of this year, a divided Supreme Court ruled in *New Process Steel, L.P. v. NLRB*, 560 U.S. __ (2010), 130 S.Ct. 2635 (No. 08-1457), that the two-member Board did not have the authority to issue decisions. The Court, split 5 to 4, reversed the Seventh Circuit's decision in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), in which the Court of Appeals had concluded that the two-member Board constituted a valid quorum of a three-member group to which the Board had lawfully delegated its powers. Several other courts of appeals, including the Second Circuit, had reached the same conclusion as the Seventh Circuit. See, e.g., *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009). However, on the same day as the Seventh Circuit's decision, the Court of Appeals for the District of Columbia came to the opposite conclusion in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (2009).

Justice Stevens wrote the majority opinion for the Court, reversing the Seventh Circuit's decision. The opinion initially noted that, based on the first sentence of Section 3(b) of the NLRA, "[t]he Board is authorized to delegate to any group of three or more members any and all of the powers which it may itself exercise…." *New Process Steel*, 130 S.Ct. at 2639. Thus, the Court concluded that Members Liebman and Schaumber could act as a quorum of the Board during the short period of time in which the Board was comprised of three members, during the last three days of December 2007, pursuant to the Board's December 2007 delegation of such authority. However, the question to be decided by the Court, Justice Stevens wrote, "is whether those two members could continue to act for the Board as a quorum of the delegee group after December 31, 2007, when the Board's membership fell to two and the designated three-member group of 'Members Liebman, Schaumber, and Kirsanow' ceased to exist

due to the expiration of Member Kirsanow's term." *Id.* at 2639-40.

The majority opinion noted that there were two different ways to interpret the first sentence of what the Court called Section 3(b)'s "delegation clause," which provides that the Board may delegate its powers to a "group of three or more members." Under the interpretation urged by the Government, the clause would require only that a delegee group contain three members at the time the Board delegates its powers, but not thereafter. Thus, two members alone would have full authority to act so long as they were part of the delegee group authorized by three members at the time of its creation. *New Process Steel*, *Id.* at 2640.

The other interpretation, which was adopted by the Court, "would read the clause as requiring that the delegee group *maintain* a membership of three in order for the delegation to remain valid." *Id.* (emphasis in original). The majority reasoned that this latter interpretation was correct for the following reasons. First, reading the clause "to require that the Board's delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all the provisions in § 3(b)." *Id.* Those provisions are:

> (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group. *Id.*

The majority opinion concluded that its interpretation was consonant with the Board quorum requirement that there be three participating members "at all times," and with the delegation clause's three-member rule. Such interpretation, it noted, also permits the vacancy clause to operate to provide that vacancies do not impair the Board's ability to take action, so long as the quorum is satisfied. Further, the Court reasoned, this interpretation does not nullify the group quorum provision, which would continue to authorize a properly constituted three-member delegee group to issue a decision with only two members participating when one is disqualified from a case. The majority also concluded that the Government's interpretation would permit "two members to act as the Board ad infinitum," which would vitiate the Board quorum requirement and the delegation clause's three-member requirement, "by permitting a de facto two-member delegation." *Id.* at 2640-41. The Court also noted that, had Congress intended to authorize two members to act on an ongoing basis, it could have used straightforward language to do so. Finally, the Court stated that its interpretation of Section 3(b) was consistent with the Board's own, until recently, historical practice, of not allowing two members to act as a quorum "of a defunct three-member group." *Id.* at 2641.

Regarding the good intentions of the Board involved in its two-member Board delegation, the majority noted that it was "not insensitive to the Board's understandable desire to keep its doors open despite vacancies," but nevertheless held that the Act's "delegation clause requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board. *Id.* at 2644-45. Indeed, the Court expressly acknowledged that former Board members have identified turnover and vacancies as a significant impediment to the operations of the Board. *Id.* at 2645 n.7.

Justices Kennedy, Ginsburg, Breyer and Sotomayor dissented from the majority opinion. Justice Kennedy, writing the dissent, stated that Section 3(b)'s "plain terms permit a two-member quorum of a properly designated three-member group" to issue rulings. *Id.* at 2645. He also asserted that "the objectives of the statute, which must be to ensure orderly operations when the Board is not at full strength as well as efficient operations when it is, are better respected by a statutory interpretation that dictates a result opposite to the one reached by the Court." *Id.* Justice Kennedy concluded as follows:

> The Court's revisions leave the Board defunct for extended periods of time, a result that Congress surely did not intend. The Court's assurance that its interpretation is designed to give practical effect to the statute should bring it to the opposite result from the one it reaches. For these reasons, I would affirm the judgment of the Court of Appeals. *Id.* at 2652.

The Board's Plan of Action After *New Process Steel*

At the time of the Supreme Court's June 17 decision in *New Process Steel*, 90 of the two-member decisions were pending before various federal courts of appeals. In response to numerous FOIA requests for the information, the Agency created a database available on the Agency's public website (www.nlrb.gov) that lists all contested cases decided by the two-member Board, with status updates and links to original documents in each case. The Board is seeking to have each of the cases pending in the courts of appeals remanded to the Board for further consideration. It is unclear at this time how many of the decisions by the two-member Board not already challenged in the federal courts can or will be contested and how many may now be moot.

In addition to the cases pending in the courts of appeals, an additional six cases were pending before the

Supreme Court. In July, in the two cases pending before the Supreme Court in which the courts of appeals had enforced orders of the two-member Board, the Board has taken the position that the Supreme Court should grant petitions for a writ of certiorari, vacate the judgments of the courts of appeals, and remand the cases for reconsideration in light of the decision in *New Process Steel*. *See Teamsters Local Union Number 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009), pet. for cert. filed, 78 U.S.L.W. 3702 (May 17, 2010) (No. 09-1404); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009), pet. for cert. filed, 78 U.S.L.W. 3629 (April 15, 2010) (No. 09-1248).

On August 5, less than two months after the Court's decision in *New Process Steel*, the Board began issuing decisions in cases that had been returned to it by the federal courts of appeals. Each of the remanded cases will be considered by a three-member panel of the Board, including Chairman Liebman. Board Member Schaumber also participated in the decisions that issued in such cases before his departure from the Board on August 27. Consistent with Board practice, the other Board members not on the panel will have the opportunity to participate in the case if they so desire.

As of mid-September, when this article was written, the Board had issued new decisions in 67 of the 90 two-member Board cases that had been pending in the courts of appeals. At the same time, the Board has continued to process and issue decisions in the normal course, including a significant decision in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010), finding lawful a union's display of stationary banners at a secondary employer's premises in protest of work being performed for the owners of the establishments by construction contractors that the union claimed paid substandard wages and benefits.

Michael J. Israel is a career employee of the National Labor Relations Board. He has been the Regional Attorney in Region 3, Buffalo, New York, since May 2009. Previously, he was Deputy Regional Attorney, Supervisory Attorney, and a trial attorney in Region 3. From 1983 to 1988, Mr. Israel was an attorney in the Division of Advice, Office of the General Counsel in Washington, DC.

Mr. Israel received his B.A. degree from Columbia University and his J.D. degree from the State University of New York at Buffalo. He holds a master's degree in labor relations from Cornell University. Mr. Israel was admitted to practice in New York State in 1983.

Arbitration Fee-Splitting Provisions: Do the Benefits Outweigh the Disadvantages?

By Dayna B. Tann

Introduction

Fresh out of high school, Henry finally landed his first job. Quickly glancing over his thick employment contract, Henry shrugs as he scribbles his signature. After all, if he wants the job, he does not have much of a choice. Buried in the contract is an arbitration provision mandating that the parties share the costs of arbitration. On this same day, Margaret, an experienced securities broker, is presented with an updated employee manual. Having seen similar agreements before, Margaret flips through the manual and reads the fee-splitting provision. Margaret ponders over the provision and signs the agreement assuming that she will never need to dispute a claim.

By signing their respective agreements, Henry and Margaret have waived their rights to litigate a claim in court. The factual differences between Henry's and Margaret's circumstances help explain the arguments for and against mandatory arbitration clauses in employment contracts. Proponents of mandatory arbitration argue that sophisticated individuals like Margaret, who freely enter into an agreement, should not be able to invalidate a mandatory arbitration clause based on the freedom of contract.[1] In contrast, opponents of mandatory arbitration argue that such provisions are inherently unfair because an employee in Henry's position has little choice but to sign anything presented to him.[2] The Supreme Court has weighed in on this debate and ruled in favor of mandatory arbitration on the principle that upholding the validity of such agreements "merely provide[s] for a change of forum and not a loss of substantive rights."[3] However, given that Henry's and Margaret's particular contracts contain fee-splitting provisions, their contracts raise another issue the Supreme Court has not yet addressed: whether fee-splitting clauses in mandatory arbitration provisions are enforceable.

Recently, in *Brady v. Williams Capital Group, L.P.*,[4] the First Department severed a fee-splitting provision in an arbitration agreement on the basis that it violated public policy.[5] The court upheld the parties' agreement to split the arbitrator's fee rather than the American Arbitration Association's ("AAA") "employer pays" rule but nevertheless rendered the fee-splitting provision invalid because the high cost of the arbitrator's fee prevented the claimant from effectively vindicating her statutory cause of action in an arbitral forum.[6] This past March, the Court of Appeals affirmed the decision but remanded the case to the Supreme Court, New York County, to determine whether the claimant is financially able to share the costs of arbitration.[7]

Brady analyzes the case history examining the enforceability of a fee-splitting arbitration provision in an employment contract, discusses the enforceability of a negotiated agreement between two parties and evaluates the costs of arbitration in comparison to the costs incurred in litigation. Thus, *Brady* is an excellent avenue to discuss the issues confronting the enforceability of fee-splitting provisions. Part I of this article analyzes *Brady v. Williams Capital Group, L.P.* and the case history regarding the enforceability of fee-splitting provisions in arbitration. Part II examines the policy arguments for and against fee-splitting clauses in mandatory arbitration provisions and evaluates the debate concerning the passage of the Arbitration Fairness Act of 2009. Finally, Part III looks at claimant prevailing rates and the costs incurred by arbitration in comparison to litigation and argues that the benefits of enforcing fee-splitting provisions outweigh its disadvantages.

Part I: *Brady v. Williams* and the History of Fee-Splitting Provisions

A. The Case History of Fee-Splitting Provisions

The Supreme Court has never directly addressed whether a fee-splitting provision in an arbitration agreement is enforceable.[8] As a result, there is no uniform standard to measure the enforceability of such provisions, resulting in many different court interpretations. At first, many courts refused to uphold mandatory fee-splitting provisions. For example, in *Cole v. Burns International Security Services*,[9] the D.C. Circuit held that an arbitration agreement requiring an employee to pay half of the arbitrator's fee was *per se* unenforceable.[10] In *Paladino v. Avnet Computer Technologies, Inc.*,[11] the Eleventh Circuit "went a step further and held that a fee-splitting provision imposing steep filing fees upon an employee was a *per-se* basis for non-enforcement."[12] In contrast to this *per se* rule, the First, Fifth and Seventh Circuits apply a case-by-case test to determine the enforceability of fee-splitting provisions.[13] "These courts focus more on the certainty that a given plaintiff will incur prohibitive costs than the philosophical idea that a party [should not] have to pay for a judge when vindicating statutory rights."[14]

In response to the split among the circuits, the Supreme Court attempted to resolve the issue in *Green Tree Financial Corp. v. Randolph*.[15] Recognizing that excessive costs of arbitration could preclude a claimant from vindicating her statutory rights, the Court nevertheless placed the burden on the claimant to prove that such costs are prohibitively expensive.[16] By leaving the burden on the

claimant, the Court "cas[t] doubt on the continuing viability of earlier circuit court decisions that propose[d] a *per se* rule against enforcement of fee-splitting arrangements."[17] However, *Green Tree* hardly resolved the controversy as the decision provides little direction on how much proof is required to invalidate a fee-splitting provision.[18] Accordingly, despite the *Green Tree* decision, the debate between the circuits persisted as some circuits continued to enforce a *per se* approach while others adhered to *Green Tree's* "burden of proof standard."[19]

In *Bradford v. Rockwell Semiconductor Systems, Inc.*,[20] the Fourth Circuit attempted to refine *Green Tree*'s burden of proof standard by implementing a three-part test to determine whether a claimant is financially able to share the costs of arbitration.[21] The Fourth Circuit's burden-shifting analysis focused on (a) "the claimant's ability to pay the arbitration fees and costs, (b) the expected cost differential between arbitration and litigation in court, and (c) whether that cost differential is so substantial as to deter the bringing of claims."[22] Recently, as demonstrated in *Brady v. Williams Capital Group, L.P.*, there has been a move towards applying *Bradford's* case-by-case analysis rather than *Cole's per se* rule of unenforceability.[23]

B. *Brady v. Williams Capital Group, L.P.*

Lorraine C. Brady was hired to sell fixed income securities at Williams Capital Group, L.P. ("Williams"), an investment bank and broker-dealer.[24] One year after hiring Brady, Williams produced a new employee manual and required Brady and all of its employees to agree to its provisions as a condition of continued employment.[25] The manual contained a mandatory arbitration clause with a provision requiring the parties to equally share the costs of the arbitrator.[26] At the time of the agreement, this fee-splitting provision was consistent with the current rules under the AAA.[27]

When Brady was terminated five years later, she commenced an arbitration proceeding with the AAA for discriminatory termination.[28] By this time, the AAA adopted an "employer pays" rule in which the employer is required to pay the arbitrator's fee.[29] Pursuant to this rule, the AAA sent Williams a bill for the total cost of the arbitrator.[30] Williams refused to pay, demanding that Brady must pay half of the fee pursuant to their agreement.[31] The AAA waited several months for the fee and eventually cancelled the arbitration.[32] Brady then filed suit to compel Williams to arbitrate and pay for the costs of arbitration, but the Supreme Court dismissed her suit holding that the parties' agreement to share the arbitrator's fee equally applied.[33]

The Appellate Division reversed in a 3-2 decision.[34] The court addressed two questions: (1) whether the AAA's "employer pays" rule should supplant the fee-splitting provision of the parties' arbitration agreement, and (2) whether the fee-splitting provision should be rendered unenforceable as against public policy.[35] The court answered the first question in the negative, asserting that "'arbitration is a creature of contract, and it has long been the policy of the State to 'interfere as little as possible with the freedom of consenting parties.'"[36] The court therefore refused to rewrite the contract holding that reading the "employer pays" rule into the agreement would modify the terms and force Williams to arbitrate "in a manner contrary to [its] agreement."[37]

The court nevertheless held that it would be unconscionable to enforce the fee-splitting provision on these particular facts.[38] Recognizing that large arbitration costs could preclude a litigant from vindicating her statutory cause of action,[39] the court held that Brady met her burden in proving that the costs of arbitration are significantly prohibitive given that Brady's upfront $21,150 fee excludes additional costs that may be incurred.[40] Additionally, the majority argued that Brady's 18 months of unemployment following her termination adds further credence to her argument that sharing the costs of the arbitrator is prohibitively expensive.[41]

In contrast to these surmounting arbitration costs, the majority argued that the filing costs associated with litigation are minimal.[42] The majority pointed out that an employee may be able to secure an attorney willing to take the case on a contingency basis and may also prevail in obtaining attorneys' fees.[43] The court thus concluded that the proper remedy is to sever the improper provision rather than void the entire agreement.[44]

In a vigorous dissent, Justice McGuire argued that the majority's assertion that Brady would incur prohibitive costs was "pure ipse dixit."[45] Citing Brady's six-figure salary, the dissent argued that Brady did not even attempt to prove that she lacked the financial wherewithal to pay the arbitrator's fee and therefore failed to meet her burden in proving the arbitration fees were debilitating.[46] In the alternative, the dissent argued that even if Brady did meet her burden, invalidating the fee-splitting provision would effectively "authorize the court to do what they otherwise cannot do: fundamentally modify the terms of the parties' contract and force [one party] to arbitrate in a manner contrary to the agreement to which it has assented."[47] The dissent concluded that the proper remedy is not to rewrite the arbitration agreement but to permit the party to litigate its claims in court.[48]

The Court of Appeals affirmed the decision of the Appellate Division as modified by its opinion.[49] The Court of Appeals determined that the lower courts were correct in upholding the terms of the parties' arbitration agreement rather than the AAA's "employer pays" rule but agreed with the dissent in the Appellate Division that Brady made an "inadequate showing" that she was unable to pay her share of the arbitrator's fee.[50] As a result, the Court held that the lower courts erred by fail-

ing to apply all the criteria the Court deemed relevant to determine whether a claimant is financially able to share the costs of arbitration and remanded the case to the Supreme Court.[51] Looking towards *Bradford* and other federal courts for guidance, the Court of Appeals adopted a three-prong standard to assess a litigant's ability to share the costs of the arbitrator's fee.[52] The Court held that, on remand, the New York County Supreme Court should "at minimum" consider "(1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum."[53] The Court of Appeals did not decide what the proper remedy should be if the "equal share" provision is found unenforceable but instead left it to the Supreme Court to decide.[54] Offering no guidance as to how the Supreme Court should determine whether to render a fee-splitting provision unenforceable, the Court of Appeals concluded that the Supreme Court should determine, "in the first instance, whether to sever the clause and enforce the rest of the Arbitration Agreement, or to offer petitioner a choice between accepting the equal share provision or bringing a lawsuit in court."[55]

Part II: The Issues Confronting the Enforceability of Fee-Splitting Provisions

A. Policy Arguments for and Against Fee-Splitting Provisions

As demonstrated in the passionate discussion between the majority and dissent in *Brady*,[56] the extent to which a party must prove that a fee-splitting provision is prohibitively expensive is a hotly contested debate. At the crux of the dispute is the fairness of such provisions as scholars debate whether the costs of arbitration exceed the costs in litigation and whether claimants are more likely to prevail in one forum over the other.

Proponents of fee-splitting clauses argue that such provisions are overall more fair and a cheaper alternative to litigation. Accordingly, for the same reasons they argue to uphold mandatory arbitration provisions in general, these proponents argue that arbitration reduces the number of cases on the court's docket, lowers the cost and speed for a claimant to bring a claim, "increase[s] access to a system of dispute resolution for lower-income employees,"[57] and provides "a need for closure."[58] Advocates argue that these clauses should be upheld because parties are free to negotiate their own terms based on the freedom of contract.[59] Therefore, because the parties negotiated for an agreement to split arbitration costs—that bargained for agreement should be enforced. Those in favor of fee-splitting provisions also argue that such provisions reduce the risk of arbitrator bias as no single party is responsible for paying the arbitrator's entire fee.[60] Requiring the employer to pay *all* the costs could lead to bias in which the arbitrator curries favor to the employer in order to secure repeat business.[61]

Critics of fee-splitting clauses argue that such agreements are inherently unfair because they are provided on a take-it-or-leave-it basis and are drafted to favor employers.[62] Accordingly, they argue that the employee did not have any other choice but to sign the fee-splitting provision. In response to the argument that fee-splitting provisions limit arbitrator bias, these critics argue that there is little proven arbitrator bias in favor of an employer.[63] Adamant to protect consumers and employees who are subject to contracts of adhesion, these critics lobbied hard to propose the Arbitration Fairness Act of 2009.[64]

B. The Arguments for and Against the Enactment of the Arbitration Fairness Act of 2009

The Arbitration Fairness Act of 2009 essentially seeks to make fee-splitting provisions in pre-dispute agreements unenforceable.[65] The Act was first proposed in 2007 by Senator Russ Feingold and Congressman Hank Johnson.[66] Introduced to the United States Congress on February 12, 2009, it has not yet been scheduled for Congressional vote.[67] If enacted, it would amend the Federal Arbitration Act by adding a provision under Sec. 2. Validity and Enforceability, stating:

> (b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—
>
> (1) an employment, consumer or franchise dispute; or
>
> (2) a dispute arising under any statute intended to protect civil rights.
>
> (c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.
>
> (d) Nothing in this chapter shall apply to any arbitration provision in a collective bargaining agreement.[68]

Not surprisingly, scholars and politicians argue over the potential consequences of passing the Act. Those in favor of the Bill contend that it will finally put a stop to the unequal power between an employee and employer. For example, Scott L. Nelson, a member of the ABA's Special Committee on the Future of Civil Litigation, stat-

ed that: "[The Act will return arbitration] to what it was intended to be, which is something that allows sophisticated entities to agree on an alternative means of resolving their disputes [rather than] something imposed on weaker parties in essentially one-sided transactions."[69]

In contrast, those against the Act's enactment argue that it "overrules the settled law balancing the authority of the arbitrator and the court"[70] and neglects the fact that litigation is expensive and a burden on the court's overflowing dockets.[71] As one scholar commented:

> As now drafted the bill would undercut more than 80 years of thoughtfully developed arbitration law and reverse fundamental globally accepted principles of arbitration as to the allocation of authority between the court and the arbitrator. The bills that have been proposed would hamper the ability of US business interests to compete in cross-border commerce, where arbitration is the widely accepted method for dispute resolution, and would have a negative impact on businesses that have freely contracted for domestic arbitration as their mechanism of choice. The bills under consideration are likely to cause significant delays and additional costs, impose a meaningful extra burden on the courts, and alter the economics of commercial transactions.[72]

Arguing that the Bill is over-expansive, opponents are concerned that the Bill's breadth would invalidate predispute arbitration clauses between sophisticated business parties.[73]

Part III: The Benefits of Mandatory Arbitration Provisions Containing Fee-Splitting Provisions Outweigh the Disadvantages

As explained below, fee-splitting provisions are neither unfair nor detrimental for most employees. Although an arbitrator's fee may at first glance seem prohibitively expensive, arbitration costs are overall less expensive than litigation. Moreover, arbitration provides a forum that would otherwise be unavailable to many claimants. Thus, although there may be a few example cases to the contrary, for many claimants, it is "arbitration or nothing."[74]

A. Bargained for Fee-Splitting Provisions Are Rooted in the Freedom of Contract

The freedom of contract is a fundamental concept rooted in American contract law. Given this essential privilege, most courts defer to the parties' negotiations and interfere as little as possible with the intent of the parties.[75] In fact, in contrast to *Brady*, courts have upheld this principle despite an argument that it violates public policy. For example, in *Townes Telecommunications Inc., v. Travis, Wolff & Co. L.L.P.*,[76] the Texas Court of Appeals vacated an arbitration award which did not award costs to the prevailing party as specified in the parties' agreement but instead split the fees equally between the parties.[77] Although splitting the fee might be more equitable,[78] the Court held that the arbitrator "exceeded its powers by allocating between the parties the cost of the arbitration in direct contravention of the agreement."[79] Moreover, the parties' freedom to contract is not superseded by the argument that fee-splitting provisions are contracts of adhesion. Addressing this very argument, the Supreme Court upheld such agreements on the basis that they "merely provide for a change of forum and not a loss of substantive rights."[80]

B. The Costs and Recovery Rate in Arbitration Versus Litigation

Arbitration is generally the faster and cheaper alternative to litigation.[81] However, as demonstrated by the majority in *Brady*, that is not always the case. Like many lawyers in major law firms, arbitrators are paid based on the "billable hour."[82] This hourly basis includes many facets of the case outside of the amount of hours the arbitrator spends attending the arbitration hearing.[83] Accordingly, it is not surprising that the arbitrator's fee could sometimes exceed the amount in dispute as frequently occurs in litigation. Although there may be cases in which the claimant had to pay incredible arbitration fees,[84] these cases are the exception, not the rule.[85]

In addition, plaintiffs fare significantly better in arbitration than in litigation.[86] In a study conducted by the AAA, arbitral claimants prevailed 63% of the time.[87] In contrast, another study determined that claimants only prevailed in federal court 14.9% of the time and 16.8% of the time in EEOC trials.[88] Studies also indicate that although claimants at trial generally obtained larger awards from judges or juries, claimants as a group recovered more damages in arbitration.[89] In fact, "one study concluded that litigation is not a plausible option for employees below around the $60,000 income level but that arbitration is a realistic alternative."[90] This is due to the fact that "arbitration does not include extensive discovery or the numerous stages that are inherent in litigation."[91] Moreover, because of the informality of the process, "it is easier for a *pro se* plaintiff to prosecute a claim through arbitration rather than litigation."[92] Therefore, because arbitration provides the parties with a low-cost method to resolve their disputes that otherwise would not be available, "for many claimants, it is arbitration or nothing."[93]

C. Fee-Splitting Provisions Reduce the Risk of Arbitrator Bias

Arbitrator bias does exist in practice, most often to the detriment of the employee.[94] This bias is often created "in favor of the employer because the employer is a repeat player and [therefore is more likely] to pick that arbitrator again while the individual will probably never be before the arbitrator again."[95]

In a study on whether there is a bias in favor of repeat player employers, Professor Lisa Bingham of Indiana University proved such bias exists as employees were significantly less likely to prevail on their claims and were awarded considerably lower damages when they did win against repeat player employers.[96] As a result, "[i]ndividual employees [may] feel more comfortable paying part of the arbitrator's fee, being unable to accept the notion there is no connection between the source of payment and a potential bias on the part of the decisionmaker."[97] Given that the source of payment may affect the arbitrator's neutrality, splitting the arbitrator's fee reduces the risk of arbitrator bias.

D. The Arbitration Fairness Act Fails to Address the Problems It Seeks to Rectify and Should Not Be Enacted

Despite the valid concerns of those against mandatory arbitration agreements, the Arbitration Fairness Act of 2009 fails to address the problems that these critics seek to rectify. First, the Act ignores the potential cost of arbitration. There is no evidence "that a post-dispute agreement will cost less than a pre-dispute agreement or that the consumer will receive any information about the cost of arbitration."[98] Second, the Act does not completely eliminate fairness concerns given that "the AFA does not devise a mechanism to help consumers understand arbitration clauses, which may lead to unsuspecting consumers entering into post-dispute arbitration agreements."[99] Finally, although post-dispute agreements are more likely to be truly voluntary given that they are entered into after a particular issue has already arisen and the employee can therefore make an informed decision whether to arbitrate or go to court, "management representatives testified before the Dunlop Commission that employers would generally not be willing to enter into post-dispute agreements to arbitrate."[100] Therefore, instead of rendering mandatory arbitration provisions unenforceable, critics should instead focus on ensuring that arbitration due process protocols, including the neutrality of the arbitrator, are followed.

Conclusion

Despite valid evidence that arbitration is generally cheaper than litigation and that fee-splitting provisions may reduce the risk of arbitrator bias, the enforceability of fee-splitting provisions in the employment context remains a controversial issue. Although the unpredictable outcome in *Brady* may be difficult to draft around, *Brady* sends a message to employers that they need to carefully examine any fee-splitting provision in their arbitration agreement as it may be rendered void as against public policy. "Employers should beware of any such fee-sharing provisions which likely will be viewed with skepticism, especially when challenged by employees who have not secured new employment and thus, arguably do not have sufficient income to share arbitration costs."[101]

Endnotes

1. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 MICH. J. L. REFORM 783, 788–89 (2008).
2. *Id.* at 787.
3. *Id.* at 783.
4. 64 A.D.3d 127, 878 N.Y.S.2d 693 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).
5. *Id.* at 138, 878 N.Y.S.2d at 702.
6. *Id.* at 129, 878 N.Y.S.2d at 695.
7. *See Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).
8. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The court held that "large arbitration costs could preclude [a plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum" but did not delineate what circumstances would invalidate an agreement. *Id.* at 90. *See also* Clara H. Saafir, *To Fee or Not to Fee: Examining Enforceability of Fee-Splitting Provisions in Mandatory Arbitration Clauses in Employment Contracts*, 48 LOY. L. REV. 87, 90 (2002) (noting that "because the Supreme Court has yet to directly address this issue, lower courts are left to grapple over whether to enforce fee-splitting provisions").
9. 105 F.3d 1465 (D.C. Cir. 1997).
10. *Id.* at 1485. The court held that "an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims…[t]he only way that an arbitration agreement of the sort… can be lawful is if the employer assumes responsibility for the payment of the arbitrator's compensation." *Id.* at 1468.
11. 134 F.3d 1054 (11th Cir. 1998).
12. *See* Saafir, *supra* note 8, at 102. *See also Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999). Also relying on *Cole*, the Tenth Circuit held that such agreements are unenforceable under the Federal Arbitration Act because they do not provide the employee with an accessible forum to resolve the employee's statutory rights. *Id.*
13. *See* Ryan P. Steen, *Paying for Employment Dispute Resolution: Dilemmas Confronting Arbitration Cost Allocation Throw the Arbitration Machine Into Low Gear*, 7 J. SMALL & EMERGING BUS. L. 181, 189 (2003).
14. *Id.*
15. 531 U.S. 79 (2000).
16. *See* Saafir, *supra* note 8, at 104–05. The court held that the simple assumption that a claimant would be "saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 105.
17. *Id.*
18. *Id.* at 106.
19. *See* Steen, *supra* note 13, at 200.

20. 238 F.3d 549 (4th Cir. 2001).

21. *Id.* at 556.

22. *Id.*

23. *See Brady v. Williams Capital Group, L.P.*, 64 A.D.3d 127, 134, 878 N.Y.S.2d 693, 699 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010) (noting that the majority of the federal circuit courts adopted *Bradford's* case-by-case analysis). *See also Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 467, 928 N.E.2d 383, 387–88, 902 N.Y.S.2d 1, 6 (2010) (adopting *Bradford's* analysis as a matter of New York state law).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See Brady v. Williams Capital Group, L.P.*, 17 Misc. 3d 325, 326, 844 N.Y.S.2d 584, 585 (Sup. Ct. N.Y. County 2007).

28. *See Brady v. Williams Capital Group, L.P.*, 64 A.D.3d 127, 134, 878 N.Y.S.2d 693, 699 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).

29. *Id.* at 129–30, 878 N.Y.S.2d 696.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id. See also Brady v. Williams Capital Group, L.P.*, 17 Misc. 3d 325, 328, 844 N.Y.S.2d 584, 587 (Sup. Ct. N.Y. County 2007).

34. *See Brady v. Williams Capital Group, L.P.*, 64 A.D.3d 127, 878 N.Y.S.2d 693 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).

35. *Id.* at 128, 878 N.Y.S.2d at 695.

36. *Id.* at 132, 878 N.Y.S.2d at 697 (quoting *Credit Suisse First Boston Corp. v. Pitofsky*, 4 N.Y.3d 149, 154 (2005)) (quoting *Matter of Siegel*, 40 N.Y.2d 687, 689 (1976)).

37. *Id.*

38. *Id.* at 138, 878 N.Y.S.2d at 702.

39. *Id.* at 133, 878 N.Y.S.2d at 698 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Green Tree Fin. Corp-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

40. *Id.* at 135, 878 N.Y.S.2d at 700.

41. *Id.*

42. *Id.* (contending that "in general, it cannot be disputed that the out-of-pocket expenses for an employee filing a legal suit are minimal"). The majority argued that unlike in arbitration where the parties pay the arbitrator's fee, "the costs of maintaining and operating the court system, including the salaries of judges and other court employees, are borne by the taxpayers, not the litigants themselves." *Id.*

43. *Id.*

44. *Id.* at 137, 878 N.Y.S.2d at 701. In support of this remedy, the majority argued that the agreement itself contains a clause providing that "the rendering of any provision void or unenforceable 'shall not affect the validity of the remainder of the Agreement,'" and the court therefore "will not be overriding the intent of the parties to arbitrate." *Id.* at 137–38, 878 N.Y.S.2d at 701.

45. *Id.* at 156, 878 N.Y.S.2d at 714 (McGuire, J., dissenting). For example, the dissent argued that the majority's "implicit assumption that representation on a contingency fee basis is more likely in litigation than when attorneys represent claimants in arbitration [is based] on sheer speculation." *Id.* at 157, 878 N.Y.S.2d at 715.

46. *Id.* at 153, 878 N.Y.S.2d at 713–14.

47. *Id.* at 139, 878 N.Y.S.2d at 702–03 (citing *Matter of Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 85 N.Y.2d 173, 182-183 (1995)).

48. *Id.* at 145, 878 N.Y.S.2d at 706–07. The dissent also argued that the severability clause is not properly before the court because Brady only first mentioned the clause in her reply brief. *Id.* at 148, 878 N.Y.S.2d at 709.

49. *See Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).

50. *Id.* at 465–66, 928 N.E.2d at 386, 902 N.Y.S.2d at 4–5.

51. *Id.* at 465–66, 928 N.E.2d at 386, 902 N.Y.S.2d at 5. Although the Court of Appeals does not require a full hearing in all situations to determine whether a litigant can afford the costs of arbitration, the Court does require "a written record of the findings pertaining to a litigant's financial ability." *Id.* at 467, 928 N.E.2d at 388, 902 N.Y.S.2d at 6.

52. *Id.* at 466–67, 928 N.E.2d at 386–88, 902 N.Y.S.2d at 5–6.

53. *Id.* at 467, 928 N.E.2d at 387–88, 902 N.Y.S.2d at 6.

54. *Id.* at 467–68, 928 N.E.2d at 388, 902 N.Y.S.2d at 6.

55. *Id.*

56. *See Brady*, 64 A.D.3d at 136, 878 N.Y.S.2d at 700 (The majority cast off the dissent's argument as "an attempt to minimize the effect of [the] high cost [of arbitration] by [suggesting] that the alternative litigation cost would be much higher.") Moreover, the length and detail of the dissent demonstrates the dissent's disdain for the majority opinion. *Id.* at 139–59, 878 N.Y.S.2d 702–17.

57. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 36 (Alan Miles Ruben, ed., 6th ed. 2003).

58. *See* Interview with Mitchell Rubinstein, Senior Associate, New York State United Teachers (Oct. 14, 2009).

59. *See* Antoine, *supra* note 1, at 788.

60. *See* Interview with Mitchell Rubinstein, Senior Associate, New York State United Teachers (Oct. 14, 2009).

61. *Id.*

62. *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563 (2005).

63. *See, e.g., Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (holding that "[i]t is doubtful that arbitrators care about who pays them, so long as they are paid for their services").

64. *See* Sherwyn, Estreicher & Heise, *supra* 62, at 1563 (noting that "policy debates [regarding arbitration] continue with undiminished force in the academy [and] is often the case with controversial issues, those opposing arbitration are more vocal than those favoring arbitration").

65. *See* Edna Sussman, *The Unintended Consequences of the Proposed Arbitration Fairness Act*, 58 FEDRLAW 48, 48 (May 2009).

66. *See* Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 157 (2009).

67. *See* Sandra D. Grannum, *The Faith and Face of Securities Arbitration After the 2008 Crash* in PRACTISING LAW INSTITUTE, *Corporate Law and Practice Course Handbook Series: Securities Arbitration in the Market Meltdown Era: Achieving Fairness and Perception in Reality*, 111, 115 (2009) (noting that the Bill "'has a long way to go'").

68. *See* ARBITRATION FAIRNESS ACT OF 2009, H.R. 1020, 111th Cong. (2009), *available at* http://www.opencongress.org/bill/111-h1020/text (last visited October 20, 2009).

69. *See* Henry R. Chalmers, *Future of Mandatory Arbitration of Consumer Disputes in Doubt*, LITIGATION NEWS (August 2009), *available at* http://www.abanet.org/litigation/litigationnews/top_stories/arbitration-consumer-disputes.html

70. *See* Sussman, *supra* note 65, at 48.

> Although it is the court's responsibility to determine if there is a valid agreement to arbitrate, arbitrators generally decide if a contract is otherwise valid or if a specific dispute falls within the scope of the arbitration clause. Yet the [Arbitration Fairness Act] would invest the courts with sole authority to determine the validity of arbitration agreements irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. *Id.* at 50.

71. *See* Chalmers, *supra* note 69 (citing Edward M. Mullins, current co-chair of ABA's International Litigation Committee, and Andrew L. Sandler, co-chair of ABA's Consumer and Personal Rights Litigation Committee).
72. *See* Sussman, *supra* note 65, at 48.
73. *Id.* at 50. For example, the Bill as now drafted would invalidate pre-dispute clauses in franchise disputes which have sophisticated parties on both sides. *Id.*
74. *See infra* note 93.
75. *See supra* note 36.
76. 291 S.W.3d 490 (Tex. App. 2009).
77. *Id.* at 492. The Court vacated the portion of the award relating to the payment of costs. *Id.* at 494.
78. *Id.* at 493.
79. *Id.*
80. *See* Antoine, *supra* note 1, at 783.
81. *See* Elkouri, *supra* note 57, at 40.
82. *See* Ronald J. Offenkrantz, *Arbitrating Commercial Issues: Do You Really Know the Out-of-Pocket Costs*?, 81 N.Y. ST. B. J. 30, 31 (2009).
83. *See* Elkouri, *supra* note 57, at 40 (noting that "[a]d hoc arbitrators typically charge on a per diem basis for hearing time, travel time, and time spent studying the case and preparing the decision").
84. *See* Offenkrantz, *supra* note 82. For example, one claimant was forced to seek bankruptcy protection in a California Bankruptcy Court to avoid a $50,000 arbitrator advance retainer. *Id.*
85. *See supra* note 81.
86. *See* Sherwyn, Estreicher & Heise, *supra* note 62, at 1578 (noting that "there is no evidence that plaintiffs fare significantly better in litigation…in fact, the opposite may be true").
87. *See* Antoine, *supra* note 1, at 792.
88. *Id.* at 792–93. However, these studies have been met with skepticism as the reports may have been "comparing apples and oranges." *Id.* In an attempt to obtain more precise results, Professor Lisa Bingham of Indiana University conducted a study comparing claims based on individual contracts and claims based on employee manuals. *Id.* In these two separate studies, Bingham concluded that employees prevailed 68.8 and 61.3% of the time on claims based on individual contracts but only 21.3 and 27.6% of the time on claims based on employee manuals. *Id.*
89. *See* Antoine, *supra* note 1, at 792.
90. *See* Antoine, *supra* note 1, at 791. Arbitration is also well-suited for those whose potential recovery does not warrant the substantial amount of time and money to hire a first-rate lawyer to prepare the action for court. *Id.*
91. *See* Kevin R. Casey, *Mandatory Consumer Arbitration*, THE METROPOLITAN CORPORATE COUNSEL, Aug. 5, 2009, *available at* http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2009&EntryNo=10019.
92. *See* Sherwyn, Estreicher & Heise, *supra* note 62, at 1575.
93. *See* Casey, *supra* note 91. *But cf.* Sherwyn, Estreicher & Heise, *supra* note 62, at 1564–65 (noting the impossibility to gather completely accurate statistics through these studies). The problem with these studies is that no case is ever the same and "one can never be sure if the reason for a disparity in outcomes, if any, involves the adjudication system or some other factor, such as the strength of the case, or perhaps a selection factor determining which cases go to court and which cases end up in arbitration." *Id.* Nevertheless, although these studies may not be perfect, these studies show that arbitration serves as a more than adequate mechanism to dispute a party's claim.
94. *See infra* note 96.
95. *See* Interview with Mitchell Rubinstein, Senior Associate, New York State United Teachers (Oct. 14, 2009).
96. *See* Sherwyn, Estreicher & Heise, *supra* note 62 at 1570 (noting that "Bingham found that while employees won 64% of all cases combined, they won only 16% of cases against repeat players"). Nevertheless, Bingham acknowledged that there may be causes for repeat employer success other than arbitrator bias such as the fact that repeat players are more experienced in the process and better able to identity cases worth settling. *Id.*
97. *See* Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 INDIANA L. J. 83, 89 n. 45 (2001).
98. *See* Casey, *supra* note 91.
99. *Id.*
100. *See* Antoine, *supra* note 1, at 790.
101. *See* Fee-Splitting Provisions in Arbitration Agreements Subject to Scrutiny, CROWELL & MORING LABOR & EMPLOYMENT LAW ALERT, May 2009, *available at* http://www.crowell.com/NewsEvents/Newsletter.aspx?id=1222.

Dayna B. Tann earned her J.D. in 2010 from St. John's University School of Law. She earned her B.A. in 2005 from The University of Scranton. This article won third place in the 2010 Dr. Emanuel Stein and Kenneth Stein Memorial Writing Contest sponsored by the Labor and Employment Law Section of the New York State Bar Association.

Ethics Matters

By John Gaal

Q I am representing a client in litigation and I have just discovered that the adverse party is on Facebook and MySpace. I am confident that if I access her pages on those sites, I will find information useful in impeaching her damages claim. May I do that?

A Social networking sites present almost limitless opportunities and almost as many traps for the unwary. In this case, we have a little of both.

If you are able to access her pages on these sites (or any other social networking site) because they are publicly available, you may ethically do so. The New York State Bar Association Committee on Professional Ethics, in Formal Opinion 843, just recently issued an opinion reaching this conclusion. As the Committee concluded, where the lawyer may gain access without engaging in deception, that access is permitted. Indeed, the Committee found that acquiring information in this manner is no different than acquiring information through some publicly accessible online or print media, or though a subscription research service such as Nexis of Factiva.

Where you can run afoul of New York's Rules of Professional Conduct is if you try to access sites that are not open to the public. On many social networking sites access is limited to those granted access rights by the page creator. In some cases, access is limited to those who "friend" the creator. While Formal Opinion 843 declined to address that situation, because it was not the case presented to it for an opinion, it did note a recent opinion issued by the Philadelphia Bar Association. In Opinion 2009-02, the Philadelphia Bar was confronted with a situation in which a lawyer inquired about using a third party to access the social networking site of an unrepresented adverse witness in a pending lawsuit for the purpose of obtaining information that might be useful for impeachment purposes at trial. Access could only be gained by the third party "friending" the adverse witness. The inquiring lawyer was proposing that the third party would friend the witness, using only truthful information but concealing the connection between the third party and the lawyer. The Philadelphia Bar Association concluded that such conduct would violate the Pennsylvania Rules of Professional Conduct. Specifically, the Philadelphia Opinion concluded that the third party's failure to reveal the connection with the lawyer would constitute deception in violation of the Rules and since the third party was acting under the supervision of the lawyer, the lawyer would be responsible for that deception.

While NYSBA Formal Opinion 843 declined to formally opine on the "friending" situation presented in the Philadelphia Opinion, it seems likely that the NYSBA Committee on Professional Ethics would reach a similar conclusion, since the specific Rules relied upon by the Philadelphia Bar—Rules 8.4(c), 5.3(c)(1) and 4.1—are all matched in New York's Rules of Professional Conduct. In addition, New York Rule 4.3 prohibits a lawyer in the course of representing a client from stating or implying to anyone that the lawyer is "disinterested." "Friending" another party in this context without revealing the relationship to the opposing party would seem to clearly run afoul of this Rule as well. And, of course, responsibility could not be avoided by using a third party since Rule 5.3 generally prohibits a lawyer from using a third party to do what he or she cannot do directly.

If the party to be friended is represented, Rule 4.2 is also implicated. That Rule prohibits communication by a lawyer with any represented party without the consent of that party's counsel. While that Rule should not be implicated where access is merely gained to the public portion of a social networking site, it may well apply where "communication" is attempted through friend status.

If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John Gaal at (315) 218-8288.

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC in Syracuse, New York and an active Section member.

Remembering New York's Triangle Fire One Hundred Years Later

By Leigh David Benin

"They did not die in vain, and we will never forget them."

Frances Perkins

The newspaper headlines in New York and across the country that Sunday morning were truly shocking. A fire at the Triangle Waist Company in Greenwich Village had killed more than one hundred garment workers late Saturday afternoon—March 25, 1911. It was by far the largest workplace disaster in New York City history. (It remained so for ninety years, until the terrorist attacks of September 11, 2001 on the World Trade Center traumatized this generation.) In the immediate aftermath of the fire, no one knew exactly how many had died. Even so, the carnage clearly was on a scale that few had imagined possible. Even at a time in American history when 1,000 workers a week perished in industrial accidents across the country, the estimated death toll at Triangle was shocking, especially because the vast majority of the victims were young women—many in their teens—from among the millions of Italian and Jewish immigrants who had fled poverty and pogroms in the Old World, who had come to America to work for a better life, for the American dream of prosperity and freedom. Now they had died horribly.

The ten-year-old Asch Building, at the corner of Washington Place and Greene Street, only one block from Washington Square Park, was fireproof, but the fabric and furnishings burned, and workers in the overcrowded Triangle Waist Company could not get out fast enough to escape the rapidly spreading fire. Many succumbed to the unbearable heat, choking smoke, and searing flames within the confines of the factory loft, which occupied the building's eighth, ninth, and tenth floors. Their deaths were hidden from public view; one could only feebly, if painfully, imagine their last desperate moments of life. But scores of others with no viable way out and facing certain death made it to the windows that faced Washington Place and Greene Street. With the terrifying flames at their backs, they leapt to their deaths in view of helpless and horrified firemen and onlookers. The tallest fire ladders could only reach the sixth floor, not nearly high enough to save desperate garment workers trapped eight to ten stories above the street, and the rescue nets that were unfurled beneath them broke from the force of their falling bodies—some crashed through the deadlights in the sidewalk to the basement below. These were public deaths that could be and were described in chilling detail and with telling effect by dozens of New York newspapers, the mass media of the time (commercial radio broadcasting only arrived in 1920). This influential reporting began with William Gunn Sheppard, who serendipitously was an eye witnesses to this horror and wrote movingly about what he had seen. The searing sight of so many young women and men falling in rapid succession to their deaths, sometimes two, three, or four at a time, was burned into the consciousness of the city and country by the press, and finally aroused the public conscience. The sheer magnitude of the tragedy, its visible horror, and the massive press coverage that ensued only begin to explain the historical impact of the fire, which profoundly affected the place of labor in American life and became a powerful symbol for the abuses that typically occur in unregulated industries.

The United States welcomed the New Immigrants—who came here by the millions from southern and eastern Europe between 1880 and 1920—as a source of cheap labor for the nation's rapidly expanding industries. In New York, the garment industry employed a large number of Italian and Jewish immigrants, who labored long hours at breakneck speed, on power-driven sewing machines, in harsh and unsafe garment sweatshops. Many came to believe that in an industrial system they found to be inhumane, hard work alone would not suffice to realize their aspirations. As a new century dawned, immigrant workers formed labor unions, organized militant labor strikes, and even gravitated toward socialist politics to fight for, as well as work for, the American dream. Their struggle led to the creation labor and political organizations. A few of the most important were: the Internatinal Ladies Garment Workers Union (1900), the Socialist Party of America (1901), the Women's Trade Union League (1903), the International Workers of the World (1905), and the Amalgated Clothing Workers of America (1914).

In this time of intense labor unrest and radical longing, these and other organizations struggled fiercely to give workers a measure of industrial democracy, i.e., a voice in determining the conditions of their work. In fall 1909 a bitter and prolonged strike by women shirtwaist makers at the Triangle and Leiserson companies, two of the biggest firms in the garment industry, finally errupted into the "Uprising of the Twenty Thousand," an unprecedented general strike over the winter of 1909-1910. Support from the wealthy socialites of the Women's Trade Union League helped to focus public attention on the plight of garment workers. In the summer of 1910 a general strike by cloakmakers, known as the "Great

Revolt," led to an historic agreement between union and management, the Protocol of Peace, designed to stabilize the industry by ending labor unrest. This historic agreement was principally the work of liberal attorney Louis Brandeis (later Associate Justice of the U.S. Supreme Court), who designed a tri-partite aparatus, comprised of management, labor, and the public, for mediating inevitable labor-management disputes in the garment industry. But American labor conditions remained oppressive, exploitative, and all too commonly life threatening, as the Triangle Fire of 1911 would dramatically demonstrate. The following year, the IWW's "Big Bill" Haywood led the long and bitter "Bread and Roses" strike of textile workers in Lawrence, Massachesetts, and Eugene V. Debbs, the Socialist Party candidate for U.S. president, garnered nearly one million votes, not nearly enough to win, but more than enough to underline the potential of radical politics in a time of oppressive labor conditions. Although 1912 was a high-water mark for Socialists, they nonetheless complained bitterly that Progressives had stolen their reform agenda, therby undermining their electoral support. It is worth remembering that the Progressive reform agenda that ultimately triumphed was proposed in an atmosphere of labor struggle and radical agitation. Through labor unions, strike solidarity, and radical politics, working people courageously confronted the substantially unregulated and generally brutal industrial order that dominated their lives. Ultimately, their struggle and sacrifice won basic labor rights we now expect, but only after 146 had perished in the Triangle Fire.

Triangle was one of the biggest garment factories in New York, and its owners, Max Blanck and Isaac Harris, were known as the "Shirtwaist Kings." They packed as many sewing machines and operators into the three floors of their factory loft as possible, but the 10,000 square foot floors of the loft did not have enough exits for a large workforce to quickly exit in case of emergency. The two stairways were so narrow that factory doors, contrary to common safety recommendations, had to open inward. The two operating elevators were small. The single fire escape descended into a closed airshaft, but not all the way to the ground, and was poorly designed, with iron shutters that when fully opened obstructed passage between floors. Sprinklers, although available, were not required by law and never installed, even though the loft was often filled with thousands of pounds of highly flammable material. The Asch Building, ten years old at the time of the fire, had fulfilled the meager requirements of the building code of 1900 and regularly passed inspections by the fire and building departments. Fire drills were not mandatory and were never performed. For factory owners insured against financial loss from fire, safety was not a compelling concern. For its part, government was complicit in neglecting workplace safety: the laws were lax and feebly enforced or ignored.

In this period, fires were all too common and factory fires broke out all the time, including at the Triangle Waist Company. Fire Chief Edward Croker had warned that a major disaster was waiting to happen. Garment workers and their unions knew the danger and had made their concerns known to employers, government officials, and the public, but to no avail. Labor was weak and safety often took a back seat to pressing demands for higher wages, shorter hours, and union recognition. Even so, the shirtwaist kings had refused to recognize the union or acquiesce to any of its demands. Their creation of a company union had provoked the prolonged 1909 strike that led Local 25 of the International Ladies Garment Workers Union to call a mass meeting at Cooper Union on November 22, 1909. When Clara Lemlich, politically radical and a Local 25 founder, rose from her seat to call for strike action, shirtwaist makers enthusiastically voted for a general strike and swore a solemn oath to support it. Although Triangle's Blanck and Harris, already infamous for antiunion intransigence, finally made modest concessions on wages and hours, they still refused to recognize the union. For garment labor, the disastrous fire that broke out at Triangle a little more than a year later stood as a ringing condemnation of the shirtwaist kings and other antiunion employers, and energized the union cause, especially because Triangle survivors immediately reported that locked factory doors, a common practice to prevent theft, had significantly contributed to the staggering death toll.

The fire had broken out on the eighth floor of the Triangle Waist Company at closing time on Saturday March 25, 1911. Despite efforts to contain it with buckets of water, the fire rapidly spread through the overcrowded factory, as did panic among workers rushing toward the loft's few exits, which were quickly obstructed by fire or people desperately trying to escape by elevator, narrow stairway, or faulty fire escape. Warned by phone, those on the tenth floor, including Max Blanck, his two young daughters, and Isaac Harris, escaped to the roof, where they were assisted by New York University law students from the adjoining building. All but one of the seventy people on the tenth floor survived. But no one warned sewing machine operators on the ninth floor, who only became aware of the fire when it was on the verge of engulfing them. A locked door further limited their few avenues of escape, and the fire escape gave way—more than two dozen workers fell to their deaths in the airshaft. Despite the multiple trips made by two heroic elevator operators, many frantic workers were left behind. Surrounded by flames, scores ran to the windows. Because fire ladders could not reach them, they jumped. Because rescue nets could not resist the tremendous force of their falling bodies, they crashed to their deaths on the street below. Unable to save them, frantic firemen and citizens were horrified by the unimaginable rain of death they witnessed. Water from fire hoses quickly put out the flames, but it was too late for 146 Triangle work-

ers. Consumer activist Frances Perkins, who reached the scene just as workers began to jump, was profoundly shaken by the sight of so many people plummeting to their deaths. Even veteran firefighters were overcome by the magnitude of the horror.

For many survivors, the desperate struggle to survive immediately gave way to frantic fear for a relative or friend from whom they could not find. As news of the fire rapidly spread by word of mouth, waves of fear for loved ones swept over working-class neighborhoods. From the Lower East Side, thousands came running to the Asch Building. Soon dread was followed by the relief of finding a relative or friend traumatized but alive or, all too often, the agony of identifying a burned or mangled body in the temporary morgue that was set up at the East 26th Street Charities Pier (known as "Misery Lane" since the *General Slocum* disaster of 1904, which killed 1,021). But seven victims were not identified. Every grief stricken family was devastated. The enormity of the loss was staggering for the whole garment labor force. By the following day, the disaster was headline news across a sickened city and country.

As the horrific dimensions of the tragedy quickly became apparent, private grief and anger became palpable communal emotions that found collective expression. All garment workers and their families knew that they were at risk because of avaricious employers, incompetent or corrupt government officials, and a public indifferent to their plight. Anguish over these clearly preventable deaths inexorably led to rage and assignment of blame. Some even sought to kill Blanck and Harris. Although others called for respectful expressions of grief, public mourning unsurprisingly merged with mass protest for reforms. The fire had followed a long and hard-fought general strike over oppressive conditions in garment manufacturing. Triangle had intransigently opposed unionization. The government, which had notoriously perpetrated the merciless beatings and mass arrests of strikers, had not—it was now shamefully clear—enacted or enforced building codes to protect their lives. The dead bodies on the street, union leaders and Progressives affirmed, constituted a resounding indictment of prevailing business-oriented politics. Had government not sided with employers in their opposition to organized labor, they argued, the tragedy at Triangle could have been prevented. Because the fire broke out in the midst of labor and progressive ferment, it became a pivotal moment in the struggle for unionization and industrial reform.

On April 5th four hundred thousand turned out in a steady downpour to walk in or witness a solemn funeral procession, organized by sixty unions, for seven unidentified victims, who were buried that day in Evergreen Cemetery in Brooklyn. Amidst the cries of onlookers, they marched silently wearing badges that read: "WE MOURN OUR LOSS." This unprecedented outpouring of visible grief and restrained anger constituted a powerful call for punishing the guilty and reforming the labor system that had caused the tragedy. In the fall, the Triangle owners Blanck and Harris were tried for manslaughter—for illegally locking a factory door—but were acquitted with the help of a brilliant attorney, Max Steuer—who convinced the jury that prosecution witnesses had memorized their testimony—and a friendly judge, Thomas Crain—who charged the jury to acquit unless the prosecution had proved beyond a reasonable doubt that Blanck and Harris *knew* that the door was locked at the time of the fire. Their acquittal, which angered bereaved relatives and garment workers, who continued to believe them guilty, unquestionably energized movements for labor reforms that we now consider essential. Although civil actions were brought against Blanck and Harris, they were able to avoid paying anything to the victims' families. Three years later, an insurance company settled with the last twenty-three families for the paltry sum of $75 apiece to compensate them for their loss, which was emotionally, and often financially, devastating. This modest compensation eloquently attested to the low value placed on the lives of garment workers. Blanck and Harris, however, collected so much from their insurance claim ($60,000 more than their losses) that they ended up richer as a result of the fire. They were soon back in business. In 1913 Blanck was charged with locking doors during working hours at his Fifth Avenue factory (to prevent theft, he said), for which he was found guilty and fined $20.

This was the era (between 1900 and U.S. entry into World War I in 1917) when Progressives condemned monopoly in business, called for more democracy in government, and advocated public policies to ameliorate the conditions of poor working people. In the face of public outrage over the Triangle Fire, hitherto anti-labor Tammany Hall political leaders embraced progressive reforms, insuring the popularity of their political machine among recent immigrants. It was Tammany Hall politicians Robert Wagner and Al Smith who led the Factory Investigating Commission that was created in response to fire. For consumer activist Frances Perkins, who had reached the scene of the fire just as the first workers jumped to their deaths, the horror she witnessed was a life-altering experience. She became chief investigator for the Factory Investigating Commission, pushing Wagner and Smith to see for themselves the horrors that factory workers across the state lived with every day, and sometimes—all too often—died from. The Commission's work informed the legislative process that resulted in passage of more than thirty workplace safety and other laws to protect workers, making New York the most progressive state in the Union with respect to safeguarding the welfare of working people. This progress was interrupted by U.S. entry into World War I in 1917, the Red Scare of 1919, which led to the deportation of radical immigrants, the passage of immigration restriction in 1921 and 1924, which discriminated against southern and

eastern Europeans, and the ascendency of conservative politics throughout the 1920s. Al Smith ran unsuccessfully for U.S. president in 1928, but his successor as progressive governor of New York, Franklin Delano Roosevelt, was elected president of the U.S. in 1932, in the depth of the Great Depression, which necessitated government intervention in the economy. FDR appointed Frances Perkins as Secretary of the United States Department of Labor, a position she held for twelve years, during which she successfully pushed a progressive agenda to improve conditions for working people. New York progressives Roosevelt, Perkins, and Wagner—who as U.S. Senator was a principal architect of the National Labor Relations Act (NLRA or Wagner Act) of 1935 and other progressive labor legislation—transformed national labor policy by expanding the protections for workers they had enacted in New York. Frances Perkins later wrote that the New Deal, in which she played such a crucial role, was born on the day of the Triangle Fire. Her perspective as a leading figure of triumphant urban liberalism places the Triangle Fire at the heart of the historic readjustment of the power relations between capital and labor that the government imposed and managed in the public interest.

The NLRA facilitated labor organization, union roles swelling by five million in five years. This was the generation that was integrated into the American mainstream through labor organization, won World War II, and became in the postwar era the mass middle class that formed the basis of our consumer economy and stable democracy. Of course, not everyone was happy at government's expanded role, especially its unprecedented tilt toward organized labor. Subsequent legislation in the 1940s and 1950s curbed some of the power labor had gained. But by 1955, when the AF of L and CIO merged, 35% of American workers belonged to labor unions. At the fiftieth anniversary commemoration of the Triangle Fire in 1961, Frances Perkins and Eleanor Roosevelt sat together on the podium, justifiably honored guests who had played leading roles in the liberal triumph that had, from a historical perspective, redeemed the sacrifice of 146 lives in the Triangle Fire. They could view with satisfaction labor's progress (albeit imperfect) in the fifty years since the tragedy. Organized labor had gained a seemingly secure place in American life and Eleanor Roosevelt had gained passage by the United Nations of the Universal Declaration of Human Rights, which proclaimed progressive ideals internationally. Moreover, further progress might reasonably be expected. John F. Kennedy had just been elected president with labor's support, not least important, with support from the 350,000 member strong International Ladies Garment Workers Union, which had become one of the most powerful and politically influential unions in the country. In the prosperous 1960s, progressives enlarged democracy with historic civil rights legislation and enhanced the prosperity of working people through the programs of Lyndon B. Johnson's Great Society, which emulated the New Deal.

Throughout the one hundred years since the Triangle Fire, its memory has served as a touchstone of collective memory and a source of political will. Unionists summon the memory of the victims in their struggles for social and economic justice. Immigrant advocates have compared the plight of Jewish and Italian workers in 1911 to the struggles faced by succeeding waves of immigrant workers. Feminist historians have examined the fire to illustrate the discounted contributions of women workers in our national history. The New York City Fire Department examines the Triangle Fire in its training curricula. The American Society of Safety Engineers, founded in 1911 in response to the fire, strives to prevent similar disasters. Law students still study the criminal trial of the factory owners as a valuable case study. Our political leaders reference the tragedy during debates on workplace safety legislation and anti-sweatshop activists the world over invoke it as a call to vigilance and protest.

As the 100th anniversary of the Triangle Fire approaches we remember the Triangle victims to honor their sacrifce, to respect our labor heritage, and to defend our hard won rights, which must never be taken for granted. Finally, we are called by memory of 1911 to make *all* workplaces safe.

NOTE: The Centennial Commemoration of the Triangle Fire will take place March 25, 2011 at the corner of Washington Place and Greene Street, and is being coordinated by Workers United, the successor union to the ILGWU.

Leigh David Benin holds a Ph.D. in American History from New York University. His *The New Labor Radicalism and New York City's Garment Industry: Progressive Labor Insurgents in the 1960s* was published in 2000 as part of Garland's series, The History of American Labor. He co-edited *Organizing the Curriculum: Perspectives on Teaching the US Labor Movement,* which appeared in 2009 as part of Sense Publishers' series, Transgressions: Cultural Studies and Education. He is co-author of *The New York City Triangle Factory Fire,* forthcoming in March 2011 as part of Arcadia Publishing's Images of America series. He is a founding member of the Education & Labor Collaborative. Dr. Benin, who teaches Social Studies in Adelphi University's Ruth S. Ammon School of Education, is related to Rose Oringer, who died at age 19 in the Triangle Fire.

2010 U.S. Court of Appeals, Second Circuit Decisions Affecting Labor and Employment

By Evan J. White

So far in 2010 the Second Circuit court of appeals has hit on several issues that have been the subject of recent headlines within labor and employment circles. As discussed in detail in the Summer 2010 *Labor and Employment Law Journal*, the parameters of the New York City Human Rights Law ("NYCHRL") continue to take shape—this year the Second Circuit addressed two cases with important implications on the development of the NYCHRL. The Second Circuit has also adopted the U.S. Supreme Court's publicized decision in *New Process Steel v. NLRB* that overturned numerous cases decided by the National Labor Relations Board when occupied by two board members.

Below please find summaries of these and other important 2010 Second Circuit decisions affecting labor and employment law in New York State. Readers should be sure to refer to the full text of each decision as the discussion below only offers a brief summary of each matter.

Weight Discrimination

Elliot Spiegel, Jonathan Schatzberg v. Daniel ("Tiger") Schulmann, UAK Management Co. (Decided May 6, 2010)[1]

An employee claiming discrimination on the sole basis of excessive weight is not entitled to protection under the Americans with Disabilities Act ("ADA") or the New York State Human Rights Law ("NYSHRL"). However, whether excessive weight on its own constitutes a protected characteristic under the New York City Human Rights Law ("NYCHRL") has been remanded to federal district court for determination.

In June 2002, Elliot Spiegel was terminated from the position of Karate Instructor with Tiger Schulmann Karate School. In response, Spiegel informed his employer that he intended to file a human rights complaint because he was fired on the basis of his weight. Spiegel ultimately filed a complaint in the Eastern District court alleging violations of the NYSHRL and NYCHRL for terminating him because of his excessive weight. The Eastern District court dismissed Spiegel's claim in its entirety upon a motion for summary judgment filed by Defendants, ruling that he failed to state prima facie claims of discrimination under the NYSHRL and NYCHRL.

On appeal, the Second Circuit affirmed that Spiegel failed to make out a prima facie case under the NYSHRL for being fired due to excessive weight. The court specified, "weight, in and of itself, does not constitute a disability for discrimination qualification purposes and… discrimination claims in that respect are…unsustainable."[2] In that regard, Spiegel argued that he presented evidence showing that he had a medical condition rendering him unable to lose weight. Specifically, a physician's note and personal statements. Nevertheless, the Second Circuit noted that both pieces of evidence failed to identify a connection between a medical condition and Spiegel's excessive weight. Thus, the court dismissed the NYSHRL claim for lack of evidence.

Next, the Second Circuit addressed whether Spiegel's excessive weight condition might constitute a disability under the NYCHRL. The Eastern District ruled that Spiegel failed to demonstrate that his weight constituted a pretext for discrimination under the NYCHRL. Notably though, the lower court rejected Spiegel's testimony that his former boss initially informed him that he was being fired because of his weight, as inadmissible hearsay.

The Second Circuit disagreed, finding Spiegel's testimony admissible. As a result of the incorrect evidentiary determination, the Second Circuit concluded that the district court did not address the question of whether obesity alone constitutes a disability pursuant to the NYCHRL and remanded the matter to district court for further proceedings.

* * *

Does an Employer's Failure to Investigate Complaint of Racial Harassment Constitute Retaliation?

Fincher v. Depository Trust and Clearing House (Decided May 14, 2010)[3]

An employer's failure to investigate an employee's claim of discrimination does not constitute an act of retaliation toward the employee for making the complaint.

The Plaintiff, Cynthia M. Fincher, an African-American woman, was employed by the defendant as a Senior Auditor until she resigned on June 5, 2006. Prior to resigning, Ms. Fincher received a "Performance Warning" and was told that her failure to improve would result in further discipline up to and including termination.[4] In March, Ms. Fincher lodged a complaint with the Senior Director of Labor Relations alleging that "black people were set up to fail at [the Auditing] department because they were not provided and given the same training opportunities as white employees."[5]

Ms. Fincher subsequently filed a complaint in Southern District court alleging that she was the victim of racial discrimination, subject to retaliation and constructive discharge. Specifically, discriminatory employer practices in-connection with training opportunities, performance evaluations, salary decisions as well as a claim of retaliation for the employer's failure to investigate her internal complaints of discrimination. The Southern District court dismissed all of Ms. Fincher's claims upon a motion for summary judgment filed by defendant. The Plaintiff appealed this ruling to the Second Circuit.

On appeal, Ms. Fincher reiterated her claims of discrimination and retaliation based on her employer's failure to investigate her discrimination complaint. Upon review, the Second Circuit court affirmed the Southern District's determination that the defendant's failure to investigate Ms. Fincher's discrimination complaint did not constitute a retaliatory adverse employment action, even under the broader New York City Human Rights Law standard.[6]

However, the court clarified its determination, "[w]e do not mean to suggest that failure to investigate a complaint cannot ever be considered an adverse employment action…if the failure is in retaliation for some separate, protected act by the plaintiff."[7]

* * *

National Labor Relations Board Authority Under Two-Member Board

NLRB v. Talmadge Park (Decided June 23, 2010)[8]

On June 23, 2010, the Second Circuit concluded that the National Labor Relations Board ("NLRB") as constituted by a two-member board did not have authority to issue an order on May 27, 2009 against Talmadge Park. This appears to be the Second Circuit's first application of the Supreme Court's ruling in *New Process Steel v. NLRB*, ruling that the National Labor Relations Board lacked requisite authority to issue determinations when comprised of only two members versus three members which it requires to constitute a quorum.[9]

Significantly, the employer in *Talmadge Park* never actually challenged the Board's authority to issue their decision under the two-member board, indicating that the Second Circuit will deny challenges regardless of whether one is made on that basis. Additionally, the Second Circuit also failed to remand the matter to the Board for reconsideration, likely precluding the Board from reviewing the case permanently. The D.C. Circuit court took a different position on this issue in *Laurel Baye* where it remanded the matter to the Board for reconsideration.[10]

* * *

Applicability of *Faragher-Ellerth* Defense Under the New York City Human Rights Law

Zakrzewska v. The New School (Decided May 6, 2010)[11]

The defendant appealed the Southern District Court's determination that it was not entitled to summary judgment on the basis that the *Faragher-Ellerth* defense does not apply to claims brought under the NYCHRL, unlike its state and federal counterparts.[12] In a brief decision, the Second Circuit affirmed the District Court did not err in denying the motion for summary judgment.

This decision confirms that an employer will not be able to rely on its corrective actions taken to prevent and correct harassing workplace behavior as a defense to liability for NYCHRL claims.[13] Nevertheless, proof of policies and procedures that mitigate workplace harassment can be used to reduce claims for civil penalties and punitive damages under the NYCHRL.

* * *

Fair Labor Standards Act's "Outside Salesperson" and "Administrative" Exemptions Applied to Pharmaceutical Drug Representative

In re Novartis Wage and Hour Litigation (Decided July 6, 2010)[14]

Largely relying on the interpretation of the Secretary of the Department of Labor, the Second Circuit overturned a judgment in an Fair Labor Standards Act ("FLSA") action dismissing unpaid overtime claims of a class of nearly 2,500 pharmaceutical sales representatives working for Novartis. The Plaintiff class initiated this claim against Novartis for overtime wages, citing that they were not exempt "outside salespersons" under the FLSA, as Federal Law prohibited them from making the actual sale of their employer's prescription drugs. Although the sales representatives make "sales calls," they claimed they actually only encouraged physicians to prescribe certain drugs. Moreover, Plaintiffs contended they were not excluded from FLSA coverage as Administrative employees under the act, since they merely followed managerial protocol when communicating to physicians.

Upon a motion to dismiss filed by the defendant the Southern District ruled against Plaintiffs, finding that sales representatives fell within both outside salesperson and administrative exemptions. Since Federal law prohibited sales representatives from selling pharmaceutical drugs in any capacity, the Southern District reasoned, "[r]eps makes sales in the sense that sales are made in the pharmaceutical industry."[15] Moreover, the court found that the sales representatives fell with in the administrative exemption too, since sales representatives influence drug sales and are "a matter of considerable significance" to Novartis.[16]

On appeal, the Plaintiff class reasserted claims that they were not outside sales persons or administrative employees under the FLSA as they engaged in no actual sales and only communicated marketing themes established by their directors. In addition, the Secretary of the United States Department of Labor participated in the appeal in support of the sales representatives. Unlike the Southern District, the Secretary endorsed a more literal interpretation of the outside salesperson exemption, emphasizing that the sales representatives were not exempt outside salespersons, as they did not obtain orders or makes sales. Furthermore, the Secretary stated that the sales representatives did not exercise the requisite discretion or independent judgment to fall within the administrative exemption. In agreement with the Secretary, the Second Circuit overturned the defendant's summary judgment motion and remanded the proceedings back to District Court.

Endnotes

1. 604 F. 372 (2d Cir. May 6, 2010).
2. *Id.* at 81, *citing Delta Air Lines v. N.Y. State Div. of Human Rights*, 91 N.Y.2d 65, 689 N.E.2d 898, 902, 666 N.Y.S.2d 1004 (N.Y. 1997).
3. 604 F.3d 712 (2d Cir. May 14, 2010).
4. *Id.* at 717.
5. *Id.*
6. *Id.* at 723, *citing Pilgrim v. McGraw-Hill Cos., Inc.*, 599 F. Supp. 2d 462, 469 (S.D.N.Y. 2009) ("The *prima facie* standard for retaliation claims under the CHRL is different [from the federal and state standard], in that there is no requirement that the employee suffer a materially adverse action. Instead, the CHRL makes clear that it is illegal for an employer to retaliate in 'any manner.'").
7. *Id.* at 722, *citing Rochon v. Gonzalez*, 438 F.3d 1211 (D.C. Cir. 2006) (where the employer's failure to investigate an employee's complaint was found to be in retaliation to that employee's prior complaint of discrimination).
8. 608 F.3 913 (2d Cir. June 23, 2010).
9. 130 S. Ct. 2635, 2644 (U.S. 2010).
10. 564 F.3d 469 (D.C. Cir. May 1, 2009).
11. 2010 N.Y. Slip Op. 03796 (2d Cir. May 6, 2010).
12. *See Faragher v. Boca Raton*, 534 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724 (1998).
13. *See* N.Y.C. Admin. Code § 8-107(13)(b)(1)-(3), which imposes liability for discriminatory conduct of an employee or agent where:

    (1) The employee or agent exercised managerial or supervisory responsibility; or

    (2) The employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

    (3) The employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.
14. 611 F.3d 141 (2d Cir. July 6, 2010).
15. *Id.* at 650.
16. *Id.*

Evan J. White is a labor and employment attorney based out of New York City. Prior to opening his New York City law firm, Evan practiced in both public and private sectors. To learn more about Evan J. White please visit: www.evanwhitelaw.com.

Update of Decisions by the New York State Public Employment Relations Board

By Philip L. Maier

The following is a digest of recent decisions issued by the Public Employment Relations Board from January through September 15, 2010

GOOD FAITH BARGAINING

TOWN OF WALKILL AND TOWN OF WALKILL POLICE BENEVOLENT ASSOCIATION, INC. 43 PERB ¶ 3026 (2010). In this consolidated appeal, the Board affirmed an ALJ decision which held that the Town violated the Act by engaging in bad faith negotiations by refusing to continue to negotiate until the PBA formally withdrew its disciplinary proposal. The Board dismissed the exception that the charge was moot since the parties had entered into an agreement. In part, the Board stated that a party does not have the right to cease participating in negotiations because it believes the other party committed an improper practice. The Board stated that the Town improperly discontinued negotiations after three sessions and that a party may not condition continued negotiations on the other party's capitulation to a legal argument. Additionally, the Town's argument about the negotiability of the demand has already been rejected. The Board also found that the ALJ properly dismissed the charge against the PBA, stating that the record did not demonstrate that the PBA did not have a sincere desire to reach an agreement.

CHENANGO FORKS CENTRAL SCHOOL DISTRICT. 43 PERB ¶ 3017 (2010). The Board affirmed an ALJ decision finding that the District violated the Act by discontinuing the past practice of reimbursing the cost incurred by current and retired employees for Medicare Part B health insurance premium payments. The Board had previously remanded the matter, (40 PERB ¶ 3012 (2007)), for a determination of whether the Association and / or current employees had actual or constructive knowledge of the practice. The remand was necessitated because the stipulated record submitted by the parties failed to set forth sufficient facts to determine whether the employees had a reasonable expectation that the practice would continue. The Board found that the evidence presented during the remand constituted sufficient evidence to substantiate that the employees had such notice. The Board did not disturb the credibility determinations found by the ALJ, and found that the evidence was probative. The Board stated that based upon the law of the case doctrine it would not reconsider the exceptions to rulings made in its prior decision.

COUNTY OF ERIE. 43 PERB ¶ 3016 (2010). The Board affirmed, as modified, an ALJ decision which held that the County violated the Act by hiring employees to fill regular part-time positions to replace employees who vacate full time positions in the same title. The County hired employees designated as regular part-time employees (RPT) to work 39 hours to replace full time employees without any change in the level of services. The County's practice had been to give RPT employees 50% of the amount of certain benefits, such as vacation leave, regardless of the number of hours worked. In effect, the County reduced the number of hours and benefits by converting full-time positions to 39-hour RTP positions. The evidence demonstrated a clear and explicit policy to convert full-time positions to 39-hour positions. The Board rejected the County's defense that a reduction in the number of hours constituted a *per se* decrease in services. The County did not present any specific evidence that the same level of services can be completed in fewer hours or evidence that the County made a good faith reduction in services. The Board also rejected the County's duty satisfaction, and management rights defenses. It also stated that the failure to address a defense which has been plead does not constitute abandonment of the claim.

STATE OF NEW YORK—UNIFIED COURT SYSTEM. 43 PERB ¶ 3011 (2010). The Board held that an off-duty employment policy constituted a material change from the employer's existing policy and its imposition constituted a violation of the Act. UCS's general policy barring outside employment where there was a conflict of interest did not permit it to unilaterally impose more restrictive conditions and therefore to preclude employment where it had previously been permitted. While the prior policy required prior notice to insure there were no conflicts of interest, the Board found that this did not mean that prior approval was required. Additionally, the Board found that there was a mandated disciplinary component. The Board therefore found that the new policy changed the previous policy by prohibiting all outside actively in establishments where the legal sale and consumption of alcohol is the primary business, by requiring pre-approval, rather than notice, of outside employment, and by requiring annual re-approval, all subject to discipline. The Board rejected UCS's argument that its interest in promoting its mission justified the adoption of the policy, and found that the UCS's interests did not outweigh the employee interests involved.

COUNTY OF ERIE AND ERIE COUNTY MEDICAL CENTER CORPORATION. 43 PERB ¶ 3008 (2010). The Board affirmed, as modified, an ALJ decision and held that the employers violated § 209-a.1(e) by refusing

to continue the terms of an expired agreement when it unilaterally increased the wage rate for *per diem* nurses. The Board rejected the employers' defense that they had a compelling need to change the wage rate, stating that this defense is not a defense to a charge alleging a violation of § 209-a.1(e). The Board therefore found it unnecessary to determine whether the employers met their burden to show a compelling need in a § 209-a.1(d) context. The Board also rejected the defense that the change was permissible since it was done pursuant to a title reallocation or reclassification, and did not decide whether the unilateral increase was a violation of §§ 209-a.1(a) and (d).

VILLAGE OF CATSKILL. 43 PERB ¶ 3001 (2010). The Board affirmed an ALJ decision finding that the Village violated the Act by unilaterally changing a past practice relating to dual employment, a mandatory subject of bargaining. The Board concluded that a past practice existed. The incidents in which employees had dual employment demonstrated that the Village abandoned the discretion it had reserved in its earlier written policy. The new policy was more than a mere clarification of the earlier policy. The Board also, in applying a balancing test, found that the work rule was a mandatory subject of bargaining since the new work rule went beyond what was necessary to further the employer's mission. There was a lack of any demonstrated conflicts, and the potential for civil liability was insufficient to outweigh the employees' interests.

CITY OF NIAGARA FALLS. 43 PERB ¶ 3005 (2010). The Board affirmed an ALJ decision which held that the City violated the Act when it refused to negotiate concerning an appeal procedure from an initial City decision that an employee was not in compliance with the City's residency requirements. A local law did not include an appeal procedure permitting the challenge to an adverse determination that a unit employee is in compliance with the City's residency law. Even if Public Officers Law § 30.4(3), which relates to police forces of less than 200 full-time members, is applicable, such an appeal procedure as demanded in this matter is mandatorily negotiable.

INTERFERENCE AND DISCRIMINATION

COUNTY OF MONROE. 43 PERB ¶ 3025 (2010). The Board affirmed an ALJ decision finding that the County violated § 209-a.1(a) of the Act when it conducted a mail-ballot poll of part-time employees with respect to their interest in continuing to be represented by CSEA. The Board stated that the parties' agreement does not contain language explicit enough to indicate that the parties sought to waive, replace or supplement the decertification procedures under § 201.3 of the Rules. The Board also concluded that the agreement does not provide a colorable source of right or legitimate basis to the County for conducting the poll. The Board stated that it did not need to reach the issue of whether an agreement containing such a waiver or one which provides a right to poll is violative of the Act. The Board also found that the County did not have a good faith belief and reasonable basis to conduct the poll, and that the County's conduct of soliciting, polling and surveying members was inherently destructive of rights under § 202 of the Act.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK (RUIZ). 43 PERB ¶ 3022 (2010). The Board affirmed an ALJ decision, as modified, dismissing a charge alleging that Ruiz was placed on the ineligible list for teachers and received a threatening phone call because of her union activities. The Board affirmed the ALJ's ruling denying certain subpoena requests. The Board stated that an ALJ has discretion to grant or deny a request, and it will not disturb a decision denying a subpoena request absent abuse of discretion resulting in prejudice to a party's ability to present relevant and necessary evidence. The Board modified the ALJ decision in that it stated that an adverse witness may be presumed to be hostile. Accordingly, Ruiz, having called an employer's witness, was able to treat her as a hostile witness without regard to the manner of her testimony. The Board also found no basis to substantiate Ruiz's allegations of bias, and that the ALJ correctly determined that Ruiz failed to establish a *prima facie* case. In this regard, the Board stated that it was proper to rely upon the evidence presented in Ruiz's direct case to the effect that the adverse action complained of was unrelated to her union activity.

ELWOOD UNION FREE SCHOOL DISTRICT. 43 PERB ¶ 3012 (2010). The Board affirmed but modified an ALJ decision finding that the employer violated the Act when it terminated an employee in retaliation for his union activities. The Board held that the union established a *prima facie* case and that the reasons proffered by the District were pretextual. Of note, the Board found that reporting anti-union comments constitutes protected activity under the Act.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK (GRASSEL). 43 PERB ¶ 3010 (2010). The Board affirmed an ALJ decision dismissing a charge alleging interference and retaliation because of the exercise of protected activity. The Board rejected arguments that the ALJ should have been disqualified, affirmed a denial of a motion for particularization, affirmed the denial of requests for subpoenas and records, and affirmed the reliance upon facts stated on the record as constituting an offer of proof. The Board reversed the ALJ decision to the extent that a submission after the offer of proof constituted newly discovered evidence and the finding that a grievance filed in 1997 was the only protected actively referenced in the charge. The Board affirmed the conclusion that any grievance activity referenced in the charge was too remote to establish a finding of a violation of the Act.

CITY OF ONEONTA. 43 PERB ¶ 3006 (2010). The Board reversed an ALJ decision and held, contrary to the ALJ, that the union met its burden of proof that the employer failed to promote the unit president because he refused to reopen negotiations. The Board held that the employer did not meet its burden of proof to show a legitimate nondiscriminatory reason in failing to promote the employee, and found a violation of the Act. As for remedy, it ordered that the City render a final determination as to the promotion without regard to the president's union activities and the refusal to reopen the agreement.

REPRESENTATION

TOWN OF WALWORTH. 43 PERB ¶ 3013 (2010). The Board affirmed an ALJ decision finding it appropriate to place the title of Deputy Highway Superintendent in a unit with full- and part-time employees in the highway department. The Board rejected the argument that the statutory authority of the position pursuant to Town Law § 32.2 constituted a *per se* basis to exclude the title from the unit. The Board also found that the record did not support a finding of managerial or confidential status under the Act or that the title should be excluded due to an actual or potential conflict of interest. See *City of Binghamton*, 12 PERB ¶ 3099 (1979); *St. Paul Boulevard Fire District*, 42 PERB ¶ 3009 (2009).

TOWN OF ISLIP. 43 PERB ¶ 3003 (2010). The Board affirmed an ALJ decision dismissing a certification / decertification petition seeking to fragment certain titles from an existing unit on the basis that they perform law enforcement duties. The Board reiterated that it is appropriate to fragment from an existing unit those employees who hold titles where the duties are exclusively or predominantly law enforcement duties. The employees at issue have peace officer rather than police officer status, and the record does not demonstrate that the duties performed are predominantly or exclusively law enforcement duties.

PRACTICE AND PROCEDURE

AMALGAMATED TRANSIT UNION, LOCAL 1056 AND NEW YORK CITY TRANSIT AUTHORITY (LEFEVRE). 43 PERB ¶ 3027 (2010). The Board affirmed a Director's decision dismissing a charge alleging a breach of the duty of fair representation because the brief submitted by the union to the arbitrator was not sufficiently comprehensive. The Board stated that the apparent dissatisfaction with the union's tactical decisions did not state a breach of the duty, and that the brief, a copy of which was attached to the charge, showed a high level of competence.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO (ELGALAD). 43 PERB ¶ 3028 (2010). The Board dismissed exceptions to an ALJ decision since they were not timely served upon the other parties to the proceeding. The Board stated that it has strictly construed the requirements concerning the filing of exceptions. The Board overruled County of Clinton, 13 PERB ¶ 3021 (1980), in which the Board did entertain exceptions which were not properly served, and stated that it had been implicitly overruled by subsequent cases.

LONG BEACH SCHOOL DISTRICT and LONG BEACH ADMINISTRATORS' UNION (FAIL-MAY-NARD). 43 PERB ¶ 3024 (2010). The Board affirmed a Director's decision dismissing a charge as untimely and, as against the union, that the charge did not allege sufficient facts to state a claim of the breach of the duty of fair representation.

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. LOCAL 1000, AFSCME, AFL-CIO, NASSAU LOCAL 830, and COUNTY OF NASSAU (ARREDONDO). 43 PERB ¶ 3021 (2010). The Board reviewed exceptions to a deficiency notice, treating the exceptions as a motion for leave to file exceptions. The Board stated that under Rule 212.4(h) it will not grant leave to file exceptions to non-final rulings absent extraordinary circumstances. Finding none to exist, the Board denied the motion.

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. LOCAL 1000, AFSCME, AFL-CIO, and COUNTY OF MONROE. 43 PERB ¶ 3023 (2010). The Board denied a motion seeking leave to file exceptions to a Director's ruling finding a charge partially deficient. The Board stated that any review of the ruling could be done at the after a review of the merits of the decision. Finding no statewide policy or legal implications for future improper practice charges, the Board denied the motion.

MICHAEL ABRAHAMS and CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. LOCAL 1000, AFSCME, AFL-CIO, and VILLAGE OF HEMPSTEAD. 43 PERB ¶ 3007 (2010). Under the unique facts of this case, the Board found that Abrahams had established extraordinary circumstances within the meaning of § 213.4 sufficient to grant his motion for an extension of time to file exceptions to a decision dismissing his charge. Abrahams established that he did not receive a copy of the decision from PERB or his attorney, who had been suspended from practice. He filed a motion for an extension of time within four days of finding out about the decision having been issued and had not been informed by his attorney concerning his dismissal.

COUNTY OF LIVINGSTON. 43 PERB ¶ 3018 (2010). The Board affirmed in part an ALJ decision which held that a charge was untimely. A memorandum was issued by the County announcing and implementing a new work schedule more than four months prior to the filing of the charge. The charge was therefore untimely. That portion of the charge which alleged a failure to negotiate impact, however, which was not addressed in the ALJ's decision, was remanded.

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, and COUNTY OF ROCKLAND (DAVITT). 43 PERB ¶ 3015 (2010). The Board denied leave to file an interlocutory appeal of the denial of subpoena requests and of a motion to recuse, on the grounds that Davitt did not articulate any facts or circumstances to demonstrate extraordinary circumstances. The Board also denied exceptions to a Director's decision dismissing his charge, and affirmed the dismissal.

BROOKLYN EXCELSIOR CHARTER SCHOOL. 43 PERB ¶ 3004 (2010). The Board granted a motion to file an amicus brief, commenting that though the Rules do not explicitly provide for such a filing, it has historically granted such motions.

DUTY OF FAIR REPRESENTATION

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 650, AFL-CIO (SERAFIN). 43 PERB ¶ 3019 (2010). The Board reversed an ALJ decision based upon a stipulated record which the Board concluded had not in fact been agreed to by the parties. Granting all favorable inferences to the charging party, the Board concluded that it was improper to have dismissed the charge and remanded the charge for further processing.

UNITED STEELWORKERS, LOCAL 9434-00 (BUCHALSKI). 43 PERB ¶ 3002 (2010). The Board affirmed an ALJ decision dismissing a charge alleging that the union violated its duty of fair representation. The Board found that the charge was not timely, and that even if it was, there was no evidence presented to demonstrate that the union's decision was arbitrary, discriminatory or taken in bad faith.

Overview of the New York City Office of Collective Bargaining and Update of Board Decisions

January 2010 through August 2010

By Steven C. DeCosta

I. Overview

A. Statutory Framework

The Public Employees' Fair Employment Act (N.Y. Civil Service Law, Article 14, §§ 200 *et seq.)* (commonly known as the "Taylor Law") creates organizational and bargaining rights for public employees, establishes an agency (the Public Employment Relations Board—"PERB") to administer those rights, and continues the existing prohibition of strikes by such employees. Section 212 of the Taylor Law creates a "local option" that authorizes local governments to enact local collective bargaining laws that have been determined by PERB to be "substantially equivalent" to the provisions of the Taylor Law. Subdivision 2 of § 212 expressly recognizes the existence of the New York City's local collective bargaining law, which does not require prior approval by PERB.

The New York City Collective Bargaining Law ("NYCCBL") (New York City Administrative Code, Title 12, Chapter 3, §§ 12-301 *et seq.*) is applicable to municipal agencies and other enumerated public employers within New York City, and implements the Taylor Law rights and procedures, as well as additional and different provisions that are unique to New York City. New York City Charter, Chapter 54, §§ 1171 *et seq.*, establishes an independent agency, the Office of Collective Bargaining ("OCB"), to administer and enforce rights created under the NYCCBL and the applicable provisions of the Taylor Law. The agency is comprised of two adjudicative boards: the Board of Collective Bargaining and the Board of Certification. Presently, OCB exercises jurisdiction over approximately 250,000 public employees who are placed in about 80 bargaining units.

B. The Adjudicative Boards of the OCB and Their Substantive Jurisdiction

The Board of Collective Bargaining is a seven-member tripartite body, consisting of two City (management) members appointed by the Mayor; two Labor members designated by the Municipal Labor Committee (a consortium of all of the municipal unions); and three Impartial members elected by the unanimous vote of the City and Labor members. Board members all practice in the area of labor and employment and are recognized for their expertise in this field. The Impartial members serve staggered three-year terms; the City and Labor members serve at the pleasure of the party that appointed them. One of the Impartial members is elected to be the Chairman of the Board. The Chairman, who is the only full-time member, also serves as the Director of the OCB.

The Board's powers and duties are set forth in NYCCBL § 12-309(a). The Board of Collective Bargaining determines improper practice, injunctive relief, arbitrability, and scope of bargaining cases, and determines whether an impasse has arisen in collective bargaining negotiations.

1. **Improper practice** cases may include issues of interference, domination, discrimination / retaliation, refusal to bargain / unilateral change, failure to maintain status quo, and breach of the duty of fair representation. The Board is empowered to grant an appropriate remedial order if a violation is found.

2. Questions of whether a demand or action involves a mandatory subject of bargaining may be raised either in a refusal to bargain and / or unilateral change improper practice charge, or a petition for a **scope of bargaining** determination. The latter is analogous to a declaratory judgment.

3. Questions of substantive (but not procedural) **arbitrability** (*i.e.*, whether a particular grievance is within the scope of matters the parties have agreed to arbitrate) may be presented to the Board for determination.

4. **Impasses** may be declared by the Board when it determines that the parties to contract negotiations have exhausted good faith bargaining without reaching agreement. After the Board has declared an impasse, a panel of impartial arbitrators is appointed as an "impasse panel" to determine the terms of the parties' contract. Appeals from an impasse panel's award may be taken to the Board only on very limited statutory grounds.

The Board of Certification consists of only the three Impartial members of the Board of Collective Bargaining. It determines the certification and decertification of unions as exclusive collective bargaining representatives;

questions of appropriate bargaining units, including whether new titles should be added to an existing unit or placed in a separate unit; issues regarding the amendment of certifications; and issues of whether particular employees are managerial and / or confidential within the meaning of the law and thus excluded from collective bargaining rights.

C. Public Employers and Their Employees Who Are Covered by the NYCCBL

Employees of "municipal agencies" are under the jurisdiction of the OCB. This includes any administration, division, bureau, office, board, commission, or other agency of the City established under the City Charter or other law, the head of which has appointive powers, and whose employees are paid in whole or in part from the City treasury. Employees of certain other public employers have been made subject to the jurisdiction of the OCB by specific provision of statute other than the NYCCBL. An example of this is the New York City Health and Hospitals Corporation.

Other public employers, not expressly placed within the jurisdiction of the OCB by law, may elect coverage by filing a written election, subject to approval by the Mayor. Public employers that have filed approved elections include, *inter alia*, the New York City Housing Authority, the Board of Elections, and the District Attorneys and Public Administrators of the five counties within the City.

Employees of the MTA NYC Transit, MTA Bridges and Tunnels, the City University, the Unified Court System, and the New York City Board of Education / Department of Education, although employed within the City of New York, are covered by the Taylor Law and are under the jurisdiction of PERB.

Pursuant to an amendment to the Taylor Law, unions representing members of the City's police force and fire department may elect to submit their impasses in bargaining to resolution under the procedures of either PERB or OCB. They remain under OCB's jurisdiction for all other purposes, including improper practices.

II. UPDATE OF 2010 BOARD DECISIONS

Board of Collective Bargaining

(Note: Summary determinations by the Board's Executive Secretary on the facial sufficiency of improper practice charges (ES Decisions) have no precedential value and, therefore, are not described below.)

PBA, 3 OCB2d 1 (BCB 2010)

The City challenged the arbitrability of a grievance alleging that the City violated a Memorandum of Understanding and the PBA Retiree Health and Welfare Fund Agreement when it failed to contribute a $400 one-time lump sum payment for each covered retiree to the PBA Retiree Health and Welfare Fund. The City argued that the Union could not establish the requisite nexus as the Retiree Agreement expressly excludes from arbitration disputes regarding the procedures for making payments to the Retiree Fund. The Board found that the Union has established the requisite nexus between the parties' obligation to arbitrate and the subject of the grievance. The petition was denied and the request for arbitration granted.

DC 37, Local 1549, 3 OCB2d 2 (BCB 2010)

The Union claimed that the City and the NYPD violated a Union member's *Weingarten* rights and retaliated against the member in violation of NYCCBL § 12-306(a)(1) and (3) when supervisors questioned the member about whether she had followed proper procedures when requesting leave to attend a Union meeting, continued questioning the member after the member requested Union representation, confiscated the member's identification card when the member refused to continue without Union representation, and suspended the member. The City argued that the Union member did not have a reasonable fear of discipline and, therefore, no right to Union representation at the meeting. Further, the NYPD's actions were not motivated by any Union activity but by the member's refusal to follow orders and her discourtesy, including slamming a door on a lieutenant. The Board found that the NYPD did not retaliate against the Union member but that two of the five charges levied against the Union member stemmed from her reasonable invocation of a request for Union representation and ordered those two charges expunged. Accordingly, the petition is granted, in part, and denied, in part.

Captains Endowment Ass'n, 3 OCB2d 3 (BCB 2010)

The City of New York and the New York City Police Department challenged the arbitrability of a grievance alleging that the City had failed to comply with the "reopener" provision of its agreement with the Union by declining to reopen negotiations based upon an adjustment to another union's longevity benefits. The City alleged that it had fully complied with the reopener provision after that other union's negotiations, and that, in any event, the reopener agreement in question was limited to adjustments to the "salary scale" and that the Union had failed to establish a nexus between longevity and the reopener agreement. The Union argued that the term "salary scale" should be interpreted to include all forms of remuneration. The Board, based upon the long-established use of the term salary scale, as exemplified in the agreement at issue itself, found no nexus had been established and denied the request for arbitration.

District No. 1, PCD, MEBA, ILA, 3 OCB2d 4 (BCB 2010)

Petitioner alleged that DOT violated NYCCBL § 12-306(a)(1) and (4) by unilaterally issuing a regulation that dictated that an employee who took three or more consecutive sick leave days had to provide a specific

form of medical documentation in order to return to work. The City maintained that this regulation merely clarified an existing contractual sick leave provision and that this regulation ensured the public employer's compliance with federal statutes and safety regulations. Alternatively, the City argued that any change to the existing sick leave provisions was *de minimis* and justified by the strong public policy to protect the safety of the public by ensuring that DOT's employees are able to perform their duties. The Board found that the issuance of this regulation constituted a unilateral change in a mandatory subject of bargaining and that there was no overriding public policy requiring the change. Therefore, the Union's petition was granted.

DC 37, 3 OCB2d 5 (BCB 2010)

The Union alleged that the City violated NYCCBL § 12-306(a)(1) and (4) when it began charging employees a fee to replace a lost or damaged paycheck. The City argued that the new fee did not constitute a unilateral change in a term or condition of employment, the fee was a non-mandatory subject of bargaining, and the policy is a managerial right. The Board found that by implementing the new check replacement fee, the City made a unilateral change in terms and conditions of employment. Accordingly, the petition was granted.

USA, Local 831, 3 OCB2d 6 (BCB 2010)

The Union alleged that the City violated NYCCBL § 12-306(a)(1) and (4) when it began charging employees a fee to replace a lost or damaged paycheck. The Union additionally challenged various other payroll-related fees. The City argued that the new fee did not constitute a unilateral change in a term or condition of employment and that the fee was a non-mandatory subject of bargaining, and that the policy is a managerial right. The City also argued that the DOS must be dismissed as a respondent because it did not implement, enforce, or profit from this new City-wide policy, and to the extent that the Union's petition pertains to fees other than the replacement check fee, the petition should be dismissed as untimely. The Board found that by implementing the new check replacement fee, the City made a unilateral change in terms and conditions of employment. The Board further ordered a hearing on the timeliness of the other claims. Accordingly, as to the check replacement fee, the petition was granted.

DC 37, *Local 768 and SSEU Local 371*, 3 OCB2d 7 (BCB 2010)

The Union filed a request for arbitration stemming from NYCHA's decision to lay off certain employees working in community centers, and the City and DYCD's concurrent decision to fund centers to provide similar services to the community via private contractors. The City filed a petition challenging the arbitrability of the grievance. NYCHA filed a separate petition challenging the arbitrability of the same grievance. The Board found that the contractual claim related solely to NYCHA, and dismissed the request as to the City. The Board further found that there was no nexus between the contracting-out provisions of the agreement and NYCHA's decision to lay off employees for economic reasons. Accordingly, NYCHA's challenge to arbitrability was granted.

ADW/DWA, 3 OCB2d 8 (BCB 2010)

Petitioner claimed that DOC violated the NYCCBL § 12-306(a)(4) when it refused to bargain over procedures for use, prior to retirement, of compensatory time accrued by Deputy Wardens. The City sought to defer the matter to arbitration, asserted that no unilateral change has taken place, and that the demand arose during the term of an unexpired contract, and thus no duty to bargain was implicated, and, in any event, there was no duty to bargain over the DOC's rules and regulations capping compensation for terminal leave time including compensatory time. The Board declined to defer the matter to arbitration, and held that, as the demand was made during the term of an unexpired contract and in the absence of any significant change, no duty to bargain existed at the time the demand was made. Accordingly, the improper practice petition was dismissed.

New York City District Council of Carpenters, UBCJA, 3 OCB2d 9 (BCB 2010)

NYCHA filed a petition challenging the arbitrability of a Union grievance concerning the assignment of work locations. NYCHA asserted that the Union did not identify a specific provision of a collective bargaining agreement or of any other NYCHA rule or regulation and that, in any event, the assignment of work is a managerial right. The Union grieved NYCHA's violation of a written policy regarding borough assignments, which it argued was arbitrable. The Board found that the Union had articulated an arbitrable grievance. Accordingly, request for arbitration was granted.

PBA, 3 OCB2d 10 (BCB 2010)

The City filed a petition challenging the arbitrability of a Union grievance concerning the right to union representation at a "command discipline" meeting. The City asserted that there was no nexus between the Union's claim and the contractual provisions cited, and that the matter was excluded from arbitration pursuant to the parties' agreement. The Union argued that the matter was arbitrable and fell within the parties' Agreement. The Board found that the grievance presented in part an arbitrable question. Accordingly, the petition challenging arbitrability was denied in part and granted in part.

Local 333, United Marine Division, ILA, 3 OCB2d 11 (BCB 2010)

The Union alleged that the DOT violated § 12-306 (a)(1) and (4) of the NYCCBL by unilaterally implement-

ing for ferry employees changes to the DOT drug testing policy. The City claimed that it revised the drug testing policy to reflect amendments to federal regulations, and that a public employer has no duty to bargain over a subject preempted by an explicit federal regulatory mandate. The Board found that although the DOT's requirement that its employees comply with the new federal regulations was not subject to bargaining, the City must bargain over the implementation of those regulations to the extent that the regulations permit the exercise of discretion in how to achieve such compliance. The Board held that to the extent the implementation procedures proposed to be bargained relate to the newly imposed "direct observation" drug testing requirement, they constituted a change from the prior procedure, and the procedures attendant thereto were bargainable.

DC 37, AFSCME, 3 OCB2d 12 (BCB 2010)

The Union alleged that the DOT violated § 12-306 (a)(1) and (4) of the NYCCBL by unilaterally implementing changes to the DOT drug testing policy for holders of a Commercial Driver's License in safety-sensitive positions. The City claimed that it revised the drug testing policy to reflect amendments to federal regulations and that a public employer has no duty to bargain over a subject preempted by an explicit federal regulatory mandate. The Board found that although the DOT's requirement that its employees comply with the new federal regulations was not subject to bargaining, the City must bargain over the implementation of those regulations to the extent that the regulations permit the exercise of discretion in how to achieve such compliance. The Board held that to the extent the implementation procedures proposed to be bargained relate to the newly imposed "direct observation" drug testing requirement, they constituted a change from the prior procedure, and the procedures attendant thereto were bargainable.

UFA, 3 OCB2d 13 (BCB 2010)

Petitioner alleged that the FDNY failed to bargain in good faith over the issuance of a Memorandum which unilaterally implemented a 30-day pilot program adding a third shift for those members on light duty status, and other changes. The Union alleged that in creating such a program, the City violated NYCCBL § 12-306(a)(1) and (4). The City alleged that the claim is untimely, that the claim is moot since the pilot program has ended, that the claim should be deferred to arbitration, and that it must be dismissed, as the claim involves an issue that falls under a statutorily granted management right. The Board found that the claim was untimely filed because the date of accrual, the date the Memorandum was issued, was more than four months prior to the filing of the petition.

CSTG, Local 375, 3 OCB2d 14 (BCB 2010)

The Union claimed that the Administration for Children's Services, in violation of NYCCBL § 12-306(a)(1) and (3), discriminated and retaliated against a Union member when a superior demanded that the member withdraw an out-of-title grievance that was also the subject of an Article 75 court petition. The City argued that the Union failed to establish a violation because the Union member was not restrained, coerced, or interfered with in the exercise of his rights, nor was he retaliated against. The Board found that the superior's comments were inherently destructive and thus constituted interference with protected rights, but that the Union member was not retaliated against. Accordingly, the Union's petition was granted in part and dismissed in part.

Banerjee, 3 OCB2d 15 (BCB 2010)

Petitioner alleged that the Union breached its duty of fair representation under the NYCCBL by failing to arbitrate a wrongful discipline grievance arising out of the termination of her employment and that HHC retaliated against her because of her earlier submission of an out-of-title grievance. The Union contended that the arbitration of Petitioner's disciplinary complaint was rendered impossible because of a Court of Appeals decision invalidating contractual provisions affording disciplinary grievance rights for provisional employees such as Petitioner, so that it could not be deemed to have breached its duty to her by not pursuing such an arbitration. HHC asserted that the petition is untimely as to it, and that Petitioner failed to show that HHC retaliated against her. The Board found that Petitioner's claim was untimely as to HHC, and that it failed to allege facts sufficient to state a claim under the NYCCBL against the Union, so the petition was dismissed in its entirety.

UFA, 3 OCB2d 16 (BCB 2010)

The Union alleged that the assignment of firefighters to respond to an emergency condition following a steam pipe explosion in Manhattan by hosing down buildings that had been sprayed with debris, including possible asbestos contamination, created a practical impact on the safety of the firefighters, thereby giving rise to a duty to bargain. The Union further alleged that the FDNY violated NYCCBL § 12-306(a)(1), (4), and (5) because its actions constituted a failure to bargain over the job duties of firefighters and a violation of the *status quo*. The City alleged that the petition should be deferred to arbitration; that the FDNY acted within its managerial prerogative by requiring these firefighters to work at the location; and that the Union failed to demonstrate a practical impact with regard to this work assignment. The Board found that the assignment of firefighters to perform tasks at issue constituted a proper exercise of the FDNY's managerial prerogative, but that the evidence demonstrated that in this particular situation a practical impact on employee

safety resulted. Therefore, the Board ordered the parties to bargain over the amelioration of that practical impact, and dismissed all other claims.

Smith, 3 OCB2d 17 (BCB 2010)

Petitioner claimed that the Union violated NYCCBL § 12-306(b)(3) by failing to grieve and arbitrate her termination. Petitioner also alleged that the City and the Department of Parks and Recreation ("DPR") violated NYCCBL § 12-306(a)(1) by interfering with her ability to assist the Union's effort to process, investigate, and grieve the termination of her employment. The Union alleged that it did not violate its duty of fair representation as it availed itself of all rights and remedies Petitioner had pursuant to the relevant collective bargaining agreement. The City argued that Petitioner's claims should be dismissed as Petitioner did not present sufficient facts to support her claims. The Board found that, in view of the limited rights afforded seasonal employees under the applicable agreement, and in the absence of specific factual allegations to support a claim that either the Union or the City discriminated against Petitioner, or otherwise impaired her rights under the NYCCBL, no improper practice was established. Accordingly, Petitioner's improper practice petition was dismissed.

PBA, 3 OCB2d 18 (BCB 2010)

The Union claimed that the New York City Police Department violated NYCCBL § 12-306(a)(1), (4), and (5) by unilaterally instituting a college loan repayment program, thereby allegedly interfering with the statutory rights of Police Officers, failing to bargain in good faith, and unilaterally changing the terms and conditions of employment. The City claimed that the alleged implementation of this new program did not violate the NYCCBL because, *inter alia*, an independent, nonprofit organization was the sole party responsible for the institution and funding of this program. The Board held that the record evidence established that the college loan repayment program was implemented and administered by the NYPD, even though funded by an outside source, and therefore the institution of this program constituted a violation of the duty to bargain. The Board also held, however, that the NYPD did not engage in direct dealing in violation of § 12-306(a)(1) and did not unilaterally change the terms of an agreement during a period of *status quo*, in violation of NYCCBL § 12-306(a)(5). Accordingly, the Union's petition was granted in part and dismissed in part.

Morris, 3 OCB2d 19 (BCB 2010)

Petitioner alleged that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(1) and (3), after HHC terminated his employment, by failing to pursue any remedial action. Further, he alleged that HHC terminated his employment in violation of NYCCBL § 12-306(a)(1) and (3) because he sought the Union's assistance regarding overtime compensation. The Union claimed that Petitioner failed to state a claim. HHC argued, primarily, that Petitioner failed to state a claim that it had retaliated against him for union activity, and that, regardless of motivation, it had legitimate business reasons for terminating Petitioner's employment. The Board found that the Union did not breach its duty of fair representation and that the Petitioner did not allege facts sufficient to support his claim that HHC's termination of his employment was improperly motivated.

SSEU, L. 371, 3 OCB2d 22 (BCB 2010)

The Union claimed that the Manhattan DA retaliated against a member in violation of NYCCBL § 12-306(a)(1) and (3) by terminating the member in response to her request that her supervisor meet with the Union. The Union also claimed that the supervisor's anti-union statements at a subsequent staff meeting constituted interference in violation of § 12-306(a)(1). The Manhattan DA claimed that no violation has been established as the meeting request was neither protected activity nor the cause of the member's termination, which was approved prior to her meeting request. The Manhattan DA further argued that the supervisor had no anti-union animus, that it had legitimate business reasons for the termination, and that there was no independent act of interference. The Board found no retaliation, since the termination decision had been made prior to the member's meeting request. However, the Board found that the supervisor's subsequent comments were inherently destructive of protected employee rights. Accordingly, the Union's petition was granted in part and dismissed in part.

Local 1181, CWA, 3 OCB 2d 23 (BCB 2010)

The Union alleged that the New York City Police Department violated the NYCCBL § 12-306(a)(1) and (3) by changing a Union member's shift, disciplining her, and diminishing her supervisory duties. The City argued that its actions were taken for legitimate business reasons, not anti-union animus. The Board found that the Union failed to establish retaliation motivated by anti-union animus. Accordingly, the improper practice petition was dismissed.

Mora-McLaughlin, 3 OCB2d 24 (BCB 2010)

Petitioner claimed that the Union violated its duty of fair representation by failing to represent him regarding a counseling memorandum that he characterized as a disciplinary matter. Both HHC and the Union argued that the petition should be dismissed as untimely. The Union further argued that no violation of this duty occurred because the Union communicated with Petitioner, assisted him, and advised him on how he could best handle the matter. In addition, HHC contended that no violation of the duty of fair representation occurred because the action taken by HHC did not constitute discipline; there-

fore, the Union correctly declined to represent Petitioner. The Board found that Petitioner's claim was untimely filed. Accordingly, the petition was dismissed.

Morales, 3 OCB2d 25 (BCB 2010)

Petitioner alleged that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b)(1) and (3), by failing to adequately represent him in proceedings which led to his termination and, after his termination, by failing to adequately challenge the termination. The Union claimed that the petition was untimely filed and that Petitioner failed to allege facts sufficient to state a claim that it breached its duty of representation. The City also argued that the petition was untimely filed and that Petitioner failed to state a claim. As Petitioner's grievance was on-going, and was proceeding to Step III of the grievance procedure with the assistance of the Union, the Board dismissed this matter without prejudice to re-file.

USA, *Local 831*, 3 OCB2d 27 (BCB 2010)

The Union filed a petition alleging that the City violated NYCCBL § 12-306(a)(1) and (4) when it implemented a new policy of charging employees various payroll-related fees. The City claimed that the petition was not timely filed, as the Union should have had notice of the fees because its members were subject to these fees for years. After an evidentiary hearing, the Board found that the Union did not have notice of the fees until July 2009. Accordingly, the Board found the Union's petition was timely filed and found that by unilaterally imposing the fees, the City violated NYCCBL § 12-306(a)(1) and (4).

Kaplin, 3 OCB2d 28 (BCB 2010)

Petitioner, a probationary Staff Nurse, claimed that the Union breached its duty of fair representation toward her in the handling of a disciplinary matter arising from an error in the administration of medication. Petitioner also claimed that HHC violated NYCCBL § 12-306(a)(1) and (3) by denying her request for union representation when she was questioned by supervisors about the error, and retaliating against her for asserting that right by terminating her employment and reporting the medication error. Respondents argued that the instant petition is untimely and that, even if it were not, Petitioner's probationary status precluded any grievance rights and that the Union thus did not breach the duty of fair representation. HHC asserted as well that Petitioner had no *Weingarten* rights under the circumstances, that the meeting at issue was not disciplinary in nature, and that it did not retaliate against Petitioner. The Board found the claims against the Union and HHC pertaining to the supervisory conference were untimely. The Board further found that the petition failed to allege facts sufficient to establish a breach of the duty of fair representation against the Union or to state a *prima facie* case of retaliation or interference on the part of HHC. Accordingly, the petition was dismissed.

LEEBA, 3 OCB2d 29 (BCB 2010)

The City petitioned for a determination that numerous specified bargaining proposals submitted by LEEBA were outside the scope of mandatory bargaining under the NYCCBL and, therefore, could not be submitted to an impasse panel. LEEBA argued that each of its proposals concerned mandatory subjects of bargaining. The Board found that several proposals were mandatory subjects, several proposals were non-mandatory subjects, certain proposals were bargainable in part and not bargainable in part, and two proposals involved a prohibited subject of bargaining.

Proctor, 3 OCB2d 30 (BCB 2010)

Petitioner, in two separate petitions, claimed that the Union violated its duty of fair representation by failing to advance a grievance on his behalf related to a positive drug test and by refusing to advocate on his behalf with regard to the drug test results. The Union argued that it represented Petitioner in previous disciplinary matters and provided information and counsel with regard to drug testing results. The City argued that Petitioner failed to set forth a viable claim against the Union and argued that any remaining claim made by Petitioner against DHS should be dismissed for failure to state a claim upon which relief can be granted. The Board held that the Union's actions in the instant matter were not arbitrary, discriminatory, or in bad faith. Accordingly, the petitions are dismissed.

New York State Nurses Association, 3 OCB2d 36 (BCB 2010)

The Union alleged that HHC violated NYCCBL § 12-306(a)(1) and (4) by unilaterally changing the alternative work schedules for three of its employees, by failing to bargain over these changes, and by failing to provide the information needed to collectively bargain. HHC contended that the improper practice petition should be deferred to arbitration because it involves the interpretation of the parties' collective bargaining agreement. Furthermore, HHC contended that the instant petition should be denied as the Union did not establish that HHC failed to bargain in good faith over a mandatory subject of bargaining. The Board found that inasmuch as the subject of alternate work schedules was addressed in the parties' collective bargaining agreement, the issues related to the implementation of new work schedules and the alleged refusal to bargain over that decision should be deferred to arbitration. The Board further found that HHC violated its duty to bargain by failing to produce information responsive to one of the Union's six document requests, but no violation was found regarding the Union's other five information requests. Finally, the Board denied the Union's claim that HHC independently interfered with the statutory rights of the Union's members. Accordingly, the Board deferred to arbitration a portion of the Union's

instant petition, and granted the petition in part, and denied it in part.

Local 2627, DC 37, 3 OCB2d 37 (BCB 2009)

The Union alleged that the City retaliated against a Union member for filing an out-of-title grievance by subjecting her to a higher level of scrutiny regarding her use of sick leave. The City contended that a majority of the allegations were untimely filed, that the member was properly placed "on documentation," and that anti-union animus did not motivate DSNY to place her in that category. The Board found that many of the Union's claims were untimely, except for the allegation that the member was subjected to a higher level of scrutiny. Furthermore, in examining the totality of the circumstantial evidence regarding the motivation behind DSNY's employment action, the Board found that the Union did not show that DSNY retaliated against Malatzky for purposes of anti-union animus.

UFA, 3 OCB2d 38 (BCB 2010)

The Union alleged that the FDNY failed to bargain in good faith over the issuance of an Excessive Overtime Control Policy, which includes up to 96 hours of "Roster Staffing overtime" towards a new cap on discretionary overtime. The Union argued that by including "Roster Staffing overtime" in the overtime cap, the City unilaterally changed a procedure and jeopardized the integrity of Roster Staffing, in violation of NYCCBL § 12-306(a)(1) and (4). The Union also sought to bargain over the alleged practical impact that the overtime cap will have on its members. The City alleged that the claim is untimely, that the claim should be deferred to arbitration, and that it must be dismissed, as the claim involves an issue that falls under a statutorily granted management right. The Board found that the matter was timely filed and should not be deferred, but that the record did not support the Union's claims that the FDNY changed its procedures or that the Overtime Policy has a practical impact on its members. Accordingly, the petition was dismissed.

Board of Certification

(Note: Decisions amending certifications to reflect name changes and/or the deletion of obsolete titles, uncontested additions of titles, voluntary recognitions, certifying the results of an election, and other non-substantive matters are not included below.)

DC 37, 3 OCB2d 21 (BOC 2010)

DC 37 sought to accrete the Behavioral Health Associate title to its bargaining unit of hospital technicians. CWA intervened to seek accretion of the title to its bargaining unit of administrative titles. HHC took the position that DC 37's bargaining unit was the most appropriate. The Board found that Behavioral Health Associates have a greater community of interest with the titles in DC 37's bargaining unit than CWA's bargaining unit and amended Certification No. 16-2007 to add the Behavioral Health Associate title.

CWA, L. 1180, 3 OCB2d 32 (BOC 2010)

CWA sought to represent Customer Information Representatives by accretion. Intervenors Local 237 and DC 37 also sought to accrete the titles. The City and NYCHA took no position as to the proper placement of the title. The Board found that the bargaining units were equally appropriate and ordered an election on unit placement.

OSA, 3 OCB2d 33 (BOC 2010)

The Union filed a petition to amend Certification No. 3-88 to add the title Administrative Staff Analyst Levels II and III. There are approximately 827 ASAs Levels II and III working in a wide variety of in-house titles at over 40 agencies of the City of New York and at the New York City Housing Authority. The City and NYCHA argued that the employees in the title should be excluded from collective bargaining as managerial and/or confidential. Based on an extensive record adduced at 74 days of hearings, the Board found that, with certain specified exceptions, the titles were eligible for collective bargaining and appropriately added to the certification.

Steven DeCosta is the Deputy Director and General Counsel of the New York City Office of Collective Bargaining.

2009-10 U.S. Supreme Court Decisions Affecting Labor and Employment

By Seth H. Greenberg

The U.S. Supreme Court's 2009-10 term again featured numerous cases that affect labor and employment law in one way or another. Those cases centered around issues involving arbitration, privacy rights, attorneys' fees, timeliness of discrimination charges, ERISA, spending in political campaigns, and the authority of the National Labor Relations Board to issue decisions. Like with any year-end review, the purpose of this article is to again discuss the major issues that were decided and what questions the Court left unanswered. I will conclude with a short preview of some labor and employment cases that are before the 2010-11 term set to begin October 4, 2010.[1]

Arbitration

Stolt-Nielsen v. AnimalFeeds (Vote: 5-3)[2] (Decided April 27, 2010)

Arbitrators cannot decide class action claims unless there is a contractual basis for concluding that the parties agreed to do so, says the Supreme Court in the first of three arbitration cases decided during the 2009-10 term. *Stolt-Nielsen* is an anti-trust case, but the high court's decision there has broad implications on arbitration in all areas of law, labor and employment included.

In *Stolt-Nielsen*, the parties' agreement was silent on class arbitrations and it was undisputed that no agreement had been reached on class arbitrations. A panel of arbitrators concluded they had authority to hear class claims, a decision that was ultimately upheld by the Second Circuit.

The Supreme Court reversed, holding that the panel exceeded its authority when it embraced its own policy and ignored the intent of the parties. Justice Alito, writing for the Court, noted that the Federal Arbitration Act (FAA) "imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'"[3] He then explained:

> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.[4]

In sum, unless explicitly included in an agreement to arbitrate, class arbitrations are precluded.

Rent-A-Center West v. Jackson (Vote: 5-4)[5] (Decided June 21, 2010)

Arbitration was clearly a focus of the Court this term. In *Rent-A-Center West v. Jackson*, the second of three arbitration-related cases, a divided court gave employment-based arbitration agreements more bite by limiting judicial review. The Court's majority held that it is up to an arbitrator to decide whether an agreement to arbitrate contained in a contract is enforceable. And the only time courts are to consider the validity of an arbitration clause is when a party to the contract challenges the validity of the agreement as a whole.

An employee signed an arbitration agreement which provided for arbitration of all past, present, and future disputes arising out of his employment, including "claims for discrimination" and "claims for violation of any federal…law." It also provided that "[t]he Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable." When the employee, Antonio Jackson, filed an employment discrimination suit against Rent-A-Center in federal court, Rent-A-Center moved to compel arbitration. Jackson argued that the arbitration agreement was unconscionable and, therefore, unenforceable. The District Court granted the employer's motion to compel arbitration. A divided Ninth Circuit reversed in part, affirmed in part, and remanded. On the question of who had the authority to decide whether the Agreement is enforceable—the court or the arbitrator—the Court of Appeals reversed, finding that the threshold question of unconscionability is for the court to decide.

But the nation's highest court thought otherwise and reversed the Ninth Circuit. Notably, the Court drew a distinction between two kinds of validity challenges under Section 2 of the Federal Arbitration Act (FAA). One type of validity challenge goes to the agreement to arbitrate and the other challenges the contract as a whole, either on a ground that directly affects the entire agreement or on the ground that the illegality of one of the agreement's provisions renders the whole agreement invalid.

Critics of this decision argue that the conservative majority denies access to the courts to those seeking to challenge arbitration agreements as unconscionable. Considered a victory for employers, this result is not all that surprising in light of the Court's decision in *14 Penn Plaza*[6] last term. Notably, the justices that make up the majority and the minority are identical in both cases, except that Justice Sotomayor replaced Justice Souter in dissenting here.

Granite Rock co. v. International Brotherhood of Teamsters (Vote: 7-2; 9-0)[7] (Decided June 24, 2010)

The final labor and employment decision issued in the 2009-10 term was *Granite Rock*. There, the Court made two conclusions of interest. First, a majority of the justices found that disputes over the effective date of a collective bargaining agreement are properly resolved by the courts as opposed to by an arbitrator. And second, the unanimous Court refused to recognize a new federal cause of action for the union's alleged tortious interference with the collective bargaining agreement.

Justice Thomas wrote the Opinion of the Court, reemphasizing that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*."[8] Citing its days-old decision in *Rent-A-Center, supra*, Thomas further explained, "[t]o satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce."[9] Unlike in *Rent-A-Center*, however, the Court ruled against arbitrability and in favor of judicial decision-making.

There was an unusual set of facts and circumstances specific to *Granite Rock* that led to the Court's ruling. Failed contract negotiations led to a strike of concrete ready-mix workers in June 2004. On July 2, 2004, the union and the company reached a tentative agreement which included a no-strike provision. But union members did not return to work, in an attempt to gain a "hold-harmless" clause to protect against potential damages arising from the strike. The company claimed the union voted to ratify on July 2 while the union claims ratification did not occur until late August (thereby not being bound by the no-strike provision). Adding to the complication was the fact that the parties executed the agreement in December 2004. This executed agreement includes an arbitration clause. The union maintained that an arbitrator should determine when the contract was ratified and whether the no-strike provision applied to the July work stoppage.

Finding the question one of contract formation rather than contract validity, the Court found the matter to be one for judicial resolution. Justice Thomas explained, "[f]or purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed. That is the case where, as here, the date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether the agreement's provisions were enforceable during the period relevant to the parties' dispute."[10]

The arbitration clause of the agreement provided that "[a]ll disputes *arising under this agreement* shall be resolved in accordance with the [Grievance] procedure." Most of the justices found that the ratification dispute clearly did not arise under the agreement. Justices Sotomayor and Stevens found otherwise, concluding that the July work stoppage was clearly a dispute arising out of the contract and should have gone to arbitration. In their dissent, both justices concluded that the date the contract was ratified was "entirely irrelevant" since the agreement was made retroactive to May 1, 2004 and the strike post-dated the May 1st date.

On remand, it is undisputed that the company can bring a breach of contract claim. The Court, however, rejected the company's request to recognize a new federal tort claim for alleged interference with the collective bargaining agreement. This unanimous decision upholds the conclusions reached by almost all the Courts of Appeals.[11]

Campaign Finance

Citizens United v. FEC (Vote: 5-4)[12] (Decided January 21, 2010)

Citizens United v. Federal Election Commission is the case that most defines the Court's latest term. Although not directly related to labor and employment law, it has significant effects on corporate and union spending in political campaigns, thereby impacting the political (and legal) landscape for years ahead. The decision, issued on January 21, 2010, held that the federal government may not ban political spending by corporations in candidate elections.

Citizens United centered around *Hillary: The Movie*, a documentary film that is quite critical of Hillary Clinton, portraying her as deceitful and power-hungry. During the 2008 presidential campaign, a group called Citizens United wanted to promote the movie in the days leading up to the election. The FEC, however, argues that this would violate the 2002 Bipartisan Campaign Reform Act that prohibits corporations from "electioneering" during the 30 days before a primary and 60 days before a general election.

In its 5-4 decision, the U.S. Supreme Court threw out the time limits for electioneering and further concluded that the federal government could not set limits on corporations spending to promote their own political messages during campaigns. According to the Court, the ban violates free speech protections

The Court's ruling appears to apply equally to labor unions as corporations. The Court specifically concludes that the identity of the political speaker (spending money on politics is speech, of course) cannot be the basis for restrictions on their independent political spending. The Court explicitly held "that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[13]

A broader question that largely goes unaddressed is how the Court will address differences between a political message that involves "express advocacy" and one

that involves "issue advocacy." Express advocacy is akin to traditional candidate support / opposition ads (e.g., "vote for" or "vote against" Candidate X). Issue advocacy is an ad that says write to Senator Y (a pro-choice lawmaker) and tell him that you are a pro-life voter.

The Court has time and again held that Congress has more power to curb "express advocacy" than "issue advocacy." But what the Court did in *Citizens United* is to strike down an explicit ban on the use of corporate funds to pay for "express advocacy," paving the way (it would seem) for the elimination of rules concerning "issue advocacy" as well.

It is hard to imagine that *Citizens United* will be the last word on corporate campaign finance. President Barack Obama criticized the Court's ruling in his State of the Union Address six days after the decision was announced. And it appears Congressional leaders across the political spectrum are in the process of legislatively overturning the decision.

So what are the effects of *Citizens United* on New York State's campaign finance system? The answer appears to be not much, if anything. But that answer must be qualified by a "you never know." The Court's ruling has vast implications on the federal level and may also affect certain state rules regarding political donations. However, it does not appear that New York's existing campaign finance system will be affected in any substantive way.

Notably, the day the Supreme Court's ruling in *Citizens United* was announced, the New York City Campaign Finance Board issued a press release from its Executive Director that provides:

> While today's decision may have a critical impact on the next federal elections, it addresses a specific provision of federal law that has no direct parallel in City law.
>
> The decision addresses *independent spending* by corporations supporting candidates; it does not disturb the prohibition on *direct contributions* from corporations to candidates.[14]

It is worth noting that no state's laws were specifically overturned by *Citizens United*, although some may now be more vulnerable to challenge. New York is no different. Until then, however, nothing changes.

Citizens United did uphold reporting requirements. In writing for the majority, Justice Anthony Kennedy concluded the government may regulate corporate political speech through disclaimer and / or disclosure requirements. However, the government may not, according to the Court, silence such political speech altogether. Justice Kennedy also concluded, "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking' [citations omitted]."[15]

ERISA

Conkright v. Frommert (Vote: 5-3)[16] (Decided April 21, 2010)

"People make mistakes. Even administrators of ERISA plans."[17] So began Chief Justice John Roberts, writing for the majority in *Conkright v. Frommert*, holding that an ERISA plan administrator must not be stripped of deference in a subsequent plan interpretation even if a previous interpretation was unreasonable. In *Conkright*, the Court sympathizes with employers, presumes good faith despite an illogical interpretation in the first instance, and gives employers a second chance.

Xerox Corporation's pension plan is at the center of *Conkright*. Xerox employees retired from the company in the 1980s and received lump sum distributions of retirement benefits. Some of these retirees were later re-hired. Xerox's plan administrator was left to determine how to account for the past distributions when calculating the re-hired employees' current benefits. The administrator adopted what is known as the "phantom account" method. This method calculated the hypothetical growth (and reduction) that the past distributions would have experienced if the money had remained in Xerox's investment funds. Employees challenged this method as irrational.

The District Court granted summary judgment to the employer / Plan, applying a deferential standard of review. On appeal, the Second Circuit vacated and remanded, holding that the method constituted an unreasonable interpretation and that the re-hired employees were not adequately notified that the phantom account method would be used.

The plan administrator then proposed a new approach, similar to the phantom account method except that it utilized an interest rate and was based upon information known at the time of the distribution. But the District Court refused to apply a deferential standard and did not accept the Plan's new, second interpretation. The Second Circuit affirmed, adopting a "one-strike-and-you're-out" analysis.

Although certiorari was granted on two questions, the Court decided only the question of whether the District Court owed deference to the Plan Administrator's interpretation of the Plan on remand. And the majority ruled that deference must be afforded.

Twenty-one years ago, in *Firestone Tire & Rubber Co. v. Bruch*,[18] the Court addressed the standard for reviewing decisions of ERISA plan administrators, granting great deference to administrators who are given discretionary authority to interpret a plan. And two years ago, in *Metropolitan Life Ins. Co. v. Glenn*,[19] the Court expanded upon *Firestone*, concluding that the deferential standard applies even in the face of a conflict of interest.

Conkright appears to be a re-affirmation of these prior decisions, whereby the Court rejects the Second Circuit's "ad hoc exception" and concludes that a single honest

mistake does not require a different approach. In other words, one error or mistake in the plan administrator's judgment will not usurp the administrator's authority to interpret the terms of the ERISA plan.

Authority of NLRB to Issue Decisions[20]

New Process Steel v. NLRB (Vote: 5-4)[21] (Decided June 17, 2010)

In a holding that calls into question hundreds of decisions by the National Labor Relations Board (NLRB) over the last two years, the U.S. Supreme Court ruled that a two-member NLRB cannot legally exercise the board's authority. The narrow 5-4 ruling in *New Process Steel v. NLRB* interprets a so-called quorum and delegation clause in the National Labor Relations Act "as requiring that the delegee group maintain a membership of three in order for the delegation to remain valid."

By the end of 2007, the ordinarily five-member board found itself with only four members and was expecting two more vacancies as the terms of two members were about to expire. By January 1, 2008, only two members remained, leaving three vacancies. According to Section 3(b) of the National Labor Relations Act, the "Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." That same provision also provides that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group" to which the board has delegated its powers.[22] The two-member board continued to issue rulings over the next 27 months under the delegated powers it believed were authorized by Section 3(b).

The nation's highest court was asked whether the two-member group was authorized to act for the board. The majority said it was not so authorized. Writing for the Court, Justice Stevens explained that the at-issue provision requires that such delegated power be vested continuously in a group of three members, concluding that this interpretation "is the only way to harmonize and give meaningful effect to all of the provisions in [Section] 3(b)."[23] Justice Stevens further reasoned that if Congress wished to allow the board to decide cases with only two members, it would have and can easily do so. According to Stevens, "Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."

What happens with the more than 500 cases decided in the last two plus years is still in doubt. Those cases were decided only where the two remaining members of the board, a Republican and a Democrat, were in agreement. Many experts argue that unless appealed on the ground that the two members lacked appropriate authority, employers and unions may have waived the opportunity for reconsideration. NLRB Chair Wilma Liebman issued a statement that defended the decision of the two-member group to issue rulings but acknowledged the board's obligation to ensure the Court's rulings are effectuated accordingly. She explained: "We believed that our position was legally correct and that it served the public interest in preventing a Board shutdown. We are of course disappointed with the outcome, but we will now do our best to rectify the situation in accordance with the Supreme Court's decision."[24]

Discrimination Charges

Lewis v. City of Chicago (Vote: 9-0)[25] (Decided May 24, 2010)

In *Lewis v. City of Chicago,* decided May 24, 2010, the high court unanimously found that a plaintiff who does not file a timely charge challenging the adoption of a practice may assert a disparate-impact claim in a timely charge alleging the employer's later application of that practice as long as he alleges each of the elements of a disparate-impact claim.

In 1995, the City of Chicago administered a civil service examination for firefighter positions. In January 1996, the City notified applicants of the test results, announcing it would draw candidates randomly from the pool of applicants scoring at least 89 out of 100 points (so called "well-qualified" candidates). Candidates scoring below 65 were notified they failed ("unqualified"). And those scoring between 65 and 88 were told that while "qualified" they were unlikely to be called but would be kept on the list as long as the list was still used. In March 1997, plaintiffs filed an EEOC charge claiming the test had a disparate impact on black applicants and was not a valid test.

The trial court found each hiring was a fresh violation of Title VII, thereby also concluding Plaintiffs' suit was timely. The Seventh Circuit reversed, holding that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act—the sorting of scores into categories. The Seventh Circuit reasoned that later hiring was merely a consequence of the test scores but not a new discriminatory act.

The U.S. Supreme Court reversed. In writing for the Court, Justice Scalia explained:

> Petitioners here challenge the City's practice of picking only those who had scored 89 or above on the 1995 examination when it later chose applicants to advance. Setting aside the first round of selection in May 1996, which all agree is beyond the cut-off, no one disputes that the conduct petitioners challenge [latest hiring from the list] occurred within the charging period. The real question, then, is not whether a claim predicated on that conduct is timely, but whether the

practice thus defined can be the basis for a disparate-impact claim at all.

We conclude that it can.[26]

* * * * *

Thus, a plaintiff establishes a prima facie disparate-impact claim by showing that the employer "uses a particular employment practice that causes a disparate impact" on one of the prohibited bases.[27]

Lewis is an interesting follow-up to the Court's decision last term in *Ricci v. DeStefano*.[28] Since layoffs and terminations usually result in a higher number of discrimination complaints, the Court's decision in *Lewis* becomes even more important.

Privacy Rights

City of Ontario, California v. Quon (Vote: 9-0)[29] (Decided June 17, 2010)

From the time the Court agreed to hear *Quon*, many legal experts had expected the ruling to be a blockbuster, offering guidance with regard to privacy in electronic communications. What the Court issued, however, was a narrow decision that focused on the search of text messages rather than the expectation of privacy in those messages. And the Court acknowledged the hype in its opening paragraph, wherein Justice Kennedy wrote: "Though the case touches issues of far-reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable."[30]

The City of Ontario, California sought to review two months' worth of text messages from a police officer's city-issued pager after it noticed that the officer had repeatedly exceeded the character limit allotted. Overage charges resulted but the officer wrote a check to the City for all overages, reimbursing it for any additional costs that were incurred. In conducting an audit of the officer's text messages, hundreds of personal messages were found, some of a sexual nature. Ultimately, the officer was disciplined.

The City had a "Computer Usage, Internet and E-Mail Policy" in which it "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." This Computer Policy did not, however, explicitly apply to text messages. However, in April 2002, City officials informed officers that text messages were to be treated the same as e-mails.

The unanimous Court refused to decide the case on privacy grounds. Justice Kennedy, writing for the Court, explained that technology is evolving so fast and that "[a]t present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."[31] There was a discussion regarding the pervasiveness of cell phone and text message communications on and off-duty. When push came to shove, though, the justices rejected a "broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment."[32]

So how did the Court reach its decision? For the purposes of resolving the case in the most narrow way, the Court made three assumptions. First, it assumed that the officer had a reasonable expectation of privacy. Second, it assumed that the City's review of the messages constituted a search within the meaning of the Fourth Amendment. And finally, the Court posited that "the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere."[33] Based upon these assumptions, the Court conducted an analysis of the search and ultimately concluded that it was reasonable.

Although it left many important questions unanswered, the Court's discussion in *Quon* offers employers in the public and private sectors some good lessons. If nothing else, employers should ensure they adopt a comprehensive electronic communications policy that places employees on notice about what may be monitored. Additionally, searches of employee communications must only be for legitimate, work-related reasons and should not be excessively intrusive in scope.

One thing is certainly clear—as technology continues to evolve and expectations of privacy continue to be a source of contention, the Supreme Court will no longer be able to dodge the tougher issues. The high court must at least offer guidance as the Circuits develop their own technology jurisprudence.

Other Cases of Interest: Attorneys' Fees and More

Perdue v. Kenny[34] and *Hardt v. Reliance Standard Life Insurance Company*[35] are two cases that address the ability of winning parties to recover attorneys' fees, and may be of interest to labor and employment lawyers. In *Perdue*, the Court upheld fee enhancements as part of a federal fee-shifting statute in civil rights cases. And the Court unanimously held, in *Hardt*, that an ERISA claimant may be entitled to attorneys' fees as long as there is "some degree of success on the merits."

In my article last year, I mentioned that the Court granted certiorari in *Mohawk Industries v. Carpenter*,[36] a case involving attorney-client privilege and discovery. There, a fired employee sued for wrongful termination, alleging that the true reason he was fired was due to his reporting immigration violations. Before his firing, the employee had met with the employer's attorney on this matter. As part of discovery, the employee sought information related to that meeting. The District Court granted the request and ordered disclosure over the company's objection; however, it also permitted the company to appeal. The issue in *Mohawk* was whether an order for discovery, involving an attorney-client privilege, is

eligible for immediate appeal. On December 8, 2009, a unanimous Court found that it was not.

Looking Ahead to the 2010-11 Term

At the time this article is published, the Supreme Court will already be knee deep in its 2010-11 term, the first with new Justice Elena Kagan. Arbitration (*AT&T Mobility LLC v. Concepcion, US*) continues to be an issue of interest to the Court, including a further look at class-wide arbitration. In *Staub v. Proctor Hospital*, the Court will consider the circumstances under which an employer may face liability based on the unlawful intent of employees who caused or influenced an adverse employment decision but did not actually make the decision itself. *Thompson v. North American Stainless*, granted certiorari on the last day of the 2009-10 term, concerns whether Title VII prohibits retaliation against a person associated with someone who engaged in protected activity (e.g., spouse or other family member), sometimes referred to as "third-party retaliation." *CIGNA Corporation v. Amara* asks the Court to address ERISA claims for inconsistency between the plan's Summary Plan Description and the action Plan itself. And in *NASA v. Nelson*, the Court will continue its look at informational privacy issues, this time in connection with background investigations of federal contract employees.

Endnotes

1. This past January, NYSBA's Labor and Employment Law Section unveiled its Section blog to provide timely notice of significant events and developments affecting practitioners of labor and employment law in New York. Blog posts are intended to cover a wide range of topics from new legislation to court decisions to agency interpretations. The blog can be accessed from the Section's homepage on the NYSBA website. Some of the decisions described within this article were also discussed by the author on the blog shortly after the Court issued its opinions. Portions of those blog posts appear throughout this article.
2. No. 08-1198, 559 U.S. __ (2010). Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens and Breyer joined. Justice Sotomayor took no part in the consideration or decision of the case.
3. *Id.* at 17.
4. *Id.* at 21.
5. No. 09-497, 561 U.S. __ (2010). Justice Scalia delivered the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined. Justice Stevens filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.
6. No. 07-581, 556 U.S. __ (2010). *14 Penn Plaza v. Pyett* was another narrowly decided case discussed in my article that appeared in the Fall/Winter 2009 edition of this *Journal* at p. 17.
7. No. 08-1214, 561 U.S. __ (2010). Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, Breyer, and Alito joined. Justices Stevens and Sotomayor joined in part. Justice Sotomayor filed an opinion concurring in part and dissenting in part, in which Justice Stevens joined.
8. *Id.* at 7.
9. *Id.*
10. *Id.* at 13.
11. Not surprisingly, California was the exception.
12. No. 08-205, 558 U.S. __ (2010). Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Stevens filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.
13. *Id.* at 50.
14. *Statement of CFB Executive Director Amy Loprest on the U.S. Supreme Court Ruling in Citizens United v. FEC,* http://www.nyccfb.info/press/news/press_releases/2010-01-21.pdf.
15. No. 08-205, 558 U.S. __ (2010), at 51.
16. No. 08-810, 559 U.S. __ (2010). Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Breyer filed a dissenting opinion, in which Justices Stevens and Ginsburg joined. Justice Sotomayor took no part in the consideration or decision of the case.
17. *Id.* at 1.
18. 489 U.S. 101 (1989).
19. 544 U.S. __ (2008).
20. The *New Process Steel* decision is the subject of a separate article that appears in this *Journal*. Authored by Michael J. Israel, the article is entitled *The Supreme Court's New Process Steel Decision and Its Aftermath—Good Intentions Are Not Enough.* Israel's article gives a more in-depth analysis of the Court's decision and describes the NLRB's plan of action in light of the high court's ruling.
21. No. 08-1457, 560 U.S. __ (2010). Justice Stevens delivered the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justice Kennedy filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.
22. 29 U.S.C. §153(b).
23. No. 08-1457, 560 U.S. ___ (2010), at 5.
24. NLRB Press Release (June 17, 2010); http://www.nlrb.gov/shared_files/Press%20Releases/2010/R-2752.pdf.
25. No. 08-974, 560 U.S. __ (2010). Justice Scalia delivered the opinion for a unanimous Court.
26. *Id.* at 4-5.
27. *Id.* at 6.
28. 557 U.S. __ (2009).
29. No. 08-1332, 560 U.S. __ (2010). Justice Kennedy delivered the opinion of what amounts to a unanimous Court, except that Justices Scalia and Stevens filed concurring opinons.
30. *Id.* at 1.
31. *Id.* at 11.
32. *Id.*
33. *Id.* at 12.
34. No. 08-970, 559 U.S. __ (2010). Decided on April 21, 2010, the case was decided by another 5-4 split along traditional ideological lines.
35. No. 09-448, 560 U.S. __ (2010). Decided on May 24, 2010, the case was decided unanimously.
36. No. 08-678, 558 U.S. __ (2010). Decided on December 8, 2009, the case was decided largely unanimously except that Justice Thomas filed an opinion concurring in part and concurring in the judgment.

Seth Greenberg is a partner/shareholder in the law firm of Greenberg Burzichelli Greenberg P.C., in Lake Success, NY. He is a member of the Section's Executive Committee and Co-Chair of its Committee on Public Sector Labor Relations. Seth received his B.A. from George Washington University and his J.D. from St. John's University School of Law.

Book Reviews

Restrictive Covenants and Trade Secrets in Employment Law: An International Survey will be available from BNA Books this winter (www.bnabooks.com). It is sponsored by the International Labor and Employment Law Committee of the ABA Section of Labor and Employment Law.

Editors-in-chief are Wendi Lazar at Outten & Golden LLP and Gary Siniscalco at Orrick, Herrington & Sutcliffe LLP. The treatise includes chapters on the laws of some 50 nations written by noted practitioners in those countries, plus a chapter on global issues and chapters providing regional overviews. Also included is a chapter on "The Challenge of Cross-Border Litigation from an EU Perspective," written by Paul Goulding QC, author of *Employee Competition: Covenants, Confidentiality, and Garden Leave* (Oxford University Press).

Regional Editors are Robert Pe and Erica Chong at Orrick (Asia), Oscar de la Vega Gomez, Basham at Ringe y Correa, S.C. (Central and South America); Paul Callaghan at Taylor Wessing and Gerlind Wisskirchen at CMS Hashe Sigle (Europe); David Millstone at Squire Sanders & Dempsey L.L.P. (Middle East); Wendi Lazar and Gary Siniscalco (North America); and Danny Ong at Rajah & Tann LLP (Oceana / Asia).

This treatise explores the differences between the U.S. and foreign countries in regulating noncompetition and nonsolicitation provisions and in imposing restrictions related to confidential information and trade secrets, as well as use of garden leave and restrictions on equity compensation in this area. The survey also identifies and analyzes the privacy concerns that arise when employers try to restrict their employees' disclosures, conduct investigations concerning possible violations, or monitor compliance. And it discusses the typical procedural questions that arise, such as use of temporary restraining orders and injunctions.

It also includes regional overviews with helpful commentary on practices specific to different parts of the world.

The book is a companion to the Committee's other treatise, *International Labor and Employment Laws*, as well as serving as an international complement to the ABA / BNA U.S. State-by-State Survey series sponsored by the Employment Rights and Responsibilities Committee of the Section: *Covenants Not to Compete*, *Employee Duty of Loyalty*, *Tortious Interference in the Employment Context*, and *Trade Secrets*.

* * *

"Go to the Worker": America's Labor Apostles by Kimball Baker

A positive response to the U.S. economic crisis has been the coming together of Americans of all faith traditions to highlight the connections between the economy and our ethics and values.

Effective collective bargaining and fair treatment of workers are among U.S. economic objectives, of course, and *"Go to the Worker": America's Labor Apostles*, a recent book from Marquette University Press by Kimball Baker, shows how ecumenical efforts in the past helped American workers and their advocates to achieve these objectives. The efforts explored in the book were those of the Catholic social-action movement from the mid-1930s to the mid-1950s, which, like the Protestant "social gospel" movement of the 19th century or the Jewish labor lyceums of the early 1900s, the author notes, contributed to this nation's sense of worker justice. For a flyer with more information about the book, contact the author at kimbaker1@comcast.net.

Section Committees and Chairpersons

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Ad Hoc: Arbitrator Mentoring
John E. Sands
Arbitrator and Mediator
200 Executive Dr., Suite 100
West Orange, NJ 07052-3303
js@sandsadr.com

Ad Hoc: Future Meeting Sites
Howard C. Edelman
119 Andover Rd.
Rockville Centre, NY 11570-1533
hcearb@aol.com

James R. Grasso
Phillips Lytle LLP
3400 HSBC Center
Buffalo, NY 14203-2887
jgrasso@phillipslytle.com

Deborah S. Skanadore Reisdorph
Skanadore Reisdorph Law Offices
18377 Beach Blvd., Suite 219
Huntington Beach, CA 92648
ladylaw@nysbar.com

Ad Hoc: Scholarships and Other Financial Support
Wayne N. Outten
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016-5902
wno@outtengolden.com

Ad Hoc: Journal and Newsletter
Philip L. Maier
PERB
55 Hanson Place
Brooklyn, NY 11217-1579
plmbox@aol.com

Janet McEneaney
205-02 33rd Avenue
Bayside, NY 11361
mceneaneyj@aol.com

Alternative Dispute Resolution
Abigail J. Pessen
Mediation Services
80 Broad Street, 30th Floor
New York, NY 10004
abigail@pessenadr.com

Jonathan Ben-Asher
Ritz Clark & Ben-Asher LLP
40 Exchange Place, 20th Floor
New York, NY 10005
jben-asher@rcbalaw.com

Glen P. Doherty
McNamee, Lochner, Titus
& Williams, P.C.
677 Broadway
Albany, NY 12207
doherty@mltw.com

Communications
Mark Daniel Risk
Mark Risk, PC
60 East 42nd Street, 47th Floor
New York, NY 10165
mdr@mrisklaw.com

James N. McCauley
701 West State St.
Ithaca, NY 14850
jmccauley@clarityconnect.com

Michael A. Curley
Curley & Mullen LLP
5 Penn Center Plaza, 23rd Floor
New York, NY 10001
mcurley@curleymullen.com

Continuing Legal Education
Ronald G. Dunn
Gleason Dunn Walsh & O'Shea
40 Beaver Street
Albany, NY 12207
rdunn@gdwo.net

Stephanie M. Roebuck
Keane & Beane, PC
445 Hamilton Avenue, Suite 1500
White Plains, NY 10601
sroebuck@kblaw.com

Diversity and Leadership Development
Jill L. Rosenberg
Orrick Herrington & Sutcliffe LLP
666 5th Ave.
New York, NY 10103
jrose@orrick.com

Natalie V. Holder-Winfield
Quest Diversity Initiatives
15 East Putnam Avenue, Suite 174
Greenwich, CT 06830
natalie@questdiversity.com

Employee Benefits
William D. Frumkin
Sapir & Frumkin LLP
399 Knollwood Road, Suite 310
White Plains, NY 10603
wfrumkin@sapirfrumkin.com

Equal Employment Opportunity Law
David Fish
David M. Fish Attorney At Law
3 Park Avenue, 28th Floor
New York, NY 10016-5902
fish@davidmfish.com

Patricia Ann Cody
TheraCare of NY, Inc.
116 West 32nd Street, 8th Floor
New York, NY 10001
pcody@theracare.com

Ethics and Professional Responsibility
John Gaal
Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, NY 13202-1355
gaalj@bsk.com

Finance
Robert T. Simmelkjaer
160 West 97th Street, Suite 8A
New York, NY 10025
simmelkjaer@att.net

Immigration Law
Patricia L. Gannon
Greenberg Traurig LLP
200 Park Avenue
New York, NY 10166
gannonp@gtlaw.com

Individual Rights and Responsibilities
Dennis A. Lalli
Bond, Schoeneck & King, PLLC
330 Madison Avenue, 39th Floor
New York, NY 10017-5006
Dlalli@BSK.com

Patrick J. Solomon
Thomas & Solomon LLP
693 East Avenue
Rochester, NY 14607
psolomon@theemploymentattorneys.com

International Labor and Employment Law
Janet McEneaney
205-02 33rd Avenue
Bayside, NY 11361
mceneaneyj@aol.com

Donald C. Dowling Jr.
White & Case LLP
1155 Avenue Of The Americas
New York, NY 10036-2787
ddowling@whitecase.com

Labor Arbitration
Barbara C. Deinhardt
State Employment Relations Board
86 Chambers Street, Suite 201
New York, NY 10007-2634
bdeinhardt@aol.com

Willis J. Goldsmith
Jones Day
222 East 41st Street
New York, NY 10017-6739
wgoldsmith@jonesday.com

Labor Relations Law and Procedure
Peter D. Conrad
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8200
pconrad@proskauer.com

Bruce S. Levine
Cohen, Weiss and Simon LLP
330 West 42nd St.
New York, NY 10036
blevine@cwsny.com

Law School Liaison
Merrick T. Rossein
CUNY School of Law
65-21 Main St.
Flushing, NY 11637
rossein@mail.law.cuny.edu

Norma G. Meacham
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
ngm@woh.com

Legislation
Sharon P. Stiller
Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP
500 Linden Oaks, Suite 130
Rochester, NY 14625
sstiller@abramslaw.com

Jonathan Weinberger
880 Third Ave., 13th Floor
New York, NY 10022
jweinberger@verizon.net

Timothy S. Taylor
NYS United Teachers
800 Troy Schenectady Road
Latham, NY 12110
ttaylor@nysutmail.org

Vivian O. Berger
Columbia Law School
435 West 116th Street
New York, NY 10027-7297
vberger@law.columbia.edu

Membership
Theodore O. Rogers Jr.
Sullivan & Cromwell LLP
125 Broad Street, 35th Floor
New York, NY 10004
rogersto@sullcrom.com

Past Chairs Advisory
Frank A. Nemia
Coughlin & Gerhart, L.L.P.
PO Box 2039
Binghamton, NY 13902-2039
fnemia@cglawoffices.com

Public Sector Book
Jerome Lefkowitz
Public Employment Relations Board
80 Wolf Road, 5th Floor
Albany, NY 12205
jlefkowitz@perb.state.ny.us

Public Sector Labor Relations
John F. Corcoran
Hancock & Estabrook, LLP
100 Madison Stret
1500 AXA Tower I
Syracuse, NY 13202
jcorcoran@hancocklaw.com

Seth Greenberg
Greenberg Burzichelli Greenberg PC
3000 Marcus Avenue
Suite 1-W-7
Lake Success, NY 11042
sgreenberg@gbglawoffice.com

Sponsorships
Wendi S. Lazar
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016
wsl@outtengolden.com

Steven D. Hurd
Proskauer Rose, LLP
1585 Broadway
New York, NY 10036-8299
shurd@proskauer.com

Gwynne A. Wilcox
Levy Ratner, P.C.
80 8th Avenue, 8th Floor
New York, NY 10011
gwilcox@levyratner.com

Union Administration and Procedure
Steven A. Crain
CSEA
Legal Department
143 Washington Avenue
Albany, NY 12210
steven.crain@cseainc.org

NEW YORK STATE BAR ASSOCIATION
LABOR AND EMPLOYMENT LAW SECTION
NYSBA One Elk Street, Albany, NY 12207

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Thank you for your cooperation.

Phil Maier
Editor

Labor and Employment Law Journal

Editor
Philip L. Maier
PERB
55 Hanson Place
Brooklyn, NY 11217-1579
plmbox@aol.com

Section Officers

Chair
Mairead E. Connor
Law Offices of Mairead E. Connor, PLLC
440 South Warren Street, Suite 703
P.O. Box 939
Syracuse, NY 13201
mec@connorlaborlaw.com

Chair-Elect
Alfred G. Feliu
Vandenberg & Feliu LLP
60 E. 42nd Street, 51st Floor
New York, NY 10165
afeliu@vanfeliu.com

Secretary
Dennis A. Lalli
Bond, Schoeneck & King, PLLC
330 Madison Avenue, 39th Floor
New York, NY 10017
Dlalli@bsk.com

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