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Message from the Section Chair

Thirty-five years. That is how long the Labor and Employment Law Section has been in existence. The Section's founding "parents," led by Frank Nemia, envisioned a Section in which labor lawyers (there were no "employment" lawyers at the time) from all over the state, representing different constituencies and with varied practices, could congregate, challenge each other, socialize, and through their collective efforts enhance the professionalism of the labor law bar in New York.

Times change. And so did the Section. Neutrals were welcomed and became driving forces in the life of the Section. Employee representatives, led by Wayne Outten, were given a seat at the table of Section leadership and have become a growing and vibrant presence in the Section.

Times continue to change, and so must the Section. New statutes and regulations, developing legal standards, the ever-growing impact of technology on our practices and on labor and employment law generally, and the evolving needs of our members require that change come to the Section. The leadership of the Section, most particularly our recent past Chairs Don Sapir and Mairead Connor, and our full Executive Committee recognized the need to update our committee structure as well as our approach to serving the needs of our members. The net result was a painful but necessary process of adapting the Section to a new time with new demands and expectations.

How will the Section change? What differences will Section members see in the weeks and months ahead?

Many changes, large and small, will soon be apparent. Perhaps most importantly, members will see a new and vibrant committee structure. New committees have been added while some existing committees have been consolidated or eliminated to better reflect the new challenges facing labor and employment lawyers in New York. For example, a new Technology in the Workplace and Practice Committee and a new Wage and Hour Committee have been established to address these key aspects of the practice. Further, the mandate of the Employee Benefits and Compensation Committee has been expanded to include executive compensation and related issues of great import to New York employment lawyers. Subcommittees will be formed by committee chairs to help expand opportunities for members to participate in the activities of the Section and to provide new opportunities to foster and develop the future leaders of the Section. Committee chairs will more energetically involve members in committee activities through, for example, use of listservs, video and telephonic meetings, and pursuit of projects of import to our collective practices.

Junior attorneys will find the Section a more welcoming place. Our newly born New Lawyers Committee will be a place where junior attorneys can congregate and advocate on behalf of those new to the practice and Section. Perhaps most important to this effort is the Executive Committee's approval of a new Mentoring Program that will be rolled out at the Annual Meeting. The Mentoring Program will institutionalize the Section's long tradition of mentoring junior attorneys by matching them with seasoned labor and employment law practitioners, including leaders in the Section and bar, and coaching them on the ways of the Section and in general on the practice of labor and employment law in New York. The new Mentoring Program's Mission Statement accompanies this article.

Section leadership has also renewed its commitment to diversity in the broadest sense of the term. Our Diversity Fellowship Program has just admitted three superb new Diversity Fellows, Delyanne Barros, Andrez Carberry, and Danitra Spencer, who will add greatly to the perspective and life of the Section hopefully for years to come. We have also assembled a Diversity and Leadership Development Committee, consisting of Norma Meacham, Jill Rosenberg, Wendi Lazar, Alyson Mathews, Chris D'Angelo, and Tim Taylor in response to the challenge issued by NYSBA's President, Vincent Doyle. This Committee has been hard at work and just issued its aggressive diversity plan for 2011-12.

The Section is also expanding its efforts to communicate more effectively with the membership through better use of our website, the Section blog, and of technology generally. More of our committee meetings will be held via video and other more advanced technological means to make attendance and participation in committee activities more convenient for our members. We are also developing initiatives to become more active and influential in legislative and regulatory matters in the state impacting the labor and employment law field.

One thing that has not changed is our Section's respect for divergent points of view and for each other. Whether representing union or management, individuals or organizations, whether an advocate or neutral, we have traditionally strived to make everyone feel comfortable and welcome when participating in Section activities. Collegiality is not an affectation in our Section but is its lifeblood.

Be on watch for further communications via email and other means relating to the far reaching changes and new initiatives that are being implemented. Most importantly, be prepared to volunteer and contribute in any way you can to make our Section a valued part of the labor and employment law practice in New York.

If you have any suggestions, proposals, new ideas, or complaints, I am anxious to hear from you. My email is afeliu@vanfeliu.com and my office number is 212 763-6802. I look forward to seeing you at Annual Meeting on January 27, 2012.

Alfred G. Feliu

Section's New Mentoring Program

Mission Statement

The Section's Executive Committee is pleased to announce the establishment of a new Mentoring Program for our Section. Under the Program, junior attorneys who are members of the Section will be paired with seasoned Section members to help ease the junior attorneys' transition into Section activities and into the practice of labor and employment law generally. More information about the Program, including how to apply for a mentor or mentee position, will circulate shortly.

The Mentoring Program's Mission Statement follows.

The New York State Bar Association's Labor and Employment Law Section ("L&E") has a long history of mentoring lawyers new to the profession. In an effort to institutionalize and expand these efforts, L&E has established a Section-wide mentoring program for junior attorneys interested in a career in the field of labor and employment law by introducing them to the Section and by increasing their exposure to seasoned labor and employment lawyers in the L&E Section.

The focus of the L&E Section's mentoring program is to nurture lawyers new to the profession by matching junior lawyers with seasoned L&E practitioners who are also leaders in the Section. Mentors have agreed to commit their time and energies to coach and counsel mentees on Section membership and the practice of law in our area. Among the goals of the program are:

- To introduce the new lawyers to the leaders of New York's labor and employment law bar;
- To help promote collegiality among and between labor and employment law practitioners in New York and to help bridge the generational divide;
- To help introduce and integrate new lawyers more easily into our Section and its activities;
- To foster and develop the mentee's practical skills and professional judgment;
- To help promote diversity in the Section; and
- To continue and promote the highest ideals of our Section and of the labor and employment law bar in New York.

Email…. Text…. Facebook…. Lawsuit?—Legal Minefield of Cyberbullying

By Joan M. Gilbride and Brian M. Sher

Technological advances in our society, especially the increased sophistication of the internet, are all very positive developments that improve people's lives and move our economy forward. Most of us cannot imagine leading our personal and professional lives without the use of our email and the internet. Face to face interactions are being rapidly replaced by emails, texts, and online social groups. Unfortunately, the individuals that seek to harass, threaten, and intimidate others can also use technology to their advantage.

Although seemingly impersonal and distant, cyberbullying and other forms of online harassment can hurt the recipient's feelings, destroy lives (as is evident in the recent case involving a Rutgers University student), and, in some cases, result in expensive lawsuits. Cyberbullying is possible among all groups, from children and young adults in educational institutions to sophisticated professionals at large companies. In this article, we will discuss several recent cases on cyberbullying and offer our thoughts on this evolving area of law.

What Is Cyberbullying?

Cyberbullying occurs when one person uses technology at his or her disposal to threaten another person. According to the New York State Department of Criminal Justice Services, it can be defined as "the repeated use of information, technology, including e-mail, instant message, blogs, chat rooms, pagers, cell phones and gaming systems to deliberately harass, threaten or intimidate others."[1] Variations of cyberbullying include offensive and sexually charged messages to the recipient, cyberstalking, sharing intimate information about the victim with others, monitoring the victim's online activities, and even infecting the victim's computer with a virus. Although much has been written about cyberbullying, caselaw involving cyberbullying is new and constantly evolving.

Cyberbullying in Educational Settings

We all remember a bully in our schoolyard. Unfortunately, bullying is no longer limited to the kids' lunchrooms and gym locker rooms. Bullying is now online. Just how different is traditional bullying from cyberbullying? Unfortunately, cyberbullying doesn't stop when the school bell rings, and it need not occur on school grounds. Technology and the internet enables harassers to instantaneously communicate with an unlimited number of people; it can be anonymous and hard to trace.

In *S.S. v. Hastings-on-Hudson Unified School District* matter,[2] [3] Plaintiff S.S. was a freshman in the Hastings High School during the 2004-2005 school year. S.S. earned excellent grades and was an honor-roll student throughout much of her tenure at Hastings. The District provided students with their own email accounts and maintained a comprehensive computer network on campus. The District also maintained an internet use policy, which strictly prohibited an improper use of the District's network. Between March 17 and March 25, 2005, Plaintiff S.S. received three short emails, all of which were sent from another student's "M.X." email account. (The "Three Emails.") The Three E-mails were extremely sexually explicit, referred to the victim's various body parts, mocked Plaintiff's weight, and were perceived by Plaintiff to be physically threatening.

S.S. brought the Three Emails to the attention of the District's administrators. As a result, the administration commenced an immediate investigation into the origin of the Three Emails. Despite being questioned by the administrators about the Three Emails, M.X. flatly denied sending them, repeatedly claiming that someone must have stolen his password and sent messages to S.S. from his email account without his knowledge or approval. S.S. *did not receive* any further emails from M.X.'s account after *March 25, 2005*, eight days after S.S's receipt of the first email. The District also changed M.X.'s password. Since M.X. denied sending the emails, the District continued its investigation—even after M.X.'s password was changed—in the hopes of tracing the Three Emails definitively to the sender, whether M.X. or someone else. This investigation was ongoing from March until the end of the school year in June of 2005. By June 2005, the District was able to conclusively determine that the Three Emails did in fact originate from M.X.'s school email account and[4] that they were most likely sent remotely, from a location outside of the school. However, due to its technological limitations, the District was not able to conclusively establish the identity of the sender.[5] Nevertheless, S.S and her parents sued the District for deprivation of S.S.'s educational opportunities under Title IX. Title IX of the Education Amendments of 1972 states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The Supreme Court in *Davis v. Monroe Cty Bd. Of Educ.*,[6] held that educational institutions may, in certain circumstances, be liable to student victims of harassment and bullying.

In the *S.S. v. Hastings-on-Hudson* matter, Plaintiffs asserted that due to these three incidents of harassment, the student became afraid for her physical safety, was forced to stop socializing with other teens, stopped getting good grades, and was eventually forced to leave the school.

Since this was a Title IX case, Plaintiffs had a burden to establish that (1) the perceived incidents of harassment were severe and pervasive; and (2) that the educational institution, the District, in this case, was deliberately indifferent and did not conduct a sufficient investigation.[7] The District's position was that (1) the three offensive emails were not severe and pervasive enough to constitute an actionable claim under Title IX; and (2) the District was not deliberately indifferent to the Plaintiff's complaint and conducted a thorough, albeit unsuccessful investigation. The District also presented evidence that the Plaintiff did not sustain any actionable damages as result of these three short emails. Plaintiff was able to successfully finish the school year and there was no evidence of decreased attendance or decrease in grades.

On the District's motion for summary judgment, the District Court found that the Three Emails, no matter how offensive, were simply not severe and pervasive enough to constitute actionable harassment. The Court held that no reasonable jury can find that three short offensive emails received over a ten-day period constituted harassment that deprived Plaintiff of her educational opportunities. Nevertheless, the District Court refused to rule, as a matter of law, that the District was not deliberately indifferent to Plaintiff's complaints and refused to hold that the District's investigation satisfied its obligations under Title IX.

On appeal, the Second Circuit reiterated the standard that was first set out by the Supreme Court in *Davis*. The *Davis* court held that in order to prevail on a claim against an educational institution under Title IX, plaintiffs must show that (1) the school acted with "deliberate indifference" to sexual harassment (2) and that the harassment was so "severe, pervasive, and objectively offensive that it effectively barred…access to an educational opportunity or benefit."[8] The Circuit Court went to hold that although each case is to be evaluated on its own facts and there are no clear and established boundaries for what constitutes sufficiently severe and pervasive harassment, the Three Emails received over a single ten-day period with no negative effect on Plaintiff's educational life, did not "rise to the level of actionable sexual harassment under federal law."[9]

In other words, the Second Circuit held that the length, content, and effect of cyberbullying on the victim's life will determine the outcome of the case brought by the victim of school online harassment. Not every email or text, no matter how offensive, can be a basis for federal claims.

Another fairly recent cyberbullying case to consider is *Brodsky v. Trumbull Board of Educ.*,[10] Plaintiffs Maria Brodsky and her minor child, S.B., brought suit against Defendants for depriving Plaintiff of educational opportunities under Title IX, claiming that the Defendants "tolerated and encouraged a pattern of sexual misconduct and gender discrimination" against S.B. Plaintiff-S.B. was an eighth grade student at Madison Middle School over the course of the 2005–2006 school year. She was the victim of harassment and bullying by her peers in and outside of school. A few incidents occurred through online instant messaging between S.B. and other students. Plaintiff was called names and comments were made with respect to her sexual orientation. Unlike in the *S.S. v. Hastings-on-Hudson* matter discussed above, this case involved numerous instances of online and offline name calling and harassment. The issue on summary judgment was whether Plaintiffs have presented sufficient evidence of each element of Title IX claim to survive summary judgment.[11]

The court found that "the evidence shows that while S.B suffered numerous instances of rude and unkind treatment by various peers, the alleged behavior was not sufficiently pervasive or severe from an objective standpoint so as to give rise under a claim under Title IX."[12] It appears that the Court based its decision on the fact that the victim and the harasser knew each other and had a "history" of insulting each other. The Court noted that federal law is not "intended and does not function to protect students from bullying generally…or to provide them recourse for mistreatment not based on sex."[13] Additionally, the court found no evidence that Plaintiff was deprived of any educational opportunities.

What do these cases teach us? Educational institutions should be mindful of two elements of online harassment and should react with due speed to all legitimate complaints. Of course, there is a difference between a stray email and string of offensive emails intent on personally attacking the recipient. All incidents, however, must be thoroughly investigated. Title IX liability for an educational institution arises only if, in addition to severity and pervasiveness of online harassment, the institution failed to take reasonable steps to investigate harassment. Of course, reasonableness is a very subjective standard and, certainly, some alleged victims would be dissatisfied with the investigation no matter how thorough or prompt. Nonetheless, the institution should follow these basic steps in order to assist the victim and protect itself from costly suits: (1) commence an investigation immediately upon receipt of an oral or written complaint; (2) take all threats to the recipient, no matter how implausible, seriously; (3) preserve all evidence; (4) work with internet technology specialists inside and, if needed, outside of the institution to trace the offensive emails or messages to the sender; (5) take appropriate actions against the alleged harasser. The institution must also develop an effective set of written policies dealing with online harassment and enforce its policies fairly and consistently.

Defamation and Emotional Distress Claims in Cyberbullying Actions

Although cyberbullying is not an independent tort, the victims of cyberbullying can also pursue causes of action for intentional infliction of emotional distress, or defamation. Certainly not an easy burden to meet, an

intentional infliction of emotional distress occurs when the harasser's conduct is so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[14] There are additional elements that must be met—the victim must prove intent to cause or knowledge of substantial probability of causing severe emotional distress. Additionally, the victim must be able to establish a connection between the harassing conduct and the injury sustained, whether that injury is psychological, financial, or even physical. Of course, Plaintiff must also be able to prove that he or she suffered from severe emotional distress.

If the victim of online harassment chooses to proceed with a cause of action for defamation, plaintiff is required to show that: (1) defendant made an oral or written false and defamatory statement; (2) regarding the plaintiff; (3) that is published to others by the defendant; and (4) that there is resultant injury or *per se* harm. It is for the Court to decide in the first instance whether the writings and/or statements are susceptible to a particular defamatory meaning which plaintiff ascribes to them.[15]

In a recent case of *Finkel v. Dauber*,[16] the Supreme Court in Nassau County found that statements posted on a secret Facebook group created by the Defendants (five of the Plaintiff's fellow school mates) did not amount to defamation. The Facebook group, called "Ninety Cents Short of a Dollar" (the "Group"), was a private Facebook group with membership restricted to invitees only.[17]

Although the Plaintiff's name was never mentioned, the Plaintiff alleges that the references to the "11th cent" throughout the Group's postings was about Plaintiff, because of an edited photograph on the site of Plaintiff, seemingly resembling a "devil," cross referenced with a post commenting that the 11th cent turned into a devil.[18] The postings by the Group's members basically stated that "the Plaintiff contracted AIDS by having sex with a horse or a baboon or that she contracted AIDS from a male prostitute who also gave her crabs and syphilis, or that having contracted sexually transmitted diseases in such manner she morphed into the devil."[19] Finding that "[t]he entire context and tone of the posts constitute evidence of adolescent insecurities and indulgence, and a vulgar attempt at humor," the court dismissed the defamation claim. The court stated that "Determining whether a given statement expresses fact or opinion is a question of law for the court and one which must be answered "on the basis of what the average person hearing or reading the communication would take it to mean." It went on to hold that the online statements directed against Plaintiff, "taken together, can only be read as puerile attempts by adolescents to outdo each other" and not as statements of fact.[20]

Additionally, the Plaintiff's second cause of action for negligent supervision against the harasser's parents failed because the parents could not be held liable for "negligent supervision of a child, absent an allegation that the parent entrusted the child with a dangerous instrument which caused harm to a third party."[21] The court declined to declare a computer a dangerous instrument, as it "would create an exception that would engulf the rule against parental liability."[22] Finally, the court rejected the Plaintiff's claim that the posts constitute cyberbullying, and stated that "the Courts of New York do not recognize cyber or internet bullying as a cognizable tort action.[23]

As this case illustrates, trial courts still view cyberbullying cases with a dose of skepticism and Plaintiffs certainly have a high burden to meet in proving defamation or emotional distress as result of cyberbullying.

Conclusion

With the proliferation of social networks and other online communication programs, we are witnessing an increase in federal and state cases alleging cyberbullying. Although some federal laws already deal with online harassment (such as Title IX in schools), it appears that the two recovery theories most often used by plaintiffs are defamation and intentional infliction of emotional distress.

Endnotes

1. http://criminaljustice.state.ny.us/missing/i_safety/cyberbullying.htm.
2. 2010 WL 1407359 (2d Cir.).
3. Our Firm successfully represented the defendants in this matter, both at the trial court level and before the Second Circuit.
4. *Finkel v. Dauber*, 906 N.Y.S.2d 697 (N.Y. Sup., Nassau County 2010).
5. *See id.*
6. 526 U.S. 629 (1999).
7. *K.M. ex. Rel. D.G. v. Hyde Park Cent. School Dist.*, 381 F. Supp. 2d 343, 360 (S.D.N.Y. 2005).
8. *Id.* at 232.
9. *Id.* at 234.
10. 2009 WL 230708 (D. Conn.).
11. *Id.* at *6
12. *Id.*
13. *Id.* at 7.
14. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293 (1983).
15. *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235 (1991); *Chalpin v. Amordian Press, Inc.*, 128 A.D.2d 81, 515 N.Y.S.2d 434 (1987).
16. 906 N.Y.S.2d 697 (Sup. Ct., Nassau County 2010).
17. *Id.* at 700.
18. *Id.* at 700–01.
19. *Id.* at 702.
20. *Id.*
21. *Id.* at 702.
22. *Id.*
23. *Id.* at 702–03.

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The National Labor Relations Act Adapts to Social Media: The First Chapter

By Barnett L. Horowitz

The world as we at the NLRB knew it changed irrevocably on November 2, 2010 with the issuance of an Agency press release headlined as follows:

Complaint alleges Connecticut company illegally fired employee over Facebook comments

Who anticipated the torrential response to follow as this "Rip Van Winkle of administrative agencies"[1] apparently was trying to awake and respond to the technological changes occurring at work place and in the society beyond. I do not believe in my 36 years with the agency any Board related story generated as much reaction and it went far beyond the mainstream media. The story of this paramedic from New Haven who was fired at least in part for her Facebook posting also went viral in the blogosphere. Perhaps my favorite comment was from gawker.com "where today's gossip is tomorrow's news," a site that on November 9, 2010 carried the following story:

> **FEDERAL GOVERNMENT ENDORSES OVERSHARING**
>
> The Feds are championing an employee who cussed out her supervisor on Facebook and called him crazy, saying such trash talk is protected speech. It is a big win for the Internet's oversharing class….There is no word on what the NLRB thinks of overshares about drinking binges, sexual fetishes, regrettable hookups or other personal hygiene challenges. But we would just love it if you sent them some examples to ponder!

The lay press, using the term in the loosest sense, perhaps could be excused for missing the point when it came to protected, concerted activity. Even the *New York Times*, however, succumbed to the hype writing a story headlined "Labor Board says Rights Apply on Net"[2] as if it was news that an employee's complaints about her supervisor as endorsed by co-workers were protected. The *Times*' lead only added to the fever when the writer, Steven Greenhouse, characterized this as a "groundbreaking case" in the view of labor officials and lawyers. I am not sure what labor officials he was referring to as the principal one he quotes, Lafe Solomon, the Acting General Counsel,[3] called it "a fairly straightforward case."

With the benefit of almost a year of hindsight perhaps it is time to reflect on whether the Connecticut Facebook case was something routine or had the NLRB, , in the words of one major law firm's blog, posted a "frightening message" here.[4] It may be premature to fully answer the question as not a single social media unfair labor practice case involving any substantive matter of law has reached the Board.[5] Clearly, however, there has been a direction taken by the Acting General Counsel in these cases, with a plethora of Advice decisions having issued and thanks to his memorandum OM 11-74 (August 18, 2011),[6] a summary of many of these decisions is all in one place. This has facilitated reflection on his view as to how Section 7 rights transfer to cyberspace and to what extent, if any, there are special characteristics of the social media that have to be addressed. In this article reflect I will on the three major issues that have emerged in these cases; (1) what is protected, concerted activity in the context of social media, principally Facebook; (2) where is the line when otherwise protected activity becomes unprotected due to its opprobrious nature; and (3) what are the ramifications for social media policy.

The Connecticut Facebook case, technically *American Medical Response of Connecticut, Inc.*, 34-CA-12576, (Advice Memorandum, October 5, 2010),[7] hereafter *AMR*, has elements of all three of the major social media concepts. The facts were widely publicized but let the Acting General Counsel summarize:

> When asked by her supervisor to prepare an incident report concerning a customer complaint about her work, the employee asked for a union representative while she prepared the report. She did not receive any union representation. Later that day from her home computer, the employee posted a negative remark about the supervisor on her personal Facebook page, which drew supportive responses from her coworkers, and led to further negative comments about the supervisor from the employee. The employee was suspended and later terminated for her Facebook postings and because such postings violated the Employer's internet policies.
>
> The Employer's employee handbook contained a blogging and internet posting policy. It prohibited employees from making disparaging remarks when discussing the company or supervisors, and from depicting the company in any

> media, including but not limited to the internet, without company permission.[8]

Germane to the story was that the "negative remark" made by the employee in the post included calling her supervisor a "scumbag," "dick" and a "17," the latter being an in-house term for a psychiatric patient. The case gave Advice the opportunity to address whether such conduct was inherently protected (it was); whether the unflattering characterizations warranted a loss of the Act's protection (they did not); and whether the social media policy was overly broad (it was). I will get into more detail as to these findings subsequently but here is what fascinates concerning *AMR*. The fact is in any given year there are myriad cases at the Board level defining protected activity and / or what constitutes overly intrusive workplace rules. Certainly, as to cases involving opprobrious conduct look no further than *Plaza Auto Center, Inc*., 355 NLRB No. 85 (2010), where the language in question, while ultimately found protected by the Board majority, makes that used by the *AMR* employee seem prudish by comparison. Yet it was the Connecticut Facebook case that caught the imagination of the public, including the practitioner class, in an unprecedented way. Why?

Setting aside sociological explanations for Facebook's allure let me focus on a more salient reason, at least from a labor law point of view. Clearly there was a shock factor at work in that most people were simply unfamiliar with the rights at issue in *AMR*. As has been observed "the scope of coverage of Section 7 and its application to nonunion employees may have been one of the best kept secrets of labor law."[9] Granted, the employees at *AMR* were represented by a Union but that was a fact largely overlooked in the general discussions.[10] In fact, there seemed to be a collective disbelief that this right existed at all, let alone extended to social media musings. A related point made by Professor Jeffrey Hirsh, blog editor, on *Workplace Prof Blog* at the time *AMR* issued was that "what might be particularly relevant about this case is that it will bring the NLRA to the attention of a lot of people who were unaware of its existence in non-union settings."[11] Such appears to be the case given the volume of social media cases since *AMR*. The word has ostensibly spread that Section 7 rights go beyond the organized workplace and this is good opportunity to segue into an examination of the contours of these rights as presently defined by the Acting General Counsel.

Protected, Concerted Activity

Obviously the threshold question for *AMR* and its progeny is whether the underlying behavior qualified as protected, concerted activity.[12] *AMR*, interestingly, was somewhat of a sport in this grouping as the employee was protesting in part the failure of her employer to grant her union representation in an investigatory interview.[13] While Advice found her discussions with coworkers on her Facebook site about her complaints over supervision to be protected, to the extent that the she was complaining about the Employer' s unlawful failure to permit the *Weingarten* rights she was entitled to as a union member makes unnecessary the need to come up with a separate protected, concerted theory of a violation. There are, however, several purer examples as to the core matter of finding protected, concerted activity that are perhaps more instructive.

Hispanics United of Buffalo, Inc., a case filed in the Buffalo office, has the distinction of being the first Facebook case to make it to a hearing before an administrative law judge. Complaint had been authorized by the Division of Advice which addressed the preliminary question as to whether a Facebook posting was both concerted and protected. The case involved, according to the NLRB press release issued after Advice found merit to the charge,[14] "an employee who in advance of a meeting with management about working conditions posted to her Facebook page a coworker's allegation that employees did not do enough to help the organization's clients." The posting generated numerous responses from co-workers speaking out in their defense. An excerpt from the page as entered in the trial as an exhibit will add flavor:

Worker #1	Lydia Cruz feels that we don't help our clients enough at HUB I about had it! My fellow coworkers what do u feel?
Worker #2	What the f…Try doing my job I have 5 programs
Worker #3	What the hell, we don't have a life as is. What else can we do???
Worker #4	Tell her to come and do my f…ing job n c if I don't do enough, that is just dum

The Employer subsequently fired all of the above employees, as well as a fifth employee who also posted a similar comment, claiming their remarks constituted harassment of Lydia Cruz. It was Advice's judgment that this was "a textbook example of concerted activity, even though it transpired on a social media platform."[15] They viewed it as an appeal for assistance and support by Worker #1, an appeal that was clearly heeded. Further, there was no question the concerns of these employees implicated working conditions. That the internet served as the medium for the discussion was not of consequence.[16]

In a decision issued by Judge Arthur Amchan on September 2, 2011 (JD-55-11) he found that the employees were engaged in protected, concerted activity as the Facebook "conversation" was a discussion of matters affecting employment amongst themselves especially where they had legitimate concerns that the complaining employee might take her criticisms to management.[17] As the conversations were clearly protected, the discipline of employees for exercising their rights was unlawful, even without express evidence that the discussions had

an object of initiating or inducing group actions.[18] For Judge Amchan, like the Acting General Counsel this appeared to be a fairly routine call, the social media aspect notwithstanding.

In *Knauz BMW*, 13-CA-46452,[19] the Charging Party was a car salesmen who was miffed when his Employer hosted an event to promote a new BMW model accompanied by rather déclassé snack food including hot dogs and cookies from a warehouse club. The Charging Party was joined by other employees in his concern that the food was not projecting the right image with which to sell an upscale vehicle and would negatively affect their sales and commissions. The Charging Party subsequently posted on his Facebook page a picture of the snack food page along with some rather critical observations of the event. The salesmen was subsequently fired for the posting.[20]

In first evaluating the concerted aspect presented here, Advice acknowledged that the posting was solely that of the Charging Party and it appears no other employees commented on line. It then referenced *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Myers II)*, 281 NLRB 882 (1986), where the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co.*, 330 F.2d 683, 685 (3d Cir. 1964).

The *Meyers* test was met in this car dealership case where the Charging Party was "vocalizing the sentiments of his coworkers and continuing the course of concerted activity that began when the salespeople raised their concerns at a staff meeting."[21] As for whether the object of this protest was protected Advice drew the nexus between the snacks, the Employer's image and the employee's commission, the latter clearly falling within wages, hours and working conditions.

The issue of Facebook as protected, concerted issue was also joined in a third case where complaint was authorized. This case involved a sports bar and tavern[22] where several employees posted statements on a Facebook page expressing dissatisfaction with the fact they owed state income taxes apparently due to the Employer's accounting shortcomings. Two of the employees were terminated for the posting. Again, Advice had no difficulty in finding the activity concerted where employees were voicing a shared concern and where at least one employee had previously had requested the Employer to deal with this at a management meeting. The concerns, moreover, were wage related and nothing is more protected than a wage related gripe. The protected, concerted finding here was, as in the cases above, reached without any strenuous exertion, as the facts fit well within traditional concepts.

The Advice memoranda have not all gone in one direction on the issue of social media and protected, concerted activity. Brief summaries of the "no-go" cases that are discussed on OM 11-74, all of which can be found at www.nlrb.gov, are set forth below:[23]

> *Lee Enterprises, Inc. d/b/a Arizona Daily Star*, 28-CA-23267 (Advice Memorandum, April 21, 2011).[24] This Employer encouraged employees to use Twitter and the Charging Party, in fact, opened an account and linked it to his Facebook page. However, his tweets were clearly inappropriate, offensive and had nothing remotely to do with protected, concerted activity as found by Advice. The one interesting issue in the case pertained to the Charging Party's claim that he was terminated pursuant to an overbroad rule where the newspaper's managing editor told him at some point told him not to air grievances or comment about the Employer in any public forum. While acknowledging that the admonition could be interpreted as crimping Section 7 rights, Advice found that it was issued in the context of discipline to this employee alone and was not a rule, per se. Further, discipline pursuant to even a proscribed rule is only unlawful where the underlying conduct involved Section 7 activity.[25]
>
> *JT's Porch Saloon & Eatery, Ltd.*, 13-CA-46699 (Advice Memorandum, July 7, 2011).[26] Charging Party was a bartender who complained to a fellow bartender about waitresses not sharing tips and the second bartender agreed that "it sucked." The Charging Party then posted a series of complaints on his Facebook page about the tips, the absence of a raise and called the customers rednecks and hoped "they choked on glass as they drove home drunk." He did not discuss the posting with co-workers nor did any comment on it. The bartender was later fired for the posting and Advice easily concluded there was nothing concerted about his activity and how it was neither an attempt to initiate group action nor was it logical outgrowth of the complaint to the fellow bartender.

Rural/Metro, 25-CA-31802 (Advice Memorandum June 29, 2011).[27] After Senator Richard Lugar's announced on his Facebook "wall" that four Indiana fire departments were getting federal grants the Charging Party, a dispatcher for the Employer, and medical transportation service posted some comments on his site. After noting that her husband was employed at Rural Metro as an EMT, she remarked that her Employer had contracts with several fire departments to provide EMS as they were the cheapest in town because they paid their employees $2 less than the national average. She noted that they both made less than $10 an hour and how her Employer did not have enough trucks. She was subsequently terminated for disparaging the Employer in a public posting. In making its finding Advice noted that the Charging Party had not discussed the posting with any other employee including her spouse and there was no evidence that employees had any group meetings or made any attempt to initiate group action. Advice characterized her action as one where she was simply trying to make Senator Lugar aware of EMS related issues and, in view of all of the foregoing, it was not concerted activity.

Martin House, 34-CA-12950 (Advice Memorandum July 19, 2011).[28] In this case at a residential facility for the homeless, the Charging Party, a recovery specialist, put on his Facebook page "spooky overnight, alone in mental institution, btw not a client not yet anyway." The Charging Party then referenced a client who is "cracking up at my post. I don't know if she is laughing with me or at me or at her voices…" No coworkers commented but a client saw the page and turned in the Charging Party who was then fired. Advice authorized dismissal where the Charging Party was not seeking to prepare for or induce group action and there was no mention of terms and conditions of employment.

Wal-Mart, 17-CA-25030 (Advice Memorandum, July 19, 2011).[29] Charging Party posted the phrase "Wuck Falmart" on his Facebook page after an interaction with the new assistant store manager and complained about the "tyranny" in the store. There was little employee reaction and the employee received a one day suspension for this posting. Advice concluded there was no concert and that the comments were the expression of an individual gripe. There was no evidence that he sought to induce or initiate group action; rather the posting only expressed frustration over his individual dispute with Assistant manager over some misplaced items.

When looking at the Advice cases to date it is clear there has been no shift as to how protected, concerted activity is defined. In, for example, *AMR* or *Knauz BMW* or *Hispanics United* there are no extra points awarded or subtracted simply because the activity is via social media. As noted above, in the *New York Times* article Acting General Counsel Solomon characterized the AMR case as "straightforward" and it did not matter to him whether the venue was Facebook or the proverbial water cooler. To paraphrase Shakespeare, protected, concerted activity by any other name smells as sweet be it via a tweet or a face to face interaction. If there is any expansion of workplace rights here it is not apparent to me from the cases to date.

Applying traditional concepts has been the motif whether in terms of finding violations or authorizing dismissals. As reflected above there has been a string of cases where, largely for reasons of absence of concert, there was a determination that no protected Section 7 activity had taken place. Some observers have suggested these "no-go" cases involve a "retreat"[30] or mid course correction by the Acting General Counsel. I disagree. None of these cases, as based upon reported facts, were particularly close and all were subject to the same *Myers* principles as the "go" cases. There was nothing incongruent about the rationale applied in all these matters. Again, the takeaway is that whatever the distinguishing characteristics of Facebook and its social media cousins, they are not appearing to have any impact on how this agency defines protected, concerted activity.

Loss of Protection

The cases where an underlying finding of protected, concerted, activity were made also have entailed the attendant question of whether the protection was lost due the offensive nature of the conduct. This will almost certainly be a recurring theme if one believes that Facebook has the tendency to reduce inhibitions leading to posts that push the bounds of modern day etiquette.

To understand this aspect of the social media cases the Board uses two guidelines for defining statutorily "inappropriate" behavior: one for conduct directed to one's Employer or coworkers, and the other for conduct directed at third parties. The first set of guidelines is extracted from *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979) where the Board set forth four factors to be carefully balanced when considering whether conduct is so

opprobrious as to the lose the protection of the Act. These factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

In assessing conduct directed at third parties such as complaints made public, relying on the Supreme Court decision in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), the Board has held that "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection."[31]

In *AMR* the Board applied the *Atlantic Steel* standards and found no basis to disqualify the discriminatee's protected activity. The posting obviously caused no workplace interruption, the subject matter was clearly protected and the name-calling was well within permissible limits as established by case law.[32] Further, the posting was "provoked" by the Employer's unfair labor practice, i.e., the refusal to grant Weingarten rights.

By the time *Knauz BMW* issued the Acting General Counsel's position on loss of protection appeared to slightly evolve. He now applied both the *Atlantic Steel* and the *Jefferson Standard* criteria, implicitly acknowledging the that Facebook postings can be internally accessible to coworkers as well as externally available to third parties. Under *Atlantic Steel* this posting was clearly about a protected subject and nature of the outburst was not so offensive as to lose the Act's protection. Interestingly the Acting General Counsel took a pass on the place of discussion simply stating that it was unnecessary to rule on it where even without unfair labor practice provocation , the conduct clearly retained the Act's protection.[33] As for *Jefferson Standard* the posting neither disparaged the product nor was disloyal and there was no basis to remove the Act's protection.[34]

In *Hispanics United* Advice applied *Atlantic Steel* and found the comments on Facebook not so opprobrious as to lose the Act's protection. Judge Amchan agreed that the alleged discriminatees did not engage in conduct which forfeited the protection of the Act based on an *Atlantic Steel* analysis. He also rejected, without a detailed discussion, the Employer's argument that these employees had engaged in harassment of the co-worker who had criticized them as the Judge simply stated there was no evidence of it.

As with the underlying judgment of whether the conduct is in the first instance protected, the Acting General Counsel, and now Judge Amchan, have addressed the concomitant question as to loss of protection through traditional principles, be it *Atlantic Steel* or *Jefferson Standard*. As the body of law gets further developed almost certainly this is one area where Employers will argue that the nature of the virtual world merits special consideration. Particularly with low privacy settings all of a sudden one's musings become open to a very wide audience. One employment lawyer on his firm's blog asked the question in reference to *Knauz BMW* "At what point does a comment by a salesperson, a person hired to espouse the positive nature of the service and product the customer wil receive for his or her patronage, become unprotected because it was blasted around the world?"[35] Another on his firm's blog commented in the wake of *AMR* that "it defies common sense to bash one's supervisor and employer in a semi-public arena where the evidence may exist forever… Indeed, there are an estimated 500 million active users of Facebook, the vast majority of which would not be co-workers of the posters."[36]

The Agency has, to date, not gone beyond the "water cooler" parallel in looking at the opprobrious or disloyal issue in the Facebook context. As these cases go up the adjudicatory chain this view is bound to be challenged as I have to believe Employers will make the case that the days of the water cooler are over and that *Atlantic Steel* and *Jefferson Standard* must make room for social media accommodations.

Social Media Policy

It is no surprise the explosive rise of social media has led employers for multiple reasons, perhaps most notably in the interest of protecting reputation, to craft policies governing the use of those who blog, tweet and / or post to Facebook.[37] It is also no surprise that as these policies by definition limit speech concerning workplace issues Section 7 questions are going to be implicated in many instances. There have been no Board cases expressly addressing the subject though there are several Advice decisions to draw on in gaining some perspective on when the Section 7 rights have been infringed and I will treat these below.

Before getting into any analysis of Advice cases, the discussion has to be placed within the framework of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) as to the Board's policies on work rules in general. In *Lutheran Heritage Village*, the Board addressed Employer rules prohibiting "abusive and profane language," "harassment" and "verbal, mental and physical abuse." Taking their cue from *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F. 3d 52 (DC Cir. 1999),[38] the Board majority, consisting of members Battista, Meisburg and Schaumber, developed a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it will violate the Act only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In determining how an

employee would reasonably construe the rule, particular phrases should not be read in isolation, but rather, considered in context.

In *Lutheran Heritage Village* the majority concluded that with regard to the rules in question as there was no explicit restriction on Section 7 activity and as only criteria (1) was otherwise applicable, "reasonable employees would infer that that the Respondent's purpose in promulgating the challenged rules was to ensure a "civil and decent" workplace, not to restrict Section 7 activity."[39] In dissent members Liebman and Walsh without expressly disagreeing with the construct took issue with the conclusion given their belief that these rules could be subject to a reasonable interpretation that would chill protected activity. Interestingly, the Board, despite its changing composition and predictions to the contrary,[40] has not moved away from the *Lutheran Heritage Village* analysis.[41] Perhaps it is because the "reasonably construe" principal is elastic enough to fit the needs of whoever holds the majority. Regardless the reason, it is *Lutheran Heritage Village* that establishes the prism through which social media policy is analytically filtered.

The first social media case to emerge from the Advice pipeline was *Sears Holdings*, 18-CA-19081 (Advice Memorandum dated December 4, 2009). This Employer, the parent of Sears and Kmart, had recently issued a "Social Media Policy" regarding blogs, social networks, and other types of on-line media. The policy stated that the following subjects may not be addressed in any form of social media by any associate:

- Company confidential or proprietary information
- Confidential or proprietary information of clients, partners, vendors, and suppliers
- Embargoed information such as launch dates, release dates, and pending reorganizations
- Company intellectual property such as drawings, designs, software, ideas and innovation
- **Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects** (emphasis added)
- Explicit sexual references
- Reference to illegal drugs
- Obscenity or profanity
- Disparagement of any race, religion, gender, sexual orientation, disability or national origin

Advice addressed only the anti-disparagement proscription and reached the conclusion that, as suggested by *Lutheran Heritage Village*, the rule's context was the key to the reasonableness of a particular construction. It found that here the disparagement rule was part of the list including plainly egregious conduct such as no explicit sexual references or disparagement of race or religion. The entire rule made clear it was not directed to Sec 7 behavior and no employee could reasonably conclude otherwise.

Sears Holding was a clean case where only the allegedly offending rule was at issue before Advice. The extent to which it could be relied on, however, to draw lessons quickly became questionable with the issuance of *AMR* in October 2010. Earlier I focused on protected, concerted issues underlying the case leading to the discharge of the protagonist in that matter. In the firestorm of publicity over what to many was a stunning revelation, i.e. that an employee may have the right to disparage his or her boss via Facebook, the fact that Advice also addressed social media policy in this case drew less attention. Now under a new general counsel, Lafe Solomon, Advice had a different take on this question than the one expressed in *Sears Holding* less than a year before.

In *AMR* the Employer had a social media policy with two sections alleged as unlawful:

> Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;
>
> Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

Advice had no trouble concluding that proscription under the first bullet, the anti-depiction language unduly restricted Section 7 rights

> …because it would prohibit an employee from engaging in protected activity; for example, an employee would be prohibited from posting a picture of employees carrying a picket sign depicting the Company's name, or wearing a t-shirt portraying the company's logo in connection with a protest involving the terms and conditions of employment.[42]

As for the anti-disparagement language the Acting General Counsel cited *University Medical Center*, 335 NLRB 1318, 1320-1322 where the Board found that a similar rule prohibiting "disrespectful conduct" towards others violated Section 8(a)(1). The Board apparently noted that the rule in that case was ambiguous because

it contained no limiting language or context that would clarify to employees that the rule did not restrict Section 7 rights. Finding no "limiting language" in *AMR* Advice likewise found the subject clause unlawful.[43] It did bootstrap the anti-disparagement language to the anti-depiction language noting that "Further, the rule appears in a list that includes the unlawful prohibition on depicting the Employer's logo or equipment, such that employees would reasonably construe the rule as also prohibiting protected activity."[44] It is not clear whether independent of the anti-depiction language Advice would have found the language on disparagement unlawful though that would appear to be the suggestion.

Significantly, there was no mention in the *AMR* decision of *Sears Holding* despite the fact that the disparagement clauses found in the social media policies are not that dissimilar. Of course, *AMR* was a more complex case where not only was there the second offensive rule but the fact an employee was discharged in breach of the policy. Nevertheless, it did seem that a mid-course correction was in the works, and the definition of reasonable construction was getting stretched.

Starting in the spring of 2011 there have been a number of social media policy cases issued by Advice. Several involve determinations to issue complaints so they have not been released to public as of my press time. However, one of the "go" cases involving a Twitter related reprimand was discussed in a Steven Greenhouse authored *New York Times* article.[45] The article referenced a reporter at Thomson Reuters who was reprimanded for being in breach of a policy where employees were "not supposed to say something that would damage the reputation of Reuters news or Thomson Reuters." The reporter had been engaging in what was found to be protected activity and the article suggested that complaint was authorized over the Employer's behavior. Without getting too deep into the underlying Advice rationale, it appears that a proscription on damaging an Employer's reputation, without qualifying language, is just too broad to pass muster particularly where the policy was applied in a manner that curtailed protected activity.

Other cases where complaint has been authorized[46] involved policies where the proscription extended to "no inappropriate discussions," "inappropriate postings of negative comments about the office," "no references to personal information," "can't disregard privacy of any person or entity," and "no posts which constitute embarrassment or harassment of Employer or any staff member," and "do not talk about the Company's business on your personal account." Additionally, several of these cases made clear that an Employer could not seek refuge in a "savings clause" nullifying the policy if otherwise precluded by law. This is "because it can be reasonably foreseen that employees would not know what conduct is protected by the NLRA, and rather than take the trouble to get reliable information, would elect to refrain from engaging in conduct that is in fact protected by the Act." *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979).

There are a few "no go" cases where social media policy issues arose though the grounds for not finding a violation were somewhat narrow. As discussed, in *Arizona Daily Star*, supra, the Employer told the Charging Party to stop making inappropriate comments and airing grievances about the Employer in public or using social media to make anti-Employer comments. These were not, however, promulgated rules but rather statements made to one person in the context of discipline for unprotected activity. See also *Sagepoint Financial, Inc.*, supra.

Sears Holding, notwithstanding, it appear that social media policy with rules that are arguably ambiguous may be at risk especially without limiting or clarifying language to the effect that the rules are not intended to restrict Section 7 rights. They are certainly at risk if an employee engaged in protected, concerted activity is discharged in conjunction with an ambiguous aspect of the policy.

Conclusion

Despite the outsized interest in these matters thus far the rules of the game appear unchanged as to how the NLRB will treat social media cases. Implicitly, the Acting General Counsel, as endorsed in at least one case thus far by an Administrative Law Judge, is saying these internet based communications should be evaluated by the same standards as traditional work place speech. I suspect that when cases start reaching the Board the issue of social media "exceptionalism" will have to be addressed more directly. Former Board member John Raudabaugh perhaps scores a point when he states that:

> Interestingly, the NLRB has yet to explain why it apparently considers modern day internet postings analogous to the old-fashioned "water cooler" conversations to justify applying older workplace principles to a very different era, at best, the "virtual" workplace.[47]

The fact is that the water cooler has seen better days. In a case addressing a different aspect of the electronic workplace, dissenting Board members Liebman and Walsh, noted that "discussion by the water cooler is in the process of being replaced by discussion via e-mail" as they made the unsuccessful argument that employees held a statutory right to use the Employer's e-mail system for Section 7 purposes. See *Register Guard*, supra, at p. 1125. No question the day is coming when the Board itself will address the issue of water cooler obsolescence and vet Employer arguments as to the need for new standards governing social media. Stay tuned.

Endnotes

1. A reference, of course, to the characterization made in the dissent of Board members Wilma Liebman and Dennis Walsh in *Guard*

Publishing Company d/b/a Register Guard, 351 NLRB 1110 (2007) the seminal and rather controversial decision establishing, *inter alia*, that there was no Section 7 right to use the Employer's e-mail.

2. Dated November 8, 2010.
3. Solomon is acting as he was recessed appointed by President Obama on June 20, 2010 to replace William Meisburg, who had resigned earlier in the month. Meisburg was an appointee of President Bush.
4. See Gavin Appleby and Philip Gordon, "NLRB Posts Frightening Message in Facebook case." November 2010. http://www.littler.com/publication-press/publication/nlrb-posts-frightening-message-facebook-case.
5. I exclude for this purpose *Bay Sys Technologies, LLC*, 357 NLRB No. 28 (2011), a default judgment case.
6. Technically titled "Report of the Acting General Counsel Concerning Social Media Cases."
7. This Advice memorandum has been released to the public and as with all released memos it can be found on the Board's website, www.nlrb.gov.
8. OM 11-74 at p. 5.
9. William R. Corbett, "Waiting for Labor Law of the Twenty First Century: Everything Old Is New Again," 23 *Berkeley Journal of Employment and Labor Law* 259, 267 (2002).
10. The countless law firm blogs that addressed the case made clear, and correctly, that AMR had application to all employers unionized or not. See e.g. Bond, Schoeneck & King, "Labor and Employment: Termination of Employee for Facebook posting results in NLRB Complaint" (November 10, 2010). www.bsk.com.
11. "Facebook and the Law" (November 8, 2010). http://lawprofessors.typepad.com/laborprof_blog/2010/11/facebook-and-labor-law.html.
12. Using the definition taken from the Board's website "protected, concerted activity "is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action."
13. Advice found the denial of these rights to be unlawful.
14. Dated June 28, 2011. The underlying Advice memorandum has not been released to the public. Where complaint has been authorized such release is discretionary.
15. OM 11-74 at p. 4.
16. Citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-54 (2007).
17. *Hispanics United of Buffalo, Inc.*, slip op. at p. 9.
18. Slip op., p. 8, citing *Automatic Screw Products Co.*, 306 NLRB 1072 (1992) and *Triana Industries*, 245 NLRB 1072 (1979).
19. As complaint was authorized, and in fact a trial before an Administrative Law Judge was held on July 21, 2011, this Advice memorandum has not been released to the public. Any reference herein made to the case, which was identified by Agency press release of May 24, 2011, will be limited to the facts set forth in the release, in OM-11-74 and in other publically available material.
20. The Employer at some remove from the discharge claimed the real reason he was fired for a second post on the site that had nothing to do with any arguable protected activity. Given the scope of this paper there is no need to address this defense here other than to note that Advice rejected it.
21. OM-11-74 at p. 8.
22. The Advice memorandum is not public nor has been press released. I will limit my observations to the facts recited in OM 11-74, p. 9-12.
23. As of the submission of this article three other "no-go" cases not discussed in OM 11-74 have been posted on the Board's web site under Advice cases: *Helser Industries*, 19-CA-33145 (Advice Memorandum, August 22, 2011). After getting *Sagepoint Financial, Inc.*, 28-CA-23441 (Advice Memorandum, August 9, 2011). *Buel, Inc.*, 11-CA-22936 (Advice Memorandum, July 28, 2011).
24. OM 11-74, p. 12-14.
25. Citing A.*T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Opryland Hotel*, 323 NLRB 723 (1997); *Saia Motor Freight*, 333 NLRB 784 (2001); *Eagle Hotel & Casino*, 341 NLRB 112(2004).
26. OM 11-74, p. 14-15.
27. OM 11-74, p. 15-16.
28. OM 11-74, p. 16-17.
29. OM 11-74, p. 17-18.
30. Jennifer A. Dunn and Doug A. Hass, "NLRB Signals Retreat On Cases Involving Employee Comments In Social Media,"August 5, 2011. www.franczek.com. *See also* Michael Schmidt, "Doing an About Face(book) at the NLRB," August 8, 2011. www.socialmediaemploymentblog.com.
31. *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000).
32. Citing *Stanford Hotel*, 344 NLRB 558(2005); *Alcoa, Inc.*, 352 NLRB 1222 (2008).
33. This appears to be tacit acknowledgment that Advice was not quite certain what to make of Facebook in the context of *Atlantic Steel's* first criteria.
34. See OM 11-74, p.4 -5. A similar conclusion was reached in the sports bar back taxes case referenced above. See OM 11-74, p. 10-11.
35. Theodore, Mark. "NLRB Pokes Another Employer for Facebook Related Discharge, Issues Complaint," May 27, 2011. www.laborrelationsupdate.com. Blog of Proskauer Rose.
36. Client Bulletin #429. "Facebook Firing Is Chock-Full of Concerns For Employers Whether You Have A Union Or Not," November 23, 2010. www.costangy.com.
37. See, e.g., "Why You Need a Social Media Policy," *Entrepreneur.com*. January 6, 2011.
38. An employer violates Section 7 when it maintains a work rule that reasonably tends to chill employees in the exercise of Section 7 rights.
39. *Lutheran Heritage Village* at 648.
40. See Paul Galligan, "Top NLRB Precedents in Jeopardy Under an Obama Labor Board." *New York Law Journal*. January 13, 2009. *Lutheran Heritage Village* made the list of Galligan's "top ten" precedents at risk.
41. See e.g. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25 (2011).
42. *AMR* Advice Memorandum p. 13.
43. The finding did not apply to rule's prohibition on discriminatory or defamatory remarks as employees would not reasonably interpret these restrictions as impinging upon Section 7 rights.
44. *Id.*, at p. 14.
45. "Labor Panel to Press Reuters over Reaction to Twitter Post," April 6, 2011.
46. These "go" cases have not been made available to the public. However, three of these cases, without identifying the names of the employers, have been summarized at OM 11-74, p. 19-22.
47. John N. Raudabaugh, "Critical Developments in Labor and Employment Law," June 1, 2011. http://www.nixonpeabody.com/attorneys_publications.asp?ID=1761.

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The Ethical Standards for Labor Arbitrators: What Every Advocate Should Know

By Arbitrator Robert L. Douglas, Esq. and Jeffrey T. Zaino, Esq.

All labor arbitrators should know the standards of professional behavior outlined by the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes." The Code is a part of most, if not all, training materials for new labor arbitrators.

Unfortunately for the labor arbitration process as a whole, many advocates are completely unaware of the existence of the Code let alone the meaning and application of its provisions. Advocates should have an understanding of the Code to function most effectively in arbitrations.

This Article will provide an overview of the key Code provisions that affect both arbitrators and advocates. Such increased knowledge by advocates will promote the fundamental tenets of the arbitration process: speed, economy and justice.

History of the Code

In 1951, a committee formed by the American Arbitration Association (AAA), the National Academy of Arbitrators (NAA), and representatives from the Federal Mediation and Conciliation Service (FMCS) approved the "Code of Ethics and Procedural Standards of Labor-Management Arbitration." The 1951 Code established detailed ethical and "good practice" guidelines for labor arbitrators and an overall framework for the labor arbitration process in general. The AAA, NAA, and FMCS then revised the 1951 Code in 1972 by establishing the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes." The Code has been amended five times since 1972; the most recent amendments occurred in 2007.

The Code contains the core principles that have made arbitration so well-respected as a fair, honest, and impartial method to resolve disputes in the workplace. As the primary creator and overseer of the Code, the NAA has always recognized the vital importance of the Code to bolster the integrity of the arbitration process. The current President of the National Academy of Arbitrators, Roberta Golick, recently observed:

> We in the dispute resolution profession are fortunate to have a Code of Professional Responsibility that has been jointly adopted by the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service. For several decades, the Code has functioned, in effect, as a constitution for our members and as a bill of rights for those who enlist our services.

Impartiality

In most cases, labor arbitrators are selected directly by the parties and advocates. Thus, they understand the importance of being known and respected by both the union and management advocates that rank and select them. This can be a challenging balancing act for the arbitrator, specifically new arbitrators, and can lead to the perception that some arbitrators intentionally split the difference in tough decisions to avoid upsetting either the union or management advocates. The drafters of the Code understood the danger of this perception by including Part 1 A 2 that provides: "[c]ompromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional." Advocates should be aware that when arbitrators intentionally split the difference, they are acting in an unethical manner and in violation of the Code.

Dignity/Integrity

Labor arbitrators and advocates interact on an ongoing basis at many professional and social events. Arbitrators routinely attempt to achieve greater visibility by speaking with advocates and by distributing business cards with the goal of soliciting business. Is such conduct ethical? Is it ethical for an arbitrator to advertise? The answer to both questions is yes, but Part 1 C of the Code does set standards by noting that "[a]n arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality. Arbitrators may disseminate or transmit truthful information about themselves through brochures or letters, among other means, provided that such material and information is disclosed, disseminated or transmitted in good faith to representatives of both management and labor." The NAA issued Advisory Opinion 24, which describes in detail permitted and prohibited approaches for arbitrators to solicit work.

Training New Arbitrators

The labor-management community always needs to develop the next generation of labor arbitrators. A special interest exists to enable an acceptable pool of younger and more diverse arbitrators to gain experience to become seasoned arbitrators. The profession is especially challenging to enter because most panels, like the AAA's panel, require that the arbitrator be neutral (i.e., not affili-

ated with or representing unions or management). The greatest training resource for a new arbitrator is an experienced arbitrator. Part 1 C 4 recognizes the importance of experienced arbitrators teaching aspiring arbitrators by emphasizing that "[a]n experienced arbitrator should cooperate in the training of new arbitrators."

Collusion

In arbitration, the parties control the arbitration process by deciding who will arbitrate the case and what procedures will be followed. What if, however, the advocates through collusion seek assistance from the arbitrator to issue an undisclosed consent award when, for political reasons or legal reasons they cannot publicly agree to the outcome. Is it ethical for the arbitrator to issue the undisclosed consent award? The Code in Part 2 A provides direction by pointing out that an arbitrator should, "refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose." An arbitrator therefore has an explicit obligation to avoid participating in such improper collusion.

Duty to Disclose

Like a judge, an arbitrator should not permit his or her personal relationships to affect decision-making. A common disclosure with labor arbitrators that teach in a law school or in an undergraduate institution is that the advocate was a former student. Is it unethical if the arbitrator does not disclose that the advocate was a former student? The answer depends on the degree of the relationship. Part 2 B (2 B 3 a) of the Code indicates that, "[a]rbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality." The Arbitrator bears the unconditional burden to disclose information to the parties. In doing so, some confusion has existed about the standard to determine the proper scope of disclosure. The judicial trend favors wider disclosure of relationships by using an inference of bias standard rather than a presumption of bias standard. Such wider disclosure, however, may have the unavoidable impact of enabling a party that seeks to delay an arbitration hearing to use the disclosure of information as a pretextual basis to insist on the recusal or disqualification of an arbitrator. Although such situations may occur, the importance of guaranteeing the impartiality of arbitrators outweighs the potential delay of some proceedings.

Privacy of Arbitration and Publishing Decisions

Arbitration in general is a private process. There exists no official public record and the process, unless the parties agree otherwise, is confidential. Advocates, however, oftentimes need resources such as published decisions to assess arbitrators during the arbitrator selection process. Some ADR providers publish redacted decisions but only with the consent of the parties. LexisNexis has over 9,000 labor decisions and is a wonderful resource for advocates. Can an arbitrator, however, unilaterally provide consent to have his or her decisions published? Part 2 C provides clear direction to the arbitrator noting, "[a]ll significant aspects of the arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or a disclosure is required of permitted by law." The Code sets forth a detailed procedure for arbitrators to obtain permission from the parties to publish a decision. Some arbitrators avail themselves of this opportunity whereas other arbitrators view the privacy of arbitration as a bar to the arbitrator becoming involved in the effort to publish an arbitration decision.

Ex Parte Communication/Ex Parte Hearings

The labor-management community in our nation is relatively small and it is likely that an arbitrator selected for a case will encounter either the union or management advocate in some social or professional context while the case is pending. Arbitrations should be mindful of the Code prohibitions on ex parte communications. The Code provides specific language in Part 2 D 1 and Part 4 1 b about avoiding ex parte communication. Exceptions do exist such as communication that is purely administrative and not substantive or if one party opts not to participate in the process. If a party decides not to participate in the arbitration proceeding, an arbitrator, pursuant to Part 5 C, "must be certain, before proceeding ex parte that the party refusing or failing to attend the hearing has been given adequate notice of the time, place, and purposes of the hearing."

Mediation by Arbitrator

Some labor arbitrators believe that if they are assigned to a case as an arbitrator that they are precluded from mediating that case. The Code, however, in Part F extensively discusses mediation and clarifies that an arbitrator, under certain circumstances, can mediate a labor arbitration case. Potential conflicts exist, however, when a labor arbitrator exerts too much pressure on the parties to mediate and when one party is clearly not receptive to mediating the matter. Part F2 c notes, "[a]n arbitrator is not precluded from suggesting mediation. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree." Either party retains the unilateral right at any time to insist that the arbitration go forward.

Use of Assistants

Some busy labor arbitrators enlist assistance to help with research and the preparation of decisions. When a

mentoring relationship exists between the experienced and the aspiring arbitrator, the new arbitrator frequently writes mock decisions or portions of decisions from actual cases for review by the experienced arbitrator. The Code discusses the use of assistants and explicitly notes in Part 2 H that "[a]n arbitrator must not delegate any decision-making function to another person without consent of the parties." The Code permits arbitrators to use assistants for "research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making process." The opportunity for aspiring arbitrators to engage in such preliminary drafting constitutes a valuable method of training newer arbitrators and sometimes enables such new arbitrators to obtain compensation from the experienced arbitrator for such efforts.

Consent Awards

In the arbitration process, advocates sometimes reach certain agreements concerning some or all of the issues and jointly request that the arbitrator include these agreements in an award. Part 2 I permits disclosed consent awards and undisclosed consent awards but notes that the arbitrator must believe that the "suggested award is proper, fair, sound, and lawful…." The Code cautions that, "an arbitrator must be certain of understanding the suggested settlement adequately in order to be able to appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed, the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing."

Delay by Arbitrator

Popular and busy arbitrators sometimes accept additional cases notwithstanding the fact that they will be unavailable for months. Also, some arbitrators, due to their schedules, fail to render timely decisions. These types of delays undermine the process of arbitration. Advocates facing a delay by an arbitrator should be aware of Part 2 J that notes, "[i]t is a basic professional responsibility of an arbitrator to plan a work schedule so that present and future commitments will be fulfilled in a timely manner. When planning is upset for reasons beyond the control of the arbitrator, every reasonable effort should nevertheless be exerted to fulfill all commitments. If this is not possible, prompt notice should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements."

Fees and Expenses

In most cases, except with permanent and rotating labor panels, the arbitrator sets his or her per diem, cancellation fee policy, and study time fees. The arbitrator's fees are listed on the panel card or resume that is distributed to the advocates. The Code addresses fees and expenses in Part 2 K by noting that "[a]n arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided." One area of contention and confusion about fees is the wrongly held belief that there is some type of acceptable industry standard connecting the amount of hearing days to the amount of study days that can be billed (e.g., for every day of hearing, it is acceptable to charge two days of study time). In the absence of a special arrangement by the parties and the arbitrator, Part 2 K 1 b 2 b addresses any confusion about study time ratios by underscoring that: "[p]er diem charges should not be in excess of actual time spent."

Gifts to Agency Personnel

Arbitrators work with administrative agencies with the goal of being listed for consideration by the parties for many different potential cases. The arbitrators know and understand the important role of the administrative agencies and its case managers in compiling lists of arbitrators. Arbitrators typically want to make sure that the case managers know of them and frequently list them. The Code limits the relationship between the arbitrator and the administrative agencies. Part 3 A 3 states "[a]n arbitrator must not seek to influence an administrative agency by any improper means, including gifts or other inducements to agency personnel." Administrative agencies, like the AAA, have zero tolerance policies with respect to case managers receiving any type of gift from arbitrators and/or advocates.

Hearing Conduct

Part 5 of the Code covers the arbitrator's role in hearing conduct by providing that: "[a]n arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence." However, what if an arbitrator becomes too aggressive and heavy handed in the process by asking a whole series of questions throughout the hearing and/or during the examination of witnesses? Part 5 A 1 c addresses these potential concerns by indicating that, "[a]n arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately." An arbitrator, however, retains the right to clarify the record by questioning a witness when necessary for the arbitrator to understand the testimony of the witness.

Transcript

Requesting and arranging to have a hearing transcribed remains primarily an area for the parties to

discuss and to decide.. The Code, however, does have a specific section on transcripts. Part 5 B notes that an arbitrator "may seek to persuade the parties to avoid use of a transcript, or to use a transcript if the nature of the case appears to require one." If the parties do not agree to a transcript, the Code states that the arbitrator may have the side requesting the transcript pay for it and make a copy available to the other party.

Plant Visits

Plant or worksite visits are rare in the labor arbitration process. From time to time, however, plant visits are requested and may affect the outcome of a decision. The Code provides guidance to both arbitrators and advocates. Part 5 D explains that an arbitrator "should comply with a request of any party that the arbitrator visit a work area pertinent to the dispute prior to, during, or after a hearing. An arbitrator may also initiate such a request." Such plant visits should occur with safeguards to avoid any ex parte communication between a party and the arbitrator.

Post-hearing Briefs

To brief or not to brief sometimes becomes an issue in labor arbitration cases. Is the case complicated enough? Will the arbitrator need briefs? Is the cost to brief justified? These questions, and others, are typically decided by the parties. If they are not, what role, if any, does the arbitrator play? Part 6 A 1 states, "[a]n arbitrator may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed." Part 6 A 1 b further notes that if the parties cannot agree on the need for briefs, "an arbitrator may permit filing but may determine a reasonable time limitation."

Bench Decisions/Expedited Awards

The Code also provides guidance to arbitrators on important topics related to the conclusion of a case such as bench decisions and expedited awards. For example, Part 5 E notes, "[w]hen an arbitrator understands, prior to acceptance of appointment, that a bench decision is expected at the conclusion of the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise." The Code also notes that if the arbitrator understands that the parties expect an expedited decision, the arbitrator must comply.

Retaining Jurisdiction

The role of the arbitrator, in most cases, concludes upon the issuance of an award at which time the functus officio doctrine provides that the power of the arbitrator ceases. The Code in Part 6 E, however, discusses the one exception of the unilateral right of an arbitrator to retain remedial jurisdiction. "An arbitrator may retain remedial jurisdiction in the award to resolve any questions that may arise over application or interpretation of a remedy."

Conclusion

The breadth of the Code is extensive by covering all aspects of the arbitrator's role in the labor arbitration process. For over sixty years, the Code has served as a time-tested tool for guiding arbitrators, the parties, and administrative agencies. Advocates who know and understand the Code have a tremendous opportunity to preserve and to elevate the ethical standards of the arbitration process. By doing so, labor arbitration will continue to obtain the respect of the parties, the judiciary, and the public.

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Update of Decisions Issued by the Boards of the New York City Office of Collective Bargaining

January through August 2011

By Steven C. DeCosta

I. Background

Section 212 of the Taylor Law (N.Y. Civil Service Law, Article 14, §§ 200 et seq.) 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.

The Board of Collective Bargaining determines improper practice, injunctive relief, arbitrability, and scope of bargaining cases; determines whether an impasse has arisen in collective bargaining negotiations; and decides appeals from impasse panel awards. The Board of Certification determines the certification and decertification of unions as exclusive collective bargaining representatives; questions of appropriate bargaining units; 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.

II. Update of 2011 Board Decisions

Board of Collective Bargaining

Improper practice decisions

1. Claimed interference, discrimination or retaliation

***Holmes*, 4 OCB2d 14 (BCB 2011)**

Petitioner alleged that HHC denied her right to Union representation in a meeting with management and interfered with her exercise of her protected rights and discriminated against her for pursuing her grievance rights by terminating her in the midst of the grievance process. Petitioner also claims that the Union breached its duty of fair representation, in violation of NYCCBL § 12-306(b) (1) and (3), by failing adequately to represent her in proceedings which led to her termination. HHC denied Petitioner's claims and asserted that it had legitimate business reasons to discipline her. The Union asserts that it did not breach its duty of fair representation. Finding no interference, retaliation or discrimination by HHC and no breach of the duty of fair representation by the Union, the Board denied the petition in its entirety.

***DEA*, 4 OCB2d 35 (BCB 2011)**

The Union filed an improper practice petition alleging that an NYPD lieutenant retaliated against Union members in violation of NYCCBL § 12-306(a)(1) and (3) by disciplining them following their refusal, on the Union's advice, to participate in a voluntary mediation program. The Union further alleged that the lieutenant's threats and attempts to coerce Union members into disregarding the Union's advice constituted interference with their § 12-305 rights, in violation of NYCCBL § 12-306(a)(1). The City moved to dismiss, claiming that the Union failed to state prima facie violations of the NYCCBL. The Board found that Union's allegations were sufficient to state claims under NYCCBL § 12-306(a)(1) and (3), and denied the motion to dismiss.

***Feder*, 4 OCB2d 46 (BCB 2011)**

Petitioner alleged that NYCHA violated NYCCBL § 12-306(a)(1) and (3) when it investigated and disciplined Petitioner for his use of NYCHA's computer because he engaged in union activity. Petitioner further alleged that NYCHA's policies governing employee use of its computer, internet, and email systems unlawfully targeted union-related activity. NYCHA contended that Petitioner's claims were barred by collateral estoppel. Further, it claimed that Petitioner was not engaged in protected union activity, and that NYCHA's actions were not motivated by anti-union animus, but were motivated by legitimate business reasons. The Board held that NYCHA violated NYCCBL § 12-306(a)(1) and (3) when it investigated and disciplined Petitioner for his internet and email use and for storing union-related documents on his computer. However, the Board also found that NYCHA established a legitimate business reason for its investigation and discipline of Petitioner for use of his NYCHA computer for campaign purposes. Accordingly, the petition was granted, in part, and denied, in part.

2. Claimed violation of the duty to bargain

***UFT*, 4 OCB2d 2 (BCB 2011)**

The Union alleged that the City violated NYCCBL § 12-306(a)(1), (4) and (5) when, during on-going negotiations for a first-time collective bargaining agreement, it ceased paying Hearing Officers (Per Session) for time

scheduled to work but superseded by jury service which it had paid prior to the time at issue. The City asserted that the Union's allegations were untimely, concerned a non-mandatory subject of bargaining, and failed to establish a violation of the status quo. The Board found the petition timely. It also found that the City's admitted failure to negotiate over the wage issue violated § 12-306(a)(4), that its change to the status quo violated § 12-306(a)(5), and that these actions constituted interference in violation of § 12-306(a)(1). Accordingly, the Board granted the petition.

***UFA*, 4 OCB2d 3 (BCB 2011)**

The Union alleged that the City unilaterally changed the selection criteria for company chauffeurs from seniority, alone, to a series of criteria including seniority, thereby violating the duty to bargain. The City contended that the Board lacked jurisdiction because the Union was attempting to enforce a contractual provision, that the matter should be deferred to arbitration, that no change took place, and that there is no duty to bargain over the assignment of employees' job duties. The Board found that it had jurisdiction, that deferral was not appropriate, and that the decision to use criteria including but not limited to seniority in filling the chauffeur position was not a mandatory subject of bargaining. Accordingly, the improper practice petition was denied.

***UFT*, 4 OCB2d 4 (BCB 2011)**

The Union alleged that the City unilaterally imposed new limits on the number of hours worked by Hearing Officers (per session). The Union further claimed that the City engaged in direct dealing by directly notifying bargaining unit members of the change by a letter and asking bargaining unit members to negotiate their hours at each agency directly with management, and that it imposed the policy in retaliation for protected activity, in violation of the NYCCBL. The City asserted that the limit on hours was longstanding and not a change, that the letter it sent to bargaining unit members clarified an existing policy, and that the City's actions were not motivated by anti-union animus, but by a legitimate business reason. The Board found that the City violated the duty to bargain and to maintain the *status quo*, but that its actions were not retaliatory. Accordingly, the petition was granted in part, and denied in part.

***DEA*, 4 OCB2d 8 (BCB 2011)**

The Union claimed that the City and the NYPD violated NYCCBL § 12-306(a)(1) and (4) by not negotiating when they changed the longstanding duty schedule of Detectives in the NYPD's Crime Scene Unit. The new duty schedule altered the hours off between tours and the hours off between sets of tours. The City argued that the Union failed to establish the claimed violations because the creation of the program at issue was not subject to bargaining but was an exercise of management's statutory rights as set forth in NYCCBL § 12-307(b). The Board found that altering the hours off between sets of tours and the hours off between tours are mandatory subjects of bargaining. Accordingly, the Union's petition is granted.

***DC 37*, 4 OCB2d 10 (BCB 2011)**

The City alleged that the Union violated its duty to bargain in good faith under NYCCBL §§ 12-306(b)(2) and (c)(4). The City claimed that the Union entered an agreement with no intention of honoring it and failed to provide information to the City necessary for the administration of the agreement's provisions. The Union argued that the Board should defer the dispute to arbitration, and that, in the alternative, the City failed to state a claim upon which relief may be granted. The Board determined that because the agreement is the ultimate source of the rights asserted and arbitration would likely resolve all of the claims, the dispute was deferred to arbitration.

***DC 37*, 4 OCB2d 19 (BCB 2011)**

The Union claimed that the FDNY violated its duty to bargain by unilaterally changing procedures in the FDNY's substance abuse policy for EMS workers. The City contended that the policy change largely fell outside the scope of mandatory bargaining, and that, to the extent bargaining was required, the City satisfied its duty to negotiate. After a hearing, the Board found that unilateral changes were made by the City. The Board further found that the addition of an alternative testing methodology when a urine sample cannot be obtained falls within the mandatory scope of bargaining. However, the City's adoption of new testing triggers, definitions of what test results are deemed to constitute positive results, and adoption of a "zero tolerance" policy resulting in termination for a first offense were found to be within management's rights. Accordingly, the petition was granted in part and denied in part.

***NYSNA*, 4 OCB2d 23 (BCB 2011)**

The Union alleged that HHC and the City unilaterally changed a term and condition of employment by instituting a new policy that will require registered nurses to wear particular-colored uniforms, in violation of § 12-306(a) (1) and (4) of the NYCCBL. The Union also argued that the new uniform policy will result in a financial impact on its members as they will need to purchase new uniforms solely to comply with the changed policy. The City argued that the policy constitutes an exercise of management rights under the NYCCBL and that, in any event, the Union's claims of practical impact are vague and speculative. The Board found that although the determination and prescription of authorized uniforms is a management prerogative, HHC and the City must bargain over the implementation of the new policy since uniform allowances are mandatory subjects of bargaining. The Board further found that the parties did not satisfy their duty to bargain through the execution of an earlier memorandum of agreement.

***DC 37, Local 1759*, 4 OCB2d 26 (BCB 2011)**

The Union alleged that the New York City Business Integrity Commission violated NYCCBL § 12-306(a)(1) and (4) by unilaterally requiring that those of its employees wishing to engage in outside employment complete a new General Release in addition to providing informa-

tion previously required. The Union argued that even if BIC did not have to bargain over its decision to require that employees grant BIC access to the requested information, BIC must bargain over related procedures. The City contended that it had no duty to bargain because its interest in the information, to ensure public and employee safety, outweighs an employee's privacy interest. The City also asserted that BIC had no duty to bargain because the change was *de minimis* and did not require increased employee participation. The Board held that the new requirement that employees provide the employer access to substantive information not previously required was not a *de minimis* change. Therefore, the Board found that BIC unilaterally changed a mandatory subject of bargaining. Accordingly, the Union's improper practice petition was granted.

***SSEU, L. 371*, 4 OCB2d 27 (BCB 2011)**

The Union alleged that HHC unilaterally altered the parties' collective bargaining agreement in violation of NYCCBL § 12-306(a)(1) and (4) by failing and / or refusing to provide notice of Step II grievance hearings to individual employees. HHC argued that the Union failed to state a claim under NYCCBL § 12-306(a)(1) and (4). HHC also sought to defer the matter to arbitration on the grounds that a resolution of the Union's allegations requires interpretation of the parties' collective bargaining agreement and the issues raised in this matter are identical to those in a pending grievance. The Board determined that because the collective bargaining agreement is the ultimate source of the rights asserted and arbitration likely will resolve all of the Union's claims, the matter should be deferred to arbitration.

***UFA*, 4 OCB2d 30 (BCB 2011)**

The UFA and UFOA filed a petition alleging that the City's actions in reducing Firefighter engine company staffing levels violates the duty to bargain and to maintain the *status quo*, and creates a practical impact on the safety of their members. The City argued that the parties' staffing agreement has expired and there is no duty to bargain over the subject. In an Interim Decision the Board found that the parties' staffing agreement had sunset and that the Unions' claims of a violation of the duty to bargain and *status quo* must be dismissed, but that the Unions had alleged sufficient facts to raise a material question as to whether the City's decision to reduce engine company staffing levels creates a practical impact on the safety of Firefighters and Fire Officers. The Board directed that a hearing be held before a Trial Examiner for the purpose of establishing a record upon which the Board may determine whether there has been a practical impact on the safety of the affected employees.

***DC 37, L. 436 & 768*, 4 OCB2d 31 (BCB 2011)**

The Unions claimed that the City and DOHMH violated NYCCBL § 12-306(a)(1) and (4) by unilaterally changing the longstanding past practice of compensating members assigned to City schools for days not worked due to unscheduled school closings caused by snow emergencies. The City argued that the Board should not find a past practice as DOHMH had an *ad hoc* approach to unscheduled school closings. Further, the City argued that nothing in the parties' collective bargaining agreements mandates payment to hourly paid school-based employees for days when the schools are closed and that there is no obligation to bargain during the term of an unexpired contract. The Board found that DOHMH had a past practice of paying the employees at issue for days that they were scheduled and ready to work but did not work because their schools were closed due to snow emergencies and they were not reassigned. Accordingly, the Unions' petition was granted.

***CSA*, 4 OCB2d 32 (BCB 2011)**

The City moved to dismiss a petition requesting that the Board find that the City and ACS violated NYCCBL § 12-306(a)(4) by failing to bargain in good faith or, in the alternative, that it order the parties submit to impasse proceedings. The City argued that the Board lacked jurisdiction because the NLRB has asserted jurisdiction over the day care centers that employ the Union's members at issue and, further, that such members are not public employees as defined by the NYCCBL. The Union argued that the intervention of the Board was required to effectuate the public policy of the NYCCBL, that the City is the employer of its members, and that the Board's jurisdiction has not been preempted by the NLRB. The Board found that it lacked jurisdiction because the Union's members are employed by non-public employer day care centers. Accordingly, the City's motion was granted, and the Union's petition was dismissed.

***DC 37, Local 3631*, 4 OCB2d 34 (BCB 2011)**

The Union filed an improper practice petition alleging that the City and the FDNY violated NYCCBL § 12-306(a)(1) and (4) by unilaterally changing the procedure for completing performance evaluations of two non-managerial members of the EMS Command. The City and the FDNY contended that the decision to increase the frequency of performance evaluations falls within the management rights clause of the NYCCBL, and that such change is not a mandatory subject of bargaining. The Board found that conducting an employee review on a more frequent basis than prescribed in FDNY policy was a procedural change which affected the employee, and is a mandatory subject of bargaining. However, the Board determined that the second alleged "performance evaluation" was not an actual performance evaluation under FDNY policy and was within the scope of management rights. Accordingly, the Board granted the petition, in part, and denied it, in part.

***DC37*, 4 OCB2d 43 (BCB 2011)**

The Union alleged that the City violated the duty to bargain by unilaterally reallocating eligibility for parking spaces in a garage adjacent to the workplace which had been available on an "as available" basis to employees in both the Police Communication Technician and Supervising Police Communication Technician titles, to the SPCT title only. The City argued that the reallocation did not amount to more than a *de minimis* change, since the SPCTs

were members of the same unit, and other spaces were available for the PCTS outside the garage. The City further argued that the change fell within its right to maintain efficiency of government operations. The Board found that the change was to a mandatory subject of bargaining, and was not a *de minimis* change. The Board further found that the change did not fall within management's right to maintain efficient government services, and granted the improper practice petition.

***DC 37*, 4 OCB2d 47 (BCB 2011)**

The Union claimed that NYCHA breached its duty to bargain by unilaterally changing the policies governing NYCHA employees' use of the employer's computer, internet, and email systems for union business. The Union further claimed that this change interfered with its members' statutory rights because the new policy prohibited use of these systems for union business. NYCHA contended that the improper practice petition was untimely and that the issuance of the memorandum fell within its managerial prerogative. NYCHA also contended that the Union had no statutory or contractual right to use NYCHA's resources. Finally, NYCHA argued that it did not make a unilateral change to a mandatory subject of bargaining because employees' previous use of these systems did not create a practice, over which the Union can now seek to bargain. The Board found that NYCHA violated its duty to bargain in good faith by unilaterally changing its policies regarding employees' use of the employer's computer, internet, and email systems for union business. In addition, the Board found that NYCHA's change to its policy interfered with employees' exercise of protected rights under NYCCBL §12-305. Accordingly, the Board granted the petition.

3. Claimed violation of the duty to provide information

***NYSNA*, 4 OCB2d 20 (BCB 2011)**

The Union alleged that the City and HRA violated their duty pursuant to NYCCBL § 12-306(c)(4) to furnish information related to the Union's representation of a member in a disciplinary grievance. The City and HRA contended that the duty to provide information necessary for contract administration did not extend to information related to disciplinary cases and that the parties' collective bargaining agreement did not require that the requested information be provided. The Board held that the duty to provide information under the NYCCBL did not contain any exception for disciplinary grievances. The Board found that some of the information requested was reasonably necessary for contract administration, and that the City and HRA were obligated under NYCCBL § 12-306(c)(4) to provide such requested materials as were maintained in the ordinary course of business, but not to create materials or provide materials beyond the scope of that duty. Accordingly, the petition was granted in part and denied in part.

***NYSNA*, 4 OCB2d 42 (BCB 2011)**

The Union alleged that HHC violated NYCCBL § 12-306(a)(1) and (4) by failing to provide information which the Union asserted it needed to bargain on behalf of Staff Nurses and Head Nurses with respect to HHC's plan to restructure HHC operations. HHC declined to provide the requested information, asserting that the requested information and/or data was either not kept in the ordinary course of business, related to nonmandatory subjects of bargaining, or were not relevant to or reasonably necessary for collective negotiations or matters related to contract administration. The Board found that, although most of NYSNA's requests were overly broad and sought information beyond the scope of the duty to provide information set forth in NYCCBL § 12-306(c)(4), the requests seeking the full restructuring plan and information regarding any planned layoffs of nurses or employees whose elimination would have a practical impact on nurses fell within the duty to provide information. Accordingly, the petition was granted in part and denied in part.

4. Claimed breach of the duty of fair representation

***Benjamin*, 4 OCB2d 6 (BCB 2011)**

Petitioner alleged that the Union breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3), by irresponsibly and unreasonably handling his grievances regarding overtime allocation and harassment by one of his supervisors. Further, Petitioner claimed that HHC violated NYCCBL § 12-306(a)(1), (2), and (3) by retaliating against him for Union activity and by interfering with his right to participate in the Union. Both the Union and HHC argued that the petition was untimely filed and that Petitioner failed to state a claim. The Board found that Petitioner's claims were timely filed but failed to allege facts that would state a cause of action under the NYCCBL.

***Porter*, 4 OCB2d 9 (BCB 2011)**

Petitioner alleged that the Union breached its duty of fair representation by failing to properly communicate with her, and/or investigate and advise her as to her complaints against the City. Petitioner also alleged that the City violated the NYCCBL by threatening and intimidating her into resigning. The Union argued that Petitioner's allegations failed to state a claim that the Union breached its duty of fair representation. The City argued that Petitioner failed to establish a *prima facie* case of interference, coercion and/or retaliation. The Board found that Petitioner's claims did not establish a violation of the NYCCBL. Accordingly, the petition was dismissed.

***Johnson*, 4 OCB2d 11 (BCB 2011)**

Petitioner asserted that the Union breached its duty of fair representation by allegedly failing to assist him in enforcing the terms of a stipulation of settlement that resolved an out-of-title grievance, which he believed entitled him to an upgraded title and a higher salary rate. Petitioner also alleged that the Union and the employer violated the NYCCBL by making unilateral changes in mandatory subjects of bargaining during a period of negotiations. The Union argued that Petitioner's claim regarding an upgraded title was untimely, and that he was not entitled to the upgrade. The Union also argued that

Petitioner's fair representation claim should be denied because the Union ultimately filed a lawsuit on his behalf. The Board found the petition timely, but denied the fair representation claim. Further, the Board found that Petitioner did not have standing to bring a claim that the Union and the City made unilateral changes in mandatory subjects of bargaining. Accordingly, the petition was dismissed in its entirety.

***Lewis*, 4 OCB2d 24 (BCB 2011)**

Petitioner alleged that the Union violated NYCCBL § 12-306(a)(4) by failing to bargain in good faith, and that it breached its duty of fair representation in violation of NYCCBL § 12-306(b)(1) and (3) by mishandling the disciplinary matters that led to Petitioner's termination. Petitioner further asserted that the City violated NYCCBL § 12-306(a)(1), (3) and (4) by pressuring Petitioner to retire, terminating her employment in retaliation for her use of sick days and her long tenure, and offering her a stipulation of settlement that did not make her whole. Both the Union and the City asserted that the duty of fair representation claim was time-barred, in part, and insufficient as to the remainder. The City also argued that Petitioner lacks standing to assert a failure to bargain in good faith violation and failed to establish a *prima facie* case of retaliation. The Board found Petitioner's claims untimely in part; to the extent her claims were timely, Petitioner lacked standing to assert a violation of the duty to bargain in good faith, and her allegations of fact were insufficient to make out a claim of retaliation and breach of the duty of fair representation. Accordingly, the petition was dismissed in its entirety.

5. Challenges to the arbitrability of grievances

***Doctors Council, SEIU,* 4 OCB2d 1 (BCB 2011)**

The City challenged the arbitrability of a grievance alleging that it failed to pay hourly physicians for two days when their workplaces were closed due to inclement weather. The City asserted that the Union did not establish the requisite nexus between the subject of the grievance and the parties' collective bargaining agreement. The Union argued that the City's petition must be denied as untimely and that it had established the requisite nexus. The Board found that the petition challenging arbitrability was untimely and that the Union 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.

***UFOA*, 4 OCB2d 5 (BCB 2011)**

The City asserted that the Union's requests for arbitration should be denied because the Union had not established a nexus between the grieved actions and a contractual provision but instead claimed rights under another union's contract. The Union asserted that the City violated an "existing policy" within the meaning of the parties' agreement. The Union also asserted that the policy existed, but that the City would not provide the information necessary to prove its existence. The Board found that a reasonable nexus existed between the grievance and the parties' agreement. Accordingly, the petition challenging arbitrability was denied.

***DC 37*, 4 OCB2d 12 (BCB 2011)**

The City filed a petition challenging the arbitrability of a grievance brought by District Council 37. The Union had filed a Request for Arbitration alleging that the City violated the parties' Agreement by failing and refusing to apply general increases provided for in § 4(a)(i) and (ii) of the Agreement to "additions to gross" as defined in that Agreement. The City argued that the dispute is not ripe for review. The Board found that the matter presented a dispute that is ripe for adjudication by an arbitrator and dismissed the petition challenging arbitrability.

***Local 371, SSEU*, 4 OCB2d 16 (BCB 2011)**

The Union filed a Request for Arbitration alleging that DEP took wrongful disciplinary action against a member by discharging her from employment without providing her any disciplinary process, or, alternatively, wrongfully laying her off out of seniority order on the same date. The City challenged arbitrability on the ground that the Union failed to identify a provision in the parties' Agreement which grants non-competitive employees the right to arbitrate their dismissal prior to the end of their non-competitive probationary periods. The Board found that the Union has shown sufficiently the existence of a material issue as to the reasons for Grievant's termination to permit this matter to proceed to arbitration and directed the arbitrator to determine, in the first instance, whether Grievant was laid off for budgetary reasons during her probationary period, and whether the City adhered to the procedures set forth in the Citywide Contract. If the arbitrator finds that Grievant was laid off and that the City did not adhere to the relevant procedures, then he or she may proceed to make a decision on the merits of the layoff claim. If the arbitrator finds otherwise, the inquiry shall end there. Additionally, the Board granted the City's petition as it pertains to the Union's claims of wrongful discipline.

***DC 37, Local 1157*, 4 OCB2d 18 (BCB 2011)**

The City challenged the arbitrability of a grievance brought by the Union that claimed that DOT violated a Mayoral Directive and the Citywide Agreement by assigning overtime to employees not in the Area Supervisor title. The City contended that there was no nexus between the provisions cited by the Union and DOT's inclusion of Supervisor Highway Repairers in the overtime rotation for Area Supervisors. The Union argued that a nexus existed because including the Supervisor Highway Repairers in the overtime rotation resulted in an inequitable distribution of overtime. The Board found that there was no nexus between the grievance and the Citywide Agreement or the Mayoral Directive. Accordingly, the Board granted the petition challenging arbitrability.

***ADA/DWA*, 4 OCB2d 21 (BCB 2011)**

The City challenged the arbitrability of a grievance alleging that the Department of Corrections violated the collective bargaining agreement by failing to follow

safety directives, train staff in fire safety duties, and have proper working fire alarm systems in all facilities. The Union argued that such obligations are set forth in DOC-promulgated directives. The City argued that the Union failed to establish the requisite nexus between the subject of the grievance, fire safety training and proper working fire alarms, and the source of the alleged rights, the directives. The Board found no nexus, and, therefore, the petition challenging arbitrability was granted, and the request for arbitration was denied.

***PBA*, 4 OCB2d 22 (BCB 2011)**

The City challenged the arbitrability of a grievance alleging that the NYPD violated the rules of its Performance Monitoring Program by placing Grievant in Level III for impermissible reasons, including the personal animosity of a Deputy Inspector. The City argued that the request for arbitration does not state a nexus between the right asserted and the arbitration provision at issue which specifically excludes arbitration of "disciplinary matters." The Union argued that it is for an arbitrator to determine if the grievance concerns "disciplinary matters" as defined by the parties' agreement. The Board found that it is for an arbitrator to determine if the grievance falls within the contract term "disciplinary matters," and therefore a nexus exists between the claim and the parties' agreement. The petition was denied, and the request for arbitration granted.

***DC 37, Local 372 and Local 983*, 4 OCB2d 25 (BCB 2011)**

The City challenged the arbitrability of the Union's grievance alleging that the Department of Education violated the parties' Memorandum of Economic Agreement. The City argued that the Board lacks jurisdiction over the Department of Education and, even if the Board has jurisdiction, the Union cannot submit a valid waiver, as required by the NYCCBL, because it submitted the underlying grievance to PERB. The Union asserted that the Board should dismiss the petition challenging arbitrability because the City is not a party to the underlying grievance and therefore lacks standing, and the Union's right to arbitrate violations of the Memorandum of Economic Agreement arises from that Agreement, not from the NYCCBL. The Board found that, under the NYCCBL, it does not have jurisdiction over the Department of Education, and dismissed the petition. However, the Board declined to dismiss the Request for Arbitration inasmuch as there is a pending court proceeding to compel arbitration under the Memorandum of Economic Agreement.

***Local 621, SEIU*, 4 OCB2d 36 (BCB 2011)**

The City challenged the arbitrability of a grievance claiming that the NYPD violated contractual disciplinary procedures by suspending the grievant without pay prior to serving him with disciplinary charges. The City argued that the Union failed to establish a nexus between the grievant's suspension and the cited contractual provisions. Additionally, the City asserted that the NYPD had an independent statutory right to suspend the grievant for thirty days prior to issuing charges. The Union alleged that the contract prohibited disciplinary action prior to the service of written charges. To the extent that a statutory right to suspend the grievant without service of written charges may have existed, the Union contended that the contract language in question effectively waived any such right. The Board found that the requisite nexus had been established, and, accordingly, denied the petition challenging arbitrability and granted the request for arbitration.

***United Marine Division*, Local 333, ILA, 4 OCB2d 37 (BCB 2011)**

The City challenged the arbitrability of a grievance brought by the Union, which asserted that DOT's creation and implementation of a new sick leave regulation violated the parties' collective bargaining agreement. The City contended that *res judicata* mandates that the grievance be denied, as the issues presented already have been decided by this Board. The City further contended that the Union could not execute a proper waiver and that the Union's request for arbitration failed to establish the necessary nexus between the subject matter of the grievance and the source of the alleged rights. The Board found that *res judicata* did not apply, but that, in the wake of recent judicial decisions reinterpreting the waiver provision of the NYCCBL, the waiver was not valid. Accordingly, the City's petition was granted and the request for arbitration denied.

***SSEU, L. 371*, 4 OCB2d 38 (BCB 2011)**

The City filed a petition challenging the arbitrability of a Union grievance alleging that the City violated the parties' collective bargaining agreement by denying the Grievant placement in ACS's Professional Development Program. The City asserted that the Union's request for arbitration should be dismissed because it cited no contractual provisions and that no nexus existed between the agreement and the underlying dispute. The City also contended that ACS's Professional Development Program was not a written rule or regulation of the Agency and that ACS's actions did not affect any term or condition of the Grievant's employment. The Union argued that an ACS memorandum and a letter regarding the Professional Development Program constitute written policies of the employer, which are grievable under the terms of the agreement. The Board found no nexus between the grievance and the ACS memorandum and letter. Accordingly, the Board granted the City's petition challenging arbitrability.

***DC 37, Local 768*, 4 OCB2d 41 (BCB 2011**

The Union filed a request for arbitration alleging that HHC violated the terms of the parties' Agreement by failing to enforce the Position Description for the job title of the Grievant's supervisor, failing to provide a performance evaluation, and wrongfully terminating the Grievant. HHC filed a petition challenging arbitrability alleging that the Union failed to establish the requisite nexus between the Grievant's termination and the Agreement because her termination was not a disciplinary action and her supervisor's Position Description was not a written policy of the employer. The Union asserted that HHC acted to circumvent the disciplinary process by permitting

the Grievant's supervisor to cease supervising her, and as a result, the Grievant lost her State-issued Limited Permit to work as a creative arts therapist. The Union also argued that HHC violated a performance evaluation policy by giving the Grievant a performance evaluation and then not allowing her an opportunity to improve. Further, the Union argued that HHC violated the supervisor's Position Description, which it claimed is a written policy of the employer, and thus grievable. The Board found that the requisite nexus existed as to the claims of wrongful discipline and violation of the performance evaluation policy, but not as to the claim arising from the Position Description. Accordingly, the petition challenging arbitrability was denied in part, and granted in part.

***SSEU, L. 371*, 4 OCB2d 44 (BCB 2011)**

The City challenged the arbitrability of a grievance alleging that the District Attorney's Office violated an employee handbook provision by terminating the grievant's employment. The City argued that there was no nexus between the grievance and the contract because the grievance alleged a wrongful termination and the disciplinary grievance provisions did not apply to District Attorney's Office employees. Furthermore, the City argued that there was no nexus between the grievance and the employee handbook because the cited provision did not require employer action, and, therefore, it could not be violated, misinterpreted or misapplied by the District Attorney's Office. The Union argued that it did not allege a wrongful disciplinary action, but, rather, alleged that the District Attorney's Office violated the employee handbook by treating an e-mail from the grievant as a resignation and by subsequently refusing to rescind it. The Board found that the requisite nexus had not been established, and, accordingly, granted the petition challenging arbitrability and denied the request for arbitration.

***DC 37, L. 768*, 4 OCB 2d 45 (BCB 2011)**

HHC challenged the arbitrability of a grievance alleging that it violated the collective bargaining agreement by reassigning the Grievant to a new tour. HHC argued that the Union did not establish the requisite nexus because no disciplinary charges were preferred against the Grievant and the reassignment was a proper exercise of its statutory management right. HHC additionally argued that the Union failed to establish that the Grievant's reassignment raised a substantial question as to whether it was for a disciplinary purpose. The Union argued that the Grievant's reassignment was punitive and that HHC's stated rationale was pretextual. The Union further argued that an employer's failure to serve charges does not bar the arbitration of a wrongful discipline claim when sufficient facts are alleged to raise a substantial question as to whether the act in question was disciplinary. The Board found that the requisite nexus had been established because the Union raised a substantial question as to whether the reassignment was disciplinary. Accordingly, the City's petition challenging arbitrability was denied and the Union's request for arbitration was granted.

6. Appeal of an Impasse Panel award

***DC 37*, 4 OCB2d 29 (BCB 2011)**

The Union appealed the Report and Recommendation of an Impasse Panel determining a dispute with the City and HHC over funding various additions to gross ("ATGs") for employees in the Creative Art Therapist ("CAT") title. The Union argued that the Impasse Panel erred by failing to compare the benefits and conditions of employment of CATs to similarly situated employees pursuant to § 12-311(3)(b)(i) of the NYCCBL, failing to properly weigh the facts surrounding the creation of the title, concluding that certain ATGs were not cost neutral, ignoring the purpose of ATGs, ignoring the parties' bargaining history, and adopting the City's position that the Union must fund all ATGs. The City contended that the Panel properly considered the evidence, testimony, and arguments of the parties, and issued a report that is supported by the record and complies with the criteria set forth in the NYCCBL. The Board found that the rationale and basis upon which the Panel reached its conclusion not to award the ATGs was not clearly expressed in the Report and, therefore, the Board remanded the Report and Recommendation to the Panel for further explanation of its conclusion that ATGs (other than the agreed-upon 15-year Service Longevity Increment) would not be awarded, and affirmed the remainder.

Board of Certification

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

***CWA, L. 1180*, 4 OCB2d 7 (BOC 2011)**

Several unions sought to represent the title Customer Information Representative, Levels I, II, and III. Based on the results of a mail ballot election, in which CWA, Local 1180; Local 237, IBT; and DC 37 participated, the Board found that the majority of employees casting valid ballots selected DC 37, and accordingly it amended DC 37's Certification No. 46C-75 to add the petitioned-for title.

***UFA*, 4 OCB2d 39 (BOC 2011)**

The UFA filed a petition to represent Pilots and Marine Engineers (Uniformed-Fire Department), currently represented by MEBA. The Board, in an earlier decision, found the petition was timely and supported by a sufficient showing of interest, and it ordered an election to ascertain the employees' wishes as to their union representation. In the present decision, based on the results of a mail ballot election, the Board found that the majority of employees casting valid ballots selected the UFA, and, accordingly, the Board terminated MEBA's certification and certified the UFA as the exclusive representative for the bargaining unit.

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Recent Developments at the NLRB

By Paul Murphy

Almost immediately after the 2008 elections, labor law observers started predicting that the members of a newly constituted Board would revisit a number of cases that were decided by their predecessors and make sweeping changes. In the three years that have elapsed since, notwithstanding the recent public outcry about the Board's actions, many of the predicted changes have not been forthcoming and Wilma Liebman's departure from the Board upon the expiration of her term on August 27, 2011, creates considerable uncertainty about the Board's future direction. In fact, given the Board's established practice of not overruling precedent in the absence of three votes to do so,[1] there may be no significant caselaw changes for the foreseeable future. Between now and the end of December, the Board will only overrule precedent if Member Hayes joins Chairman Pearce and Member Becker in voting to do so. Given that he has dissented in the small number of cases in which the Board has reversed course, there is little reason to believe that he will cast a third vote to overrule precedent on any significant issue. The prospect for change after December, 2011 is perhaps even slimmer. At that time, Member Becker's recess appointment expires and the Board will be reduced to two members. Unless, the President makes recess appointments, the Board will be unable to decide any cases, let alone revisit existing precedent. As a result of those developments, the sea change that everyone predicted three years ago has not materialized and there appears to be little likelihood that it will for at least the next 16 months.

The Board did, however issue three decisions in the waning days of Chairman Liebman's term in which it overruled precedent. These three cases will be summarized below.

After the 2008 elections, *Dana*, 351 NLRB 439 (2007) was near the top of everyone's list as a probable candidate to be overruled. In *Dana*, the Board modified its established recognition bar doctrine to provide for a 45 day window period after voluntary recognition in which employees could file a decertification petition, or a rival union could seek an election. This 45 day window period was coupled with the requirement that the parties notify the NLRB to obtain a notice informing employees that recognition had been granted and apprising them of their right to file a decertification petition or seek representation from a rival union during the 45 day window period. Under *Dana*, employers and unions were free to ignore the notification requirement, but there would be no recognition bar, and, in the event they reached a collective bargaining agreement, no contract bar until the notification requirement was satisfied.

On August 26, 2011, in *Lamon's Gasket*, 357 NLRB No. 77, the Board, by a three to one vote, with Member Hayes dissenting, overruled *Dana*. The Board returned to the traditional recognition bar doctrine, and eliminated the 45 day window period and notice posting mandate. As a result, after an employer and union enter into a voluntary recognition agreement, the union will enjoy an irrebuttable presumption of majority status for a reasonable period of time in which to negotiate a contract. The Board also, for the first time, established bench marks for measuring the "reasonable period of time." In doing this, the Board borrowed from *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), and cases where the Board has issued a remedial bargaining, ordering, and indicated that a recognition bar will create an unrebuttable presumption of majority status for at least six months, and no more than one year. In determining whether a reasonable period of time has elapsed after the first six months, but before the end of the year, the Board will weigh (1) whether the parties are bargaining for initial contract; (2) the complexity of the issues being negotiated and the bargaining processes; (3) the amount of time elapsed since the bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.

In deciding to overrule *Dana*, the Board majority asserted that the prior Board had devised a solution for which there was no problem. It noted that voluntary recognition and the need for a bar to allow time for the parties to negotiate was embedded into the fabric of the Act, and that *Dana*'s modification of the established recognition bar doctrine was based on unfounded assumptions about the unreliability of voluntary recognition and unsupported by empirical evidence.

In *Lamon's Gasket*, the Board asserted that it had conducted the empirical analysis that the *Dana* Board had failed to do and that its review of the data revealed that *Dana* was unnecessary. To support this assertion, the Board cited data drawn from the Board's four year experience with *Dana*. This data revealed that as of May 2011, the Board had received 1,333 requests for *Dana* notices. There were 102 petitions filed within the 45 day window period, but elections resulted in only 62 of those cases. A review of the data revealed that the recognized union was displaced or replaced in only 17 cases in which an election was held. The Board's majority calculated that the recognized union was ousted in only 1.2 percent of all cases in which *Dana* notices issued.[2] The majority speculated that employees would just as likely experience buyer's remorse in a similar percentage of cases[3] in which

they actually voted for representation and concluded that the Dana requirements were unnecessary and imposed unwarranted uncertainty and delay at the critical early stages of a bargaining relationship. On this basis, the majority overruled *Dana*.

Member Hayes dissented, relying on many of the same arguments put forth by the majority decision in *Dana*. He asserted that the conclusions drawn from the data by the majority were unwarranted, and deemed it significant that in 25 percent of all cases in which an election was held pursuant to a petition filed within the 45 day window period employees voted against continued representation or in favor of a different union. He also asserted that the Board's own experience demonstrated that the majority's concerns about *Dana*'s impact on newly formed bargaining relationships was unfounded. He claimed that examination of *Dana* related cases before the Board revealed that collective bargaining agreements had been reached in 100 percent of them. Therefore, he asserted *Dana*'s did not unduly burden the bargaining process.

It is not clear what lessons can be drawn from the four year experience with *Dana*, but given the unresolved debate regarding the appropriate balance between promoting stable collective-bargaining and protecting individual employees' freedom of choice, it is almost certain that the issue could be revisited if the composition of the Board changes in the future.

In conjunction with its decision in *Lamon's Gasket*, on August 26, the Board also issued its decision in *UGL-UNNICO Services Company*, 357 NLRB No. 76, overruling *MV Transportation*, 337 NLRB 770 (1972) and restoring the "successor bar" doctrine.[4] The "successor bar" is comparable to the recognition bar and is utilized to afford a union a reasonable period of time in which it enjoys an irrebuttable presumption of majority status when a successor employer is required to recognize and bargain with its predecessor's employees' bargaining representative under *NLRB v. Burns Security Services*, 406 NLRB 272 (1972) and *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 V.S. 27 (1987).

It was hardly surprising that the current Board overruled *MV Transportation* and restored the "successor bar" doctrine. Since the mid-1960s, whenever control of the White House changed, the Board's position on "successor bar" or some equivalent eventually changed. Throughout the mid-1960s, the Board did not distinguish between initial voluntary recognition and recognition granted by a successor employer, and in both instances provided unions with a reasonable period of time during which it enjoyed unchallengeable majority status. In 1975, the Board rejected the application of recognition bar principles to successorship cases and held that following a successor's recognition of the union that represented its predecessor's employees, the union enjoyed only a rebuttable presumption of majority status. *Southern Moldings*, 219 NLRB 119 (1975). The change of course was made with very little discussion, other than an observation that a union is not entitled to greater rights with respect to a successor than it had with the predecessor. In 1981, the Board reversed course, and, without mentioning *Southern Molding*, applied its recognition bar doctrine to a successor employer that had recognized the predecessor's employees' union in accordance with *Burns*.[5] *Landmark International Trucks*, 257 NLRB 1375 (1981). This decision was accompanied by little comment other than the observation that the Board could not discern any reason for distinguishing a successor employer's bargaining obligation pursuant to voluntary recognition from that of any other employer's obligation to bargain for a reasonable period following recognition.

By 1984, President Reagan's appointees were entrenched on the Board, and in *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985) the Board, in yet another relatively short decision, overruled *Landmark* and indicated that no basis existed for providing a Union with an irrebuttable presumption of majority status for a reasonable period of time to bargain with a successor employer. It noted that although the relationship between successor employer and the union is new, the relationship between the union and its constituents, the employees, is not, and that the employees have had sufficient opportunity to evaluate the effectiveness of the union.

Harley-Davidson remained the law until 1999, when the Board overruled it in *St. Elizabeth's Manor*, 329 NLRB 341 (1999). In this decision, the Board noted that it was not applying a "recognition bar" to new relationship, but would instead apply what it called a "successor bar." Regardless of what it was called, the result was the same; a union would be afforded a reasonable period of time in which its majority status could not be challenged to negotiate its first contract. The Board's underlying rationale for reversing course was that the transition period following the emergence of a successor employer is very unsettled and comes with heightened anxiety among employees about their status and future. Thus, the Board believed that any evidence of disaffection from the union among employees who had not exhibited dissatisfaction previously was unreliable and very likely only temporary. Therefore, the Board concluded that it was important to provide the union with a reasonable period of time to prove its effectiveness to the employees. Finally, in 2002, the Board composition changed and in *MV Transportation*, *supra*, the Board overruled *St. Elizabeth's*. The majority concluded that the successor bar doctrine was an unwarranted infringement on employee free choice. It noted that the "successor bar"principle coupled with established contract bar law could serve to deprive employees of the opportunity to displace or replace a union with which they are unhappy for as much as six years.

As noted earlier, the current Board, with some modifications returned to *St. Elizabeth's* and restored the successor bar in *UGL-UNNICO*. The Board's revision to the "successor bar" was characterized as an attempt to minimize the possible adverse effect of the doctrine on employees who were dissatisfied with their bargaining representative and wanted a change. The first change was to establish two different periods of reasonable time depending on whether a successor employer maintained the status quo upon assuming control of the business or exercised its right to establish new terms and conditions. In those instances where a successor employer preserves the existing conditions, in the Board's view, the parties are negotiating the equivalent of a renewal agreement, which FMCS data suggests typically takes about six months to do. Thus, the Board established a bright line rule for these circumstances and ruled that the reasonable period of time would be six months. If an employer, on the other hand, takes advantage of its rights to set initial conditions of employment, the Board said the reasonable period of time would be at least six months but for no more than one year, and that the multifaceted *Lee Lumber* analysis discussed earlier would be utilized to determine how far beyond six months, the reasonable period of time would be extended. The Board reasoned that the uncertainty arising in those circumstances where the successor employer implements new terms, justified allowing for the possibility of additional time being needed. Finally, it acknowledged the concern expressed in the *MV Transportation* that employees in these circumstances could conceivably be foreclosed from effecting a change in their bargaining representative for as much as six years, and modified the contract bar doctrine for those cases where the "successor bar" applies. In this regard, when a successor employer and a union reached agreement before the "reasonable period" of time expires and there was no opportunity to file a petition within an open period during the final year of the predecessor's bargaining relationship with the union, the new contract will only serve as a bar for two rather than three years.

Like *Lamon's Gasket*, the Board in *UGL-UNNICO* places greater emphasis on the importance of stability in collective bargaining than the cases in which they overrule, and affords less deference to the exercise of employee free choice. Given that the Board, depending on its composition, has changed its position on this issue six times in the last thirty-five years, perhaps the controversy surrounding the need for a "successor bar" may be unresolved until the Supreme Court weighs in on the issue.

The last of the notable decisions issued in the final days of Chairman Liebman's tenure is *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83. In the case, the Board overruled *Park Manor Care Center*, 305 NLRB 872 (1991), and ruled that a unit comprised of only Certified Nurses Aides and excluding all other service and maintenance employees was an appropriate unit in a non-acute health care facility. In addition, the Board indicated that it was reiterating and clarifying its standard for determining whether a petitioned for unit is inappropriate in any setting except for acute health care facilities. In doing so, the Board indicated that when a petitioned for a unit contains a readily identifiable group of employees who have a community of interest, and another party asserts that the unit is inappropriate because it does not contain additional employees, that party bears the burden of establishing that the additional employees it seeks to include sharing an overwhelming community of interest with the petitioned for employees.

Park Manor issued in the wake of the Board's use of rulemaking to address unit composition issues for healthcare employees and deciding to only apply rulemaking to acute-care hospitals and to continue adjudicating unit determinations in non-acute healthcare facilities, such as nursing homes. *Park Manor* though indicated that the rulemaking process should be used as a guide in determining units in non-acute healthcare settings. As a result, it became accepted that, on some level, the appropriate unit for non-professional, non-technical nursing home employees had to include all service and maintenance employees in a nursing home, including certified nurses aides.

In *Specialty Healthcare*, the Board indicated that a 23 year-old ambiguous rulemaking record was no longer a sound basis for making nursing home unit determinations, and held that it would utilize the established community of interest standards that it applied to all other industries to adjudicate unit determinations in nursing homes. As noted earlier, it also clarified how those established standards would be applied.

The Board noted that its unit jurisprudence required it to consider whether the petition seeks an appropriate bargaining unit, and that it does not require a union to seek a particular unit. Using this analysis, the unit sought only has to be appropriate and does not have to be the most appropriate unit. *PJ Dick Contracting*, 290 NLRB 150 (1988); *Overnite Transportation Co.*, 322 NLRB 347 and 322 NLRB 723. In fact, *Overnite*, a Region 3 case, illustrates this concept very well. In the midst of the Teamster's efforts to organize *Overnite* in the mid 1990s, a petition was filed in Tennessee seeking a unit of drivers, dock employees and mechanics. The Employer sought to exclude the mechanics, but the Regional Director for Region 26 concluded that petitioned for unit was appropriate and directed an election. The Board denied the employer's request for review. When another Teamsters local filed a petition seeking an election limited to the employer's drivers and dock employees working at a Buffalo Terminal, and excluding the mechanics, the employer countered that the mechanics had to be included. Region 3's Director, relying on the Tennessee case, agreed. The Teamsters filed a request for review. The Board granted

the request and reversed the Regional Director, finding that the drivers and dock employees were an appropriate unit, and that there were enough distinctions between their conditions of employment and those of the mechanics, that the mechanics' inclusion in the unit was not required. see *Overnite*, 322 NLRB 347 (1996). The employer filed a request for reconsideration, arguing that the Tennessee and Buffalo decisions could not be reconciled, and that the Board was providing the Teamsters with an accommodation.

In responding to the request for reconsideration, the Board indicated that the employer's arguments reflected a fundamental misapprehension of the Board's unit determination principles. It emphasized that a unit only has to be appropriate, and noted that although a unit of drivers, dock employees and mechanics was appropriate, so was a unit of just drivers and dock employees. *Overnite Transportation Company*, 323 NLRB 723.[6]

In *Specialty Healthcare* the Board indicated that the principles it explained in *Overnite* would guide its future unit determination in non-acute health care facilities, rather than relying on the rulemaking process used for acute-care hospitals. This change in approach allowed the Board to entertain the possibility that a unit limited to certified nurses aides could be an appropriate unit. It then noted that certified nurses aides share a strong community of interest for obvious reasons. Therefore, there was a distinct readily identifiable group of employees with a strong community of interest. Accordingly, the Board concluded that such a unit would be appropriate.

In what the Board said was just a clarification of its established unit determination standards, it noted that any party, seeking to add other employees to what is determined to be an appropriate unit bears the burden of demonstrating that these additional employees share an "overwhelming" community of interest with the employees in the petitioned for unit. Applying this standard in *Specialty Healthcare*, the Board, while agreeing that a unit comprised of all service and maintenance employees, including certified nurses aides was appropriate, stated that a unit of just certified nurses aides, was also appropriate. Therefore, it noted that the Employer was required to show that the remaining service and maintenance employees shared an "overwhelming" community of interest with the certified nurses aides. The Board's majority recited several differences in employment terms between the two groups, and noted that the Employer had not satisfied its burden.

This decision certainly creates an opportunity for unions to tailor their organizing efforts at nursing homes differently and provides them with some options about which groups of employees it elects to organize. It is fairly evident that when organizing non-professional, non-technical nursing home employees, unions have at least three units from which to select; all service and maintenance employees, including all CNAs; all CNAs, excluding all other service and maintenance employees, and, all non-CNA service and maintenance employees. Whether this affects organizing, and the manner in which unions direct their organizing drives in nursing homes remains to be seen.

Endnotes

1. See *Hacienda Hotel, Inc. Gaming Corp.*, 355 NLRB No. 154 (2010) (Chairman Liebman and Member Pearce's concurring opinion).
2. Region 3's own experience is consistent with the Agency wide data. From September 2007 until August 2011, the Region received 21 requests for *Dana* notices. No petition was filed pursuant to these notices. Perhaps, just as telling is what else did not happen. In the four years in which *Dana* was the law of land, there was not one petition filed in a Region 3 case in which voluntary recognition had been previously granted, where the parties had ignored the *Dana* requirements and never requested notices.
3. It might be interesting to see the results of a study that compared the longevity of bargaining relationships that were formed pursuant to voluntary recognition versus those that resulted from the NLRB's election and certification process. My untested hypothesis is that relationships formed pursuant to voluntary recognition are more stable, that the parties are more likely to reach a just contract and that fewer decertification petitions are filed. If my hypothesis is correct, it is probably more attributable to the employers' response to unions than to the means by which unions secure representation status.
4. When it originally granted review in *UGL-UNNICO*, the Board consolidated it with a Region 3 case in which it had also granted review because it too presented "successor bar" issues. *Grocery Haulers, Inc.*, 3-RC-11944. In *UGL-UNNICO*, however, the Board indicated that it was severing *Grocery Haulers, Inc.* and would decide the case separately because it presented additional issues.
5. Ironically, both *Southern Molding* and *Landmark* were unanimously decided by three member panels, and Member Fanning participated in both cases. No attempt was made to reconcile his decision in *Landmark* with his vote in *Southern Molding*.
6. The Board explained that a union is not required to petition for the largest possible unit, unless the smaller group it seeks to represent does not constitute an appropriate unit. By the same token, the Board explained that a petition is not compelled to seek a narrower unit, if a broader grouping is also appropriate.

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 October 2011.

GOOD FAITH BARGAINING

VILLAGE OF BALDWINSVILLE AND BALDWINSVILLE POLICE BENEVOLENT ASSOCIATION, 44 PERB ¶3031 (2011). The Board reversed in part and affirmed in part an ALJ decision determining the arbitrability of certain proposals. The Board stated that a PBA proposal seeking to contractually codify constitutionally protected rights governing GML §207-c property rights was a mandatory subject of bargaining. The Board also found that a Village proposal to expand the scope of an anti-discrimination clause in the CBA was not a waiver of the right to pursue Taylor Law rights in other than the grievance/arbitration procedure, and did not propose an election or choice of forums. The Board found the demand to be mandatory pursuant to *Cohoes*. The Board also concluded that a demand permitting employees to work task and then leave is nonmandatory because it abridges an employer's authority to assign work when an employee is at work and on the payroll. The Board also affirmed a proposal governing the procedure for assignment to special events.

LIVINGSTON COUNTY COALITION OF PATROL SERVICES, 44 PERB ¶3036 (2011). The Board reversed an ALJ decision and held that the union violated the Act by failing to execute an agreement which had been ratified. The union contended that the reason for the failure to execute was that there had not been a meeting of the minds as evidenced by the fact that the agreement contained language which was not previously agreed. The Board found that the language was part of the "clean up" of a particular clause and that there was in fact a meeting of the minds.

COUNTY OF MADISON AND MADISON COUNTY SHERIFF AND MADISON COUNTY DEPUTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION, INC., 44 PERB ¶3035 (2011). The Board affirmed, as modified, an ALJ decision which held that, under §209.4(g) of the Act a PBA proposal seeking to increase the accumulation of sick leave time without a modification in overall compensation is nonarbitrable. Further, a proposal intertwining compensation with disciplinary procedures is nonmandatory. The PBA's exceptions to the ALJ holding that the employer's proposal to exclude retroactive pay from employees not on the payroll at the time of contract ratification was nonmandatory was dismissed.

DEER PARK UNION FREE SCHOOL DISTRICT, 44 PERB ¶3032 (2011). The Board reversed an ALJ and held that the District did not violate the Act when it withheld vertical step increments to unit employees on the specific date alleged in the charge, which was after the expiration of the parties' CBA. Based upon the terms of the CBA, and no past practice being present, the Board found that the District did not have contractual obligation to advance employees a vertical step on the salary scale.

COUNTY OF TOMPKINS AND TOMPKINS COUNTY SHERIFF AND TOMPKINS COUNTY DEPUTY SHERIFF'S ASSOCIATION, INC., 44 PERB ¶3024 (2011). The Board affirmed in part and reversed in part an ALJ decision which made determinations about the arbitrability of certain proposals submitted to interest arbitration under §209.4(g) of the Act. The Board rejected the Association's argument that the employer's proposal to exclude all employees not on the payroll at time of ratification or the issuance of an interest arbitration award was prohibited. In addressing the merits of the Association's contentions that challenged the finding that certain of its proposals were nonmandatory, the Board reaffirmed the test in *New York State Police Investigators Association (State Police)*, 30 PERB ¶3013 (1997) (subsequent history omitted) The Board stated that when a demand which is arbitrable under this test also includes a component which is nonarbitrable, the entire demand is nonarbitrable. Accordingly, proposals which include demands relating to the timing and posting of assignments and the content of a medical release form are not arbitrable. A health insurance buy-out proposal is, however, arbitrable. Demands for release time, road patrol schedules, and one relating to equipment were not arbitrable. Association demands relating to pay, and overtime were directly related to compensation and arbitrable. The Board found, however, that a portion of a clothing allowance demand was arbitrable, but other aspects of the demand were not. The demand constituted severable demands which could be distinctly analyzed.

CHEMUNG COUNTY SHERIFF'S ASSOCIATION, INC., 44 PERB ¶3026 (2011). The Board in reviewing a determination concerning the arbitrability of proposals under §209.4(g) of the Act, held that the timeliness of an amended charge is based upon the filing date of the original charge as long as the claim relates back to the original charge. The employer's first amended charge was therefore timely, but the second, which added a new statutory claim, was not arbitrable and not timely. As a result, the employer waived any objection to arbitrability and the Board did not have to determine whether the proposal relating to a GML §207-c hearing procedure was directly related to compensation under §209.4(g) of the Act. Addressing the merits of the proposal, the Board held that the a GML §207-c hearing procedure was mandatory. The Board did so based upon the conclusion that the Court of

Appeals' decision in *Watertown* 95 NY2d 73 (2000) governed. (Compare *Poughkeepsie*, 6 NY3d 514 (2006)).

COUNTY OF ORANGE AND SHERIFF OF ORANGE COUNTY AND ORANGE COUNTY DEPUTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION, INC., 44 PERB ¶3023 (2011). The Board affirmed in part and reversed in part an ALJ decision which made determinations about the arbitrabilty of certain proposals submitted to interest arbitration under §209.4(g) of the Act. The Board reaffirmed that the test for determining whether a particular demand is arbitrable under §209.4(g) is set forth in *New York State Police Investigators Association (State Police)*, 30 PERB ¶3013 (1997) (subsequent history omitted). In applying that test, the Board will compare each proposal with the subjects specifically identified in the statute in order to determine arbitrability. The Board overruled that portion of *County of Putnam*, 38 PERB ¶3013 (2005) which concluded that proposals that were limited to seeking supplemental compensation for the nonuse of sick leave were nonarbitrable under §209.4(g). The Board also overruled that portion of *County of Sullivan*, 39 PERB ¶3034 (2006) to the extent that it held that a proposal seeking to permit the conversion of overtime compensation into compensatory leave and to permit the subsequent remoneterization of that leave into cash or be applied to health insurance is nonarbitrable. The Board therefore found that a proposal to convert unused leave time to cash or be applied to health insurance costs are directly related to compensation and therefore arbitrable. The Board also held that a proposal relating to the accumulation and conversion of leave time was nonarbitrable. An employer proposal was arbitrable to the extent that it sought to delete a clause directly related to compensation. A unitary demand including flex time and scheduling, while touching upon overtime, was nonarbitrable. An employer proposal that an employee's unpaid leave of absence run simultaneously with FMLA leave is nonarbitrable because its primary characteristic is utilization of unpaid leave.

COUNTY OF ERIE, 44 PERB ¶3027 (2011). The Board affirmed an ALJ decision, as modified, which held that the County violated section 209-a.1(d) of the Act by refusing to execute memoranda of agreement signed by the Erie County Medical Center Corporation (ECMCC). The Board found that the County and the ECMCC were joint employers by virtue of §3629 of the Public Authorities Law, and that read together with §3630 of the Public Authorities Law, a distinct type of joint employer relationship is created. For example, the employees of this joint employer do not constitute a separate unit, a statutory provision at sharp variance with Board precedent on the subject. Pursuant to Public Authorities Law §3629.2, the County's Office of Labor Relations (OLR) acts as an agent for ECMCC. The Board concluded that the Act was violated when the County failed to sign the agreement because the County had previously acquiesced in ECMCC's conducting separate negotiations with the union. As a general rule, each component of the joint employer has the obligation to notify the other when engaging in negotiations. In this matter, the County had actual knowledge. Under the facts of this case, the County had the obligation to state that it would not sign future agreements. Having cloaked the ECMCC with apparent authority to negotiate on its behalf, the County violated the Act by not executing the agreement. *See also Remedy section*.

NEW YORK CITY TRANSIT AUTHORITY, 44 PERB ¶3025 (2011). The Board affirmed an ALJ decision dismissing a charge on the grounds that the work alleged to have been unilaterally transferred had not been exclusively performed.

CITY OF NIAGARA FALLS, 44 PERB ¶3015 (2011). The Board affirmed an ALJ decision which held that the City violated the Act when it unilaterally implemented an amendment to its residency rules by eliminating the procedure for reinstatement after residency is reestablished and for reinstatement to the employee's position if vacant. The Board held that the procedures were mandatory subjects of bargaining, and are not pre-employment qualifications. The Board also held that the stipulated record failed to show whether Public Officers Law 30.4(3) applies. This statute imposes a residency requirement for police forces which consist of less than 200 full time members. Even if applicable, however, the statute does not contain language that prohibits negotiations over related procedures and rights with respect to satisfying the residency requirement imposed by the City.

CITY OF SYRACUSE, 44 PERB ¶3017 (2011). The Board affirmed an ALJ decision which held that the City violated the Act when it required employees to sign and submit a 12 paragraph affidavit of city residency. The Board found that the affidavit requirement is not a prohibited subject of bargaining, and is a mandatory subject of bargaining. The employees may be required to pay a notary fee, are subject to criminal prosecution if an affidavit contains a false statement, and their privacy rights are affected.

TOWN OF ISLIP, 44 PERB ¶3014 (2011). The Board affirmed an ALJ decision that the Town violated the Act by unilaterally terminating the past practice of providing cars to unit employees but that it did not violate the Act by refusing to bargain impact. The Board held that the conditions of a past practice were satisfied and that the Town Code and Administrative Procedures Manual did not permit unilateral action. Additionally, a local law is invalid to the extent that it is inconsistent with the Act. The Board further stated that the Town can not change a past practice absent an agreement, and that the provision of cars to employees does not relate directly to the manner and means by which services are provided to the constituency. The Board also affirmed the finding that Local 237 failed to prove that the Town refused to bargain impact, and that the withdrawal of a vehicle use proposal during negotiations did not constitute a separate bad faith bargaining violation.

CANTON POLICE ASSOCIATION, 44 PERB ¶3019 (2011). The Board affirmed an ALJ decision finding that the employer's charge challenging the arbitrability of a proposal was timely but that the at-issue proposal was nonmandatory. The Board found that the charge was timely filed within the meaning of Rule 205.6(b), and that the filing of a different response still within the time period provided by the rules did not alter this conclusion. With regard to the merits of the proposal, the proposal was nonmandatory since it set a minimum staffing level and was not sufficiently related to a nonmandatory subject in the parties CBA which would convert to a mandatory subject under *Cohoes*.

TOWN OF FISHKILL POLICE FRATERNITY, INC., 44 PERB ¶3013 (2011). The Board affirmed an ALJ decision dismissing a charge alleging that the Town violated the Act when it changed tours of duty and work schedules. The Board found that the parties' contractual language and bargaining history demonstrates that the Town satisfied its duty to bargain over the subject matter of the charge.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, 44 PERB ¶3003 (2011). The Board affirmed an ALJ decision finding that the employer violated §209-a.1(d) of the Act when it unilaterally reduced the number of parking permits issued to unit members. The Board rejected the defenses that the provision of a parking permit is not a mandatory subject of bargaining, that the employer was not responsible for the change, that the remedy to revert to the past practice violated public policy, and that impact bargaining was not demanded.

CITY OF NEW ROCHELLE, 44 PERB ¶3002 (2011). The Board affirmed an ALJ decision which held that the City violated the Act by unilaterally transferring special detail duties to superior officers when the work had traditionally been performed by police officers. The PBA and the City had entered into an agreement pursuant to which the police would be eligible to perform this work. The Board found that this agreement did not constitute an arguable source of right since it was not a source of right of exclusivity to the PBA. The Board also did not find that the agreement constituted a clear, unmistakable waiver of the City's right to negotiate, and the management rights clause did not grant the City the right to unilaterally transfer exclusive bargaining unit work. The Board found that the PBA members performed the work exclusively. Under the facts of this case, a period of one year, in which the PBA members performed the duties numerous times, which followed a period of time when the PBA members performed the same duties for private vendors, the Board found that the work was performed exclusively. Any issue regarding the propriety of the remedy issued by the ALJ would be addressed in a compliance proceeding.

BROOKLYN EXCELSIOR CHARTER SCHOOL AND NATIONAL HERITAGE ACADEMIES; BUFFALO UNITED CHARTER SCHOOL, 44 PERB ¶3001 (2011). The Board addressed the issues raised in this consolidated decision of whether the Board has jurisdiction over charter schools managed in conjunction with a for profit business pursuant to the NY Charter Schools Act of 1998, whether the NLRA preempts this Board's jurisdiction, and the power of this Board to entertain management confidential application in charter schools. Upon review of the Charter Schools Act, the Board concluded that the Act is explicitly and implicitly applicable to every New York charter school. Therefore, the role that is played by National Heritage Academies (NHA), a private for-profit charter school management company, is not determinative. Any precedent which would lead to a contrary determination has been superseded by the Charter Schools Act. The Board also concluded that based upon the absence of any reference in the Charter Schools Act to managerial or confidential applications, the Legislature intended to deprive the Board of jurisdiction to hear and determine such applications. Alternatively, the Board concluded that the evidence presented did not warrant such designations at issue. The Board also concluded that the Charter Schools Act and the Taylor Law are not preempted by the NLRA since charter schools are political subdivisions pursuant to section 2.2 of the NLRA.

DISCRIMINATION AND INTERFERENCE

COUNTY OF TIOGA, 44 PERB ¶3016 (2011). The Board affirmed, as modified, an ALJ decision which dismissed a charge alleging that the County violated the Act when it disciplined 6 unit members for engaging in protected activity and by disciplining more severely the unit president and shop steward. The activity consisted of the employees wearing a pink ribbon to demonstrate their dislike for a supervisor. The Board held that the activities in question were not protected since they did not have a relation to joining, forming or participating in a union. The Board will examine the totality of the circumstances in making its determination. The activity was not related to any ongoing union activity and was unprotected. The Board also stated that it found no basis to disturb the ALJ's credibility determination and that the pursuit of more severe penalties against the union officers under the facts presented was not a violation of the Act.

REPRESENTATION

NIAGARA TRANSPORTATION AUTHORITY, 44 PERB ¶3028 (2011). The Board affirmed a Director's decision and held that a unit placement petition is not a proper procedural vehicle for seeking to remove a position from an existing unit except under very limited circumstances. The Director's decision not to process the petition was therefore affirmed. Local 2029, the union seeking placement, had not been notified of a prior placement petition in which the sought after position was accreted to a CSEA unit. Local 2028 did not allege that the employer and CSEA were aware that it claimed to represent the positions, or that it claimed to represent it. Further, there is

no allegation that that there was an intentional failure to disclose that Local 2028 was an interested party, or that it may be affected by the petition.

TOWN OF SOUTHAMPTON, 44 PERB ¶3018 (2011). The Board reviewed an ALJ decision which dismissed a unit placement petition. The Board held that the constitution and by-laws of the petitioning party exclude the members sought to be accreted, and that this was a sufficient basis to dismiss the petition. Accordingly, it did not need to review the ALJ's determination that there was the adversarial position between the current unit members and those sought to be accreted, or the supervisory status of the current members were sufficient grounds to dismiss the petition

DUTY OF FAIR REPRESENTATION

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK (MORRELL), 44 PERB ¶3030 (2011). The Board affirmed an ALJ decision dismissing two charges alleging that the UFT breached its duty of fair representation by failing to timely respond to her letter and by its processing of a grievance challenging the failure of the arbitrator to issue a §3020-a decision within the time frame in the CBA. The other charge asserted a similar failure by the UFT in its obligation to her under its duty of fair representation. The Board affirmed the ALJ's conclusions that Morrell failed to meet her burden of proof to demonstrate that the UFT's conduct was discriminatory, arbitrary or taken in bad faith. The Board fund that the UFT responded to the letters in a reasonable period of time and that its handling of the grievances was within the wide degree of discretion accorded unions.

HOWARD S. COOPER AND STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK AT STONY BROOK) and UNITED UNIVERSITY PROFESSIONS, 44 PERB ¶3021 (2011). The Board affirmed a Director's decision which dismissed a charge alleging a violation of the duty of fair representation. The union did not have a duty to represent the individual, and the charge was also properly dismissed as untimely.

PRACTICE AND PROCEDURE

COUNTY OF MONROE, 44 PERB ¶3033 (2011). The Board denied a union's request for an expedited determination of a charge which alleged a union violated the Act by introducing proposals at fact-finding which are substantially different than the last stated position between the parties in negotiations. The Board denied the motion, stating that the procedure in §204.4(a) of the Rules was designed to allow a party to seek an expedited determination of whether a proposal is mandatory, permissive, or prohibited. The Board stated that the factual and legal issues should be fully addressed before an ALJ prior to the issues being presented to the Board.

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO (GRASSEL), 44 PERB ¶3034 (2011). The Board denied a motion for interlocutory review of an ALJ decision of a procedural ruling. The Board found no extraordinary circumstances present to warrant granting review, and also denied a cross-motion for sanctions. The Board, however, again cautioned Grassel that such sanctions may be imposed for the filing of meritless exceptions or motions.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK (RANNIE), 44 PERB ¶3029 (2011). The Board denied exceptions and dismissed a charge for failure to provide proof of service despite having granted the charging party additional time to do so.

ONTARIO COUNTY SHERIFF'S ROAD PATROL UNIT 7850-05, ONTARIO COUNTY LCAL 835, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, 44 PERB ¶3010 (2011). The Board stated that a party does not have the right to file exceptions to an interim ruling, and that a party must seek such permission pursuant to R. 212.4(h) of the Rules. The Board stated that the employer failed to show extraordinary circumstances to warrant granting of leave to file exceptions.

UNITED FEDERATION OF TEACHERS (PINKARD), 44 PERB ¶3011 (2011). The Board dismissed exceptions which were untimely filed.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND UNITED FEDERATION OF TEACHERS (ZARINFAR), 44 PERB ¶3012 (2011). The Board affirmed a Director's decision dismissing a charge for failure to state a *prima facie* case.

DEFERRAL AND JURISDICTION

RYE POLICE ASSOCIATION AND CITY OF RYE, 44 PERB ¶3022 (2011). The Board affirmed an ALJ decision which deferred a charge to the parties' grievance and arbitration procedure. The contract had expired and the Association acknowledged that it might provide an arguable source of right. Accordingly, the charge was deferred pursuant to *New York City Transit Authority (Bordansky)*.

WESTCHESTER COUNTY DEPARTMENT OF PUBLIC SAFETY POLICE BENEVOLENT ASSOCIATION, INC., AND COUNTY OF WESTCHESTER, 44 PERB ¶3020 (2011). The Board affirmed an ALJ decision which deferred a charge pursuant to the Board's merits deferral policy in *New York City Transit Authority (Bordansky)*. The Board rejected the contentions that the policy violates the Board's exclusive nondelegable jurisdiction and that the policy is consistent with the policy of the Act.

REMEDY

COUNTY OF ERIE, 44 PERB ¶3027 (2011). The Board modified a remedial order and ordered that the County refrain from interfering with the ECMCC offering a make whole remedy, and also required the posting of a notice.

2010–11 U.S. Supreme Court Decisions Affecting Labor and Employment

By Seth H. Greenberg

Labor and employment law continued to be the subject of high profile cases before the U.S. Supreme Court in its 2010-11 term. Attention-getting headlines have resulted from the Court's recent decisions addressing free speech and retaliation in the workplace, employment discrimination, and arbitration. Phrases such as the "cat's paw" became household terms (okay, maybe not household terms, but that theory of liability has earned a higher ranking in the practice's trending lexicon). There was a case involving the nation's largest private employer and a case involving one of the top cell phone service providers. In sum, it was another busy term for the high court.

Many followers of Court activities agree that there is noticeably more energy coming from the bench, the result believed to be due, at least in large part, to the fact that since 2005, the Court welcomed four new justices. Each has been actively participating in the Court's legal jousting. The term beginning October 2010 also marked the first time that three women were on the Court. The newest member, Justice Elena Kagan, recused herself in roughly half of the cases decided during the term. Her recusals in most of these cases were not surprising given the fact she was the Obama Administration's Solicitor General and had some role as an advocate during the cases' paths to the Court. Kagan's recusals do not seem to have affected the outcomes of many of the labor and employment law cases, as her participation would likely not have been the swing vote.

Not surprisingly, the Court continues to be split along ideological blocs of four liberals and four conservatives, with Justice Anthony M. Kennedy playing tie-breaker in 12 of 14 cases decided by a 5-to-4 vote. In two-thirds of those cases, Kennedy sided with the Court's more conservative jurists. Even though they continue to be narrowly decided, the Roberts Court does not seem shy about tackling labor and employment law cases. I anticipate that trend will continue.

The purpose of this article is to briefly summarize employment-related Court decisions from its most recent term, as well as to offer a short preview of the docket ahead for the 2011-12 term, set to begin October 3, 2011.[1]

Third Party Retaliation

Thompson v. North American Stainless (Vote: 8-0) (Decided January 24, 2011)[2]

According to the Supreme Court, third party retaliation can violate Title VII. In *Thompson v. North American Stainless* ("NAS"), a unanimous court, with Justice Kagan recusing herself, found that the fiancé of an NAS worker, himself an NAS employee, could bring a suit alleging he was fired in retaliation for his wife-to-be's protected activity.

After Miriam Regalado had filed a charge with the Equal Employment Opportunity Commission against NAS alleging sex discrimination, NAS fired her fiancé Eric Thompson. Thompson sued claiming third party retaliation. The District Court granted summary judgment to NAS on the ground that third party retaliation was not permitted under Title VII. The Sixth Circuit affirmed. But the Court reversed, concluding: "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[3]

The Court declined to specify a fixed class of individuals or relationships which could fit within third party retaliation. However, it made clear that "a close family member will almost always" meet the standard while "mere acquaintance will almost never do so."[4]

After finding that Thompson could allege a third party retaliation suit against NAS, the Court addressed the question whether he was a "person aggrieved" so as to fall within the zone of interests protected by Title VII. Finding Thompson was so aggrieved, he had standing to bring suit. Justice Scalia, delivering the opinion of the Court, explained: "Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her."[5]

A more likely scenario in the "real-world" workplace was not addressed by the justices. That is, whether a supporter or close work friend of a whistleblowing employee is offered the same protection against third party retaliation. Such a case is likely to make its way to the high court at some point.

Employer Liability in Workplace Discrimination

Staub v. Proctor Hospital (Vote: 8-0) (Decided March 1, 2011)[6]

A theory of employer liability known as the "cat's paw" theory was upheld by the high court in another case whose outcome was unanimous and in which Justice Kagan again took no part. In *Staub v. Proctor Hospital*, the Court held an employer can be held liable for employment discrimination "if a supervisor performs an act motivated by [ ] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate action."[7] In other words, liability can be found where a decision-maker has no discriminatory animus but is influenced by previous company action that is the product of such animus. Although the "cat's paw" theory in *Staub* was addressed in the context of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), its applicability is much more far-reaching.

The "cat's paw" theory derives from a 17th Century fable "The Monkey and the Cat" written by French poet Jean de La Fontaine. In that parable, a monkey persuades a cat to pull chestnuts from a fire. The cat ultimately gets burned and the monkey makes off with the chestnuts. In the workplace, the "cat's paw" operates similarly. A supervisor takes some step (e.g. poor performance evaluation or formal reprimand) which is improperly biased. That step is intended to result in some form of adverse employment action. A manager, with decision-making authority, carries out the adverse employment action based upon the supervisor's step(s). Although the decision-maker may be unbiased, the supervisor's conduct was the proximate cause of the ultimate decision. Under traditional agency rules, the employer may therefore be liable.

Staub, a member of the U.S. Army Reserve, was employed as a technician by Proctor Hospital. His responsibilities as a member of the reserves required him to attend army drills one weekend per month and to train full time for two to three weeks per year. Staub's immediate supervisors were "hostile to [his] military obligations," scheduling him for additional shifts without notice so that he would "pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves." Co-workers were told that Staub's military obligations were placing a strain on the hospital and were even solicited to help "get rid of him." Actions by Staub's supervisors (e.g. disciplinary warnings) and certain co-workers recruited to help (e.g. unfounded complaints and allegations that Staub was unavailable and not working) filled Staub's personnel file with negative reports. Proctor's vice-president of human resources relied upon those reports in deciding to fire Staub.[8]

Claiming his termination was motivated by anti-military bias, Staub sued Proctor Hospital under USERRA. Staub did not claim that the vice-president of human resources was hostile to his military obligations but that his immediate supervisors were and that their actions had influenced the vice-president's ultimate employment decision. A jury found that Staub's military status was a motivating factor in the hospital's decision to fire him. The Seventh Circuit reversed, holding that Proctor Hospital was entitled to judgment as a matter of law. It observed the case as one involving the "cat's paw," but concluded that such a theory could only succeed if the non-decisionmaker exercised "singular influence" over the decisionmaker and that the decision itself was the product of "blind reliance."

In reversing the Seventh Circuit's decision, the Court noted the similarities between USERRA, which prohibits employment discrimination on the basis of membership in the military, and Title VII, forbidding employment discrimination because of race, color, religion, sex, or national origin. Both statutes state that discrimination is established when one of those factors is "a motivating factor"in the employment decision.

On the one hand, the Court concluded that "[w]hen a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a 'factor' or a 'causal factor' in the decision; but it seems to us a considerable stretch to call it 'a motivating factor.'"[9] On the other hand, the Court rejected the hospital's view that an employer cannot be liable unless the *de facto* decisionmaker is motivated by discriminatory animus. This, according to the opinion written by Justice Scalia, would shield the employer completely "from discriminatory acts and recommendations of supervisors that were *designed* and *intended* to produce the adverse action."[10] The Court, therefore, concludes that the discriminatory animus must have been a proximate cause of the adverse employment action.

Notably, in a footnote, the Court limits its ruling to circumstances when the supervisor acts within the scope of his employment, expressing no view as to whether the employer would be liable if a co-worker committed a discriminatory act that influenced the employment action.[11] The Court's majority also rejected Justice Alito's suggestion, described in his concurring opinion, that an employer receive immunity if it performs an independent investigation. If the independent investigation relied on facts provided by a biased supervisor, the Court posits, then the employer "will have effectively delegated the factfinding portion of the investigation to the biased supervisor."[12]

Staub may still not be entitled to relief, however, as the case was remanded to the Seventh Circuit to determine whether variance between the original jury instruction and the Court's ruling was harmless error or dictates a new trial.

Retaliation

Kasten v. Saint-Gobain Performance Plastics Corp. (Vote: 6-2) (Decided March 22, 2011)[13]

In *Kasten v. Saint-Gobain Performance Plastics Corp.* ("Saint-Gobain"), the Court determined that oral complaints are protected by the anti-retaliation provision of the Fair Labor Standards Act ("FLSA"). Kasten, an employee at Saint-Gobain, repeatedly complained orally about the location of timeclocks which were used to determine hourly credits for compensation. Specifically, Kasten expressed his view that it was illegal to place timeclocks in areas which did not account for "the time you come in and start doing stuff."[14] His complaints, first lodged with his immediate supervisor then to human resources and the operations manager, resulted in an alleged unlawful practice of not compensating employees for time spent donning and doffing certain required equipment as well as the time it took to walk to and from work areas.

The FLSA, a federal law that sets forth certain employment rules including minimum wage and overtime pay, contains an anti-retaliation provision. That provision forbids employers from terminating or otherwise discriminating against any employee "because such employee has *filed any complaint* or instituted or caused to be instituted any proceeding under or related to [the FLSA]."[15] The phrase "filed any complaint" was the central issue in *Kasten*. After concluding that the plain meaning interpretive approach provided no conclusive answer, the Court relied upon "functional considerations" which it believed indicated legislative intent to cover oral, as well as written, grievances.

Saint-Gobain argued that the FLSA's anti-retaliation provision protects only complaints that are (1) in writing, and (2) made to judicial or administrative bodies. The Court's majority failed to address the latter issue, but the minority, written by Justice Scalia, found the two matters enmeshed so completely as to render a decision on the oral / written question inapposite if neither oral nor written complaints are protected. Scalia would have affirmed the Seventh Circuit's finding in favor of Saint-Gobain, concluding that the FLSA does not protect complaints made to the employer, but only "an official grievance filed with a court or an agency, not oral complaints—or even formal, written complaints—from an employee to an employer."[16]

In sum, the decision is a quite limited one, a narrow determination only that oral complaints are covered under the FLSA. Whether the anti-retaliation provision applies to employers still appears to be an open issue.

Arbitration and Class Actions

AT&T Mobility LLC v. Concepcion (Vote: 5-4) (Decided April 27, 2011)[17]

Handing corporations a huge victory, the conservative coalition of justices (increasingly successful in recruiting Justice Kennedy to side with it) has upheld, as enforceable, arbitration agreements in consumer contracts that prohibit classwide arbitration. The Court's decision in *AT&T Mobility LLC v. Concepcion* reflects the strong policy of the federal government that favors arbitration and the enforcement of arbitration agreements. However, the decision clearly imposes a new obstacle for claimaints, protecting exposure to defendant companies under the pretext of trying to ensure that arbitration remains more informal, more timely, and at lower cost than if such dispute were litigated in court.

The underlying facts are generally not in the dispute. Pursuant to an advertisement, Vincent and Liza Concepcion received free phones with the purchase of AT&T cell service. Although not charged for the phone devices themselves, the Concepcions were charged $30.22 in sales tax based on the phones' retail value. Subsequently, the Concepcions brought suit against AT&T in a California federal court for false advertising and fraud by charging sales tax on phones it had advertised as free. Their case was consolidated with a class action.

AT&T moved to compel arbitration under the terms of the contract which provided for arbitration of all disputes between the parties. The terms of the arbitration agreement explicitly provide that claims must be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Plaintiffs opposed the motion, alleging the arbitration agreement was unconscionable and unlawful under California law because it did not allow classwide procedures. The California Supreme Court, in *Discover Bank v. Superior*,[18] classifies most collective-arbitration waivers in consumer contracts as unconscionable. The issue for the Court is whether the *Discover Bank* rule, as it is known, is preempted by the Federal Arbitration Act.

Section 2 of the Federal Arbitration Act provides, in pertinent part, that written agreements to arbitrate a dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[19] Citing to its 15 year old decision in *Doctor's Associates, Inc. v. Casarotto*, the Court explained that this savings clause permits arbitration agreements "to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[20]

Ordinarily when a state law prohibits the outright arbitration of a particular claim, the analysis is more straightforward and the conflicting rule is preempted

by the FAA. However, the inquiry in *AT&T Mobility* is more complex, says the Court. In *AT&T Mobility*, "a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration."[21]

According to the Court, "[t]he overarching purpose of the FAA…is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[22] The Court concludes that the *Discover Bank rule* interferes with arbitration.

The Court ultimately holds that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."[23] It offers several reasons for its conclusion. First, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[24] Second, "class arbitration *requires* procedural formality."[25] Third, "class arbitration greatly increases risks to defendants." Finally, the Court boldly concludes that "[a]rbitration is poorly suited to the higher stakes of class litigation."[26]

The dissent, written by Justice Breyer, strongly opposes the majority's holding that the FAA pre-empts the rules of state law in this instance. Breyer explains, in part, that "[t]he *Discover Bank* rule does not create a 'blanket policy in California against class action waivers in the consumer context.' Instead, it represents the 'application of a more general [unconsionability] principle." According to Breyer and his more liberal colleagues, the *Discover Bank* rule is consistent with the basic purpose behind the FAA. He further challenges the majority's "idea" that individual, rather than class, arbitration is a "fundamental attribut[e] of arbitration."[27] The dissent argues there is no support in history, present practice, or the Court's precedent to reach the conclusions of the majority. For now, though, the majority's view has become the law of the land.

Does the decision in *AT&T Mobility* spell the death of class arbitration? Or will this decision be rendered moot by the newly created Consumer Financial Protection Bureau which has a statutory mandate to study the use of arbitration clauses in consumer contracts? The Bureau is authorized, pursuant to the Consumer Financial Protection Act of 2010 which was part of the Dodd-Frank Wall Street Reform and Consumer Protection Act signed into law in July 2010, to promulgate regulations that prohibit arbitration clauses in certain types of consumer contracts. One thing is for certain, *AT&T Mobility* was a huge victory for corporations.

AT&T Mobility is the fifth major arbitration case decided by the Court in the last three terms, four of which were decided with a slim majority of five justices. In the previous 2009-10 term, the Court decided three cases of major importance in the arbitration arena—*Stolt -Nielsen v. AnimalFeeds* (5-3), *Rent-A-Center West v. Jackson* (5-4), and *Granite Rock Co. v. International Brotherhood of Teamsters* (7-2, 9-0). During the 2008-09 term, the Court issued its controversial decision in *14 Penn Plaza v. Pyett* (5-4). Rationale described by the Court in *Stolt-Nielsen*, *Rent-A-Center*, and *14 Penn Plaza* all found its way into the *AT&T Mobility* opinion and their decisions were at least instructive to the Court. Clearly, arbitration continues to be a hot topic for the Court. We will have to wait and see how these recent decisions are applied by the circuit courts in the years ahead. I doubt this is the last we will see of arbitration at the high court.[28]

Employee Benefits

CIGNA Corp. v. Amara (Vote: 8-0, 6-2) (Decided May 16, 2011)[29]

In a case closely followed by employee benefits lawyers, the Court granted participants in pension and other employee benefit plans relief where there are inconsistencies between plan documents and the summary plan description ("SPD"). In *CIGNA Corp. v. Amara*, the unanimous Court concluded that the SPD is not a plan instrument under the Employee Retirement Income Security Act ("ERISA"), to the pleasure of the employer. In reaching this conclusion, the Court found that ERISA Section 502(a)(1)(B), the so-called recovery-of-benefits-due provision, does not offer participants relief when a plan administrator made misrepresentations of plan benefits. However, a majority of the justices, six to two, offered ERISA Section 502(a)(3) as a different equity-related provision which could provide remedies, including monetary relief, where there are inconsistencies between plan documents and the plan's SPD. This latter holding received applause from the ERISA plaintiffs bar.

In *CIGNA Corp.*, about 25,000 pension plan participants challenged CIGNA's conversion of its pension plan from a defined-benefit plan to a "cash balance" plan. Specifically, participants argued that the new plan was deliberately misleading in some material areas, creating a false impression that their benefits were not being reduced. The district court found the plan violated ERISA's notice requirements and the mandated need to provide participants with SPDs and summaries of material modifications. The district court relied on ERISA Section 502(a)(1)(B), reformed the plan consistent with the old plan, and presumptively granted relief to all participants on the ground that they suffered "likely harm" from the publication of such misinformation in the SPD. The Second Circuit affirmed.

The Court was originally asked to address "whether a showing of 'likely harm' is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the [SPD] or similar disclosure and the terms of the plan itself." However, the Court decided a threshold issue instead. It addressed whether the recover-of-benefits-due provision allows relief at all. The provision provides a cause of action to enforce the plan. But in the instant matter, the participants were *not* seeking to enforce the current plan but an old plan that was more favorable.

Writing for the Court, Justice Breyer explained:

> Where does §502(a)(1)(B) grant a court the power to *change* the terms of the plan as they previously existed? The statutory language speaks of "*enforc[ing]*" the terms of the plan, not of *changing* them. The provision allows a court to look outside the plan's written language in deciding what those terms are, *i.e.*, what the language means. But we have found nothing suggesting that the provision authorizes a court to alter those terms, at least not in present circumstances, where that change, akin to the reform of a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy.[30]

An SPD or other similar description cannot, according to the Court, create rights that contradict the plan instrument itself. While the SPDs are important and provide information about the plan, their statements "do not themselves constitute the *terms* of the plan for purposes of §502(a)(1)(B)."[31]

A majority of the Court also concluded that Section 5029(a)(3) may provide such participants with certain relief. Specifically, the Court explained that this provision would allow courts to reform the terms of a plan in order to remedy the false or misleading information provided. Participants so affected would also be entitled to certain equitable estoppel rights, placing them in the same position as they would have been had the representations been true. Most important to employee-side advocates, the Court suggested a monetary surcharge is also available to participants resulting from fiduciary's breach of duty. The Court further holds that a participant need not show "detrimental reliance" on the SPD misstatement to obtain relief.

Public Employment—First Amendment and Retaliation

Borough of Duryea v. Guarnieri (Vote: 8-1) (Decided June 20, 2011)[32]

In *Borough of Duryea v. Guarnieri*, the Court limits retaliation liability under the Petition Clause of the First Amendment to matters of public concern, adopting the same framework that governs the Speech Clause for public employees. Concluding that "petitions are a form of expression," the Court refused to broaden the scope of retaliation protection to speech involving matters of private concern.

Charles Guarnieri was Chief of Police for a small town in Pennsylvania. After being terminated as Chief, Guarnieri filed a grievance under the union's collective bargaining agreement challenging the decision. The grievance went to arbitration, where the arbitrator concluded that while Guarnieri engaged in misconduct, the municipality committed certain procedural errors. Guarnieri was ordered to serve a disciplinary suspension and then he was reinstated to his job. However, upon his return to work, the town council issued directives that instructed Guarnieri with regard to the performance of his duties. Guarnieri challenged the directives with a second union grievance.

Soon thereafter, Guarnieri commenced a federal lawsuit against the town, claiming that the directives issued to him were retaliation for filing the initial union grievance challenging his termination. Further, he argued, the filing of that grievance was protected activity under the First Amendment's Petition Clause. A subsequent denial by the town of certain overtime pay was alleged by Guarnieri to be further retaliation for filing the lawsuit itself.

The opinion telescopes the Court's jurisprudence governing public employee speech rights under the First Amendment, beginning with *Connick v. Myers*[33] (in which a public employee suing his employer under the Speech Clause must demonstrate that he or she spoke as a citizen on a matter of public concern) and *Pickering v. Board of Education*[34] (wherein courts are required to balance an employee's right to engage in speech against the government's interest in promoting the delivery of efficient and effective public services) through its more recent 2006 decision in *Garcetti v. Ceballos*[35] (government employee is not shielded from discipline if such discipline was made pursuant to the employee's official duties). The opinion also provides a short history of the right to petition dating as far back as the Magna Carta.

All circuits other than the Third Circuit have previously held that retaliatory actions by the government against its workers may not give rise to liability under the Petition Clause unless the employee's petition related to a matter of public concern. You may recall that in *City of San Diego v. Roe*, the Court described that "[P]ublic concern is something that is a subject of legitimate news

interest; that is, a subject of general interest and of value and concern to the public at the time of the publication…. [T]ypically matters concerning government policies that are of interest to the public at large."[36]

In *Borough of Duryea*, the town argued that the First Amendment only protected public employees from retaliation for filing petitions on matters of public concern. Since Guarnieri's complaints were private, the town argued, those complaints were not protected activities. The lower court and Third Circuit Court of Appeals both disagreed with the town, concluding that Guarnieri's petition was protected even though it involved private matters.

The Court reversed, adopting the town's position and the view of all other circuits. Justice Kennedy, writing for the Court, explained, "The considerations that shape the application of the Speech Clause to public employees apply with equal force to claims by those employees under the Petition Clause"[37] and "[i]f a public employee petitions as an employee on a matter of purely private concern, the employee's First Amendment interest must give way, as it does in speech cases."[38] Though not surprising, the Court's decision in *Borough of Duryea* continues a trend in limiting the scope of retaliatory protection for public employees.

Class Actions

Wal-Mart v. Dukes (Vote: 9-0, 5-4) (Decided June 20, 2011)[39]

The case with most media attention during the 2010-11 term was *Wal-Mart v. Dukes*. There, the Court unanimously decided that a large and diverse class of approximately 1.5 million current and former female employees, both salaried and hourly, was not properly certified by a lower court. It reached this conclusion based primarily on the differences in job responsibilities and pay scales. If certification was upheld, it would have been the single biggest class action lawsuit in the nation's history. However, the more important question, which was decided on the most narrow vote and along traditional ideological lines (with Justice Kennedy again siding with the conservative bloc), involved whether the group of women could have proceeded as a class at all.

Writing for the majority, Justice Scalia explained that the crux of the case is "commonality" and that the Court could not find a single corporate policy of pay discrimination that would permit the action to continue. Specifically referencing that a non-discrimination policy exists, Scalia explained:

> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.[40]

The minority, whose opinion was written by Justice Ginsburg, would not have foreclosed the possibility that the class at issue could have been certified. It noted that nationwide, women comprise nearly 70% of all hourly retail jobs but that women fill only 33% of management positions. And the minority group of liberal justices would have remanded the case to the Ninth Circuit for further analysis and determination.

The *Dukes* decision underscores the heavy burden that must be met by plaintiffs who seek class action status. In the short term, the result will likely be an increase in individual claims of discrimination. Given that class action cases are where the proverbial "money" is, however, I doubt this the last we will see of class action jurisprudence.

Other Cases of Interest

A few other decisions or non-decisions are worth noting. In *Mayo Foundation for Medical Education and Research v. United States*,[41] the Court held that medical residents who spend 40 hours or more per week caring for patients are reasonably classified by the IRS as employees rather than students. Therefore, such "employees" are subject to payroll taxes. The Court also unanimously decided *National Aeronautics and Space Administration v. Nelson*,[42] in which NASA's background investigation was found not to have violated federal contract employees' constitutional right to information privacy. While assuming a privacy interest exists, the Court determined that the questions being asked were reasonable and that the information obtained through the background investigation was adequately safeguarded against public disclosure. Finally, on February 28, 2011, certiorari was denied in *Novartis Pharmaceuticals Corp. v. Lopes*.[43] There, the question was whether highly paid pharmaceutical sales representatives are covered by the Fair Labor Standards Act. Despite that, or perhaps in spite of that, employee classifications will continue to be a hotly disputed issue.

Looking Ahead to the 2010-11 Term

October 3, 2011 marks the first day of the Court's next term. Although the nation continues to focus on whether "Obamacare" is Supreme Court bound, there are other cases of import to the labor and employment law practice. On October 5, 2011, oral argument is scheduled for *Hosanna-Tabor Evangelical Lutheran Church and School*[44] where the Court is being asked to decide whether a "ministerial exception" applies to teachers at a religious elementary school. Other cases to be heard during the term include *Knox v. SEIU*[45] and *Coleman v. Maryland*

Court of Appeals.[46] In *Knox*, the issue is whether a labor union's mid-year, temporary dues assessment for political expenses requires a "Hudson notice," which requires, in pertinent part, an adequate explanation of basis for fees and an opportunity to challenge the amount of the fee. *Coleman* involves the question as to whether the Family Medical Leave Act's self-care leave provision is abrogated by a state's 11th Amendment immunity.

Endnotes

1. *Labor & Employment N.Y. ("LENY")* is the official blog of the NYSBA Labor and Employment Law Section. Accessed from the Section's homepage, the blog provides 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. Some of the decisions described in this article were also discussed by the author or other bloggers on *LENY* shortly after the Court issued its opinions. Portions of those blog posts by the author may appear throughout this article.
2. No. 09-291, 562 U.S. ___ (2011). Justice Scalia delivered the opinion of the Court, in which all other Members joined, except Justice Kagan who took no part in the consideration or decision of the case. Justice Ginsburg filed a concurring opinion, in which Justice Breyer joined.
3. *Id.* at 3.
4. *Id.* at 4.
5. *Id.* at 7.
6. No. 09-400, 562 U.S. ___ (2011). Justice Scalia delivered the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor joined. Justice Alito filed an opinion concurring in the judgment, in which Justice Thomas joined. Again, Justice Kagan took no part in the consideration or decision of the case.
7. *Id.* at 10.
8. *Id.* at 2.
9. *Id.* at 7.
10. *Id.* at 8.
11. *Id.* at 10, footnote 4.
12. *Id.* at 10.
13. No. 09-834, 563 U.S. ___ (2011). Justice Breyer delivered the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Ginsburg, Alito, and Sotomayor joined. Justice Scalia filed a dissenting opinion, in which Justice Thomas joined as to almost all. Justice Kagan took no part in the consideration or decision of the case.
14. *Id.* at 2.
15. Section 215(a)(3).
16. 563 U.S. ___ , *2 (2011)(Scalia, J., dissenting).
17. No. 09-893, 563 U.S. ___ (2011). Justice Scalia delivered the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined. Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined.
18. 36 Cal. 4th 148, 113 P.3d 1100 (2005).
19. 9 U.S.C. §2.
20. 517 U.S. 681, 687 (1996).
21. 563 U.S. at 7.
22. *Id.* at 9.
23. *Id.* at 13.
24. *Id.* at 14.
25. *Id.* at 15.
26. *Id.* at 16.
27. *Id.* at 6 (Breyer, J., dissenting).
28. *Stolt-Nielsen*, *Rent-A-Center*, and *Granite Rock* were discussed more fully in my article *2009-10 U.S. Supreme Court Decisions Affecting Labor and Employment* that appeared in the Fall 2010 edition of this *Journal*. Similarly, the Court's opinion in *14 Penn Plaza* was more fully discussed in *2008-09 U.S. Supreme Court Decisions Affecting Labor and Employment* that appeared in the Fall / Winter 2009 edition of this *Journal*.
29. No. 09-804, 563 U.S. ___ (2011). Justice Breyer delivered the opinion of the Court in which Chief Justice Roberts and Justices Kennedy, Ginsburg, Alito, and Kagan joined. Justice Scalia filed an opinion concurring in the judgment, in which Justice Thomas joined. Justice Sotomayor took no part in the consideration or decision of the case.
30. *Id.* at 13.
31. *Id.* at 15.
32. No. 09-1476, 564 U.S. ___ (2011). Justice Kennedy delivered the opinion of the Court, in which Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan joined. Justice Thomas filed an opinion concurring in the judgment, while Justice Scalia filed an opinion concurring in part and dissenting in part.
33. 461 U.S. 138 (1983).
34. 391 U.S. 563 (1968).
35. 547 U.S. 410 (2006).
36. 543 U.S. 77 (2004).
37. 564 U.S. at 8.
38. *Id.* at 17.
39. No. 10-277, 564 U.S. ___ (2011). Justice Scalia delivered the opinion of the Court, in which the remaining justices joined in part. Justice Ginsburg filed an opinion concurring in part and dissenting in part, in which Justices Breyer, Sotomayor, and Kagan joined.
40. *Id.* at 14.
41. No. 09-837, 562 U.S. ___ (2011). Decided on January 11, 2011, the case was decided unanimously, with new Justice Kagan taking no part in the consideration or decision of the case.
42. No. 09-530, 562 U.S. ___ (2011). Decided January 19, 2011, this case was also decided unanimously and again saw Justice Kagan taking no part in the consideration or decision of the case.
43. No. 10-460, cert denied February 28, 2011.
44. No. 10-553.
45. No. 10-1121.
46. No. 10-1016.

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Employment Termination and Reductions-in-Force Outside the United States

By Donald C. Dowling, Jr.

Against the backdrop of bad economic news, turbulent world economic markets and talk of a "double dip" recession, multinationals are assessing budgets for the coming fiscal year. Inevitably some will face tough decisions about reduced staffing across worldwide workforces.

Firings are always difficult. Group layoffs outside the U.S. can be particularly troublesome for U.S.-based multinationals, because outside of employment-at-will, employment termination is much more heavily regulated.

This is a primer on the challenging topic of how to approach both individual employee firings and group layoffs outside the U.S. Our discussion breaks into four parts: terminating staff outside an employment-at-will environment; individual dismissals outside the U.S.; employee settlements / releases abroad; and reductions-in-force outside the U.S.

1. Terminating staff outside an employment-at-will environment

"Employment-at-will" means the right to end employment (for an employee to quit and for an employer to fire) for any reason or no reason, except that an employer cannot legally dismiss an employee for a discriminatory, retaliatory, or statutorily prohibited reason. The U.S.—including some of its territories and excluding only Montana—is the world's only major employment-at-will jurisdiction. "American exceptionalism" in this particular regard of employment termination law means that, from the point of view of a U.S.-headquartered multinational, firing employees gets stricter, more complex, and more expensive upon stepping outside the U.S.

- **Erosion**. American employment law mavens make the case that the U.S. employment-at-will doctrine has eroded over the years. Speaking historically, this is a fair point. But speaking *geographically*, America's employment-at-will rule remains robust. Other countries—even other common law jurisdictions with legal systems descended from England's like Australia, Canada, Hong Kong, Ireland, Jamaica, Malawi, New Zealand, South Africa—impose significant restrictions on unilateral firings even in the absence of any allegation of discrimination. "Despite dire predictions of the demise of [U.S.] at-will employment in the early years of the 21st century, it appears that 'funeral arrangements' may still be a bit premature." (P.J. Strelitz *et al.*, "Employment-at-Will," *International HR Journal* Thomson West, Summer 2008, at 16.)

Americans refer to employment-at-will as a "doctrine" or "rule," but actually it is the opposite—it is a mere label for the *absence* of any affirmative rule. Actual legal rules (for example, the U.S. Fair Labor Standards Act and U.S. Title VII) grant enforceable legal rights (for example, the FLSA right to overtime pay and the Title VII right to a non-discriminatory workplace). "Employment-at-will," on the other hand, just describes a legal vacuum—the *absence* of affirmative rights, the negative concept that the law, in the absence of some express agreement providing otherwise, does not grant either party to an employment relationship any right to continue the relationship, any right to pre-termination notice, any right to access an in-house claims procedure, or any right to termination pay.

Outside the U.S., laws regulate how, when and why an employer can end an indefinite-term employment relationship. Many foreign employment termination laws impose steep notice / severance pay costs and cumbersome pre-firing procedural steps. Unfortunately we have no commonly accepted term for discussing these laws, no widely used label for the *opposite* of employment-at-will. Some refer to "indefinite employment" regimes while others (particularly in the Philippines) call this the "security of tenure" doctrine. But whenever we discuss all the world's termination laws outside employment-at-will, we necessarily talk in generalizations. For example, Canada, Japan, the Netherlands and Nigeria regulate no-cause firings, but each does so in its own unique way. We might call all four countries "indefinite employment" or "security of tenure" jurisdictions, but Japan and the Netherlands are closer to a "lifetime employment" model than are Canada and Nigeria.

Employment-at-will and indefinite employment / security-of-tenure are so different because they evolved in two different environments—two divergent ways of understanding what an employment relationship is. Employment-at-will reflects the *contract metaphor* view while indefinite employment / security-of-tenure reflects the *paternal metaphor* view. The employment-at-will contract metaphor sees employer and employee as equals who freely enter a two-way business agreement to provide services (even if it is just an oral agreement terminable at will). If an employment contract expressly includes some special termination provision, then that provision controls. Otherwise, the default understanding is that one party, the employee, can end the employment relationship at any time without penalty by quitting, and so the other party, the employer, can also end the relationship at any time without penalty, by dismissing. After all, a bilateral agreement runs in two directions.

By contrast, the indefinite employment / security-of-tenure paternal metaphor sees bosses as accountable to their staff by virtue of an inherently-unequal relationship—bosses hold the economic bargaining power while employees are functionally dependant. As a *quid pro quo* to a boss's right to assign work and set the pay rate, the law attaches responsibilities. Just as we have laws that impose duties on parents and even pet owners not to commit neglect, and just as we have laws that impose a duty of support on spouses, the parental metaphor sees bosses as guardians who owe their employees certain duties. A boss who decides to enter an employment relationship locks himself into the relationship unless and until he complies with mandated termination procedures. If he later decides to end the relationship, he will have to get a legal separation analogous to divorce or emancipation proceedings, and he will have to pay mandated notice and severance pay analogous to alimony and child support.

Of course, each of these metaphors is a legal fiction. Getting a job is not really the same as entering a commercial contract, and employees are not really helpless dependents. The point is that these metaphors explain why, as contrasted with employment-at-will, indefinite employment / security of tenure jurisdictions impose strict employee protections.

2. Individual dismissals outside the U.S.

The "American exceptionalism" of employment-at-will is the backdrop against which multinational employers ask a practical question: *What are the actual rules and obligations that jurisdictions outside the U.S. impose on employers that need to fire an employee?*

- **Termination costs**. Actually, even before asking about rules and obligations, a multinational that needs to dismiss an overseas employee often asks first about termination *costs*. The notice / severance pay costs that virtually every country imposes tend to link to final pay rate, so the price in dollars to terminate a given overseas employee runs highest in economies where pay rates are highest. Within those jurisdictions, severance costs run higher where a terminated employee is long-tenured and high-compensated. The other side of that coin is that short-tenured, non-executive employees in low wage countries can be inexpensive to fire. But outside the U.S., most all terminations, even the inexpensive ones, are regulated and subject to rules and obligations.

To understand what rules and obligations jurisdictions outside the U.S. impose on employers terminating individual staff, the first step to distinguish *good-cause* from *no-cause* firings. Most every jurisdiction offers employers broad freedom to fire staff, without penalty, for certain proven misconduct. But each jurisdiction has its own concept of what constitutes good enough cause to justify a summary dismissal. Many countries require that an employer prove a fired worker guilty of some specific misdeed that appears on the country's statutory list of terminable good-cause infractions. Accordingly, in "statutory list" jurisdictions (which include countries as far-flung as Costa Rica, Czech Republic, Indonesia, Malawi, Peru, Philippines, Russia, Ukraine, Vietnam), even an employee who breaches a posted company work rule might not be terminable for cause unless his particular misdeed happens to parallel an infraction specifically included in the jurisdiction's termination law.

Sometimes an employer loses even when it proves an employee breached a statutory dismissal standard. For example, section 626 of the German Civil Code includes "theft" as grounds for dismissal, but Germany's highest labor court held otherwise in its widely publicized 2009 *Emmely* case involving petty theft of coupons worth 1.30. And having solid proof that an employee committed a terminable infraction does not necessarily excuse legal obligations to undergo pre-firing termination procedures, even if it does excuse the severance pay obligation. For example, in 2008 Parisian rogue trader Jérôme Kerviel singlehandedly lost his employer, Société Générale bank, $7.2 *billion* in unauthorized trades—but French termination procedure laws blocked Société Générale from firing Kerviel for over a month. (*See* "French Twist," *Wall St. J.*, 2 / 1 / 08 at A-1.)

Termination laws outside the U.S. tend to recognize only egregious misconduct as good enough cause to excuse an employer from termination payments. Even a demonstrable business reason to terminate is often insufficient. Few jurisdictions recognize substandard performance, imperfect attendance, bad attitude, mismatched skill set, or internal restructuring as good enough cause for termination to relieve notice and severance pay obligations. A rough analogy here is the willful misconduct standard under U.S. state unemployment compensation law. If some employee outside the U.S. commits an act of willful misconduct that, if committed stateside, would be egregious enough to defeat a U.S. state unemployment benefits claim, then we might expect a foreign labor court

to uphold a no-pay firing as for cause. But where an employer's alleged good cause for termination amounts to something less than willful misconduct that would bar U.S. state unemployment compensation benefits, do not expect foreign law to justify the termination.

- **Economic dismissals**. This said, some jurisdictions credit employers that can justify a dismissal economically. These jurisdictions may not excuse an economic dismissal the way they excuse a termination for willful misconduct, but they credit economic dismissals by reducing severance pay awards. For example, courts in Argentina reduce severance pay where a dismissal is because of a *force majeure* that amounts to economic reason for layoff. In Spain, an employer that can clear the hurdle (which Spain lowered in 2010) defining a Spanish "economic dismissal" saves a lot of money in severance pay—liability drops from the usual Spanish severance award of 45 or 33 days' pay per year of service capped at 42 months' pay, down to 20 days' pay per year capped at 12 months' pay.

The far more common scenario is where an employer fires an outside-U.S. employee under circumstances that the employer realizes will not likely amount to legally-recognized good cause, and so must comply with local-law severance obligations for no-cause firings. As a starting point, the employer will have to cash out / pay out all vested / accrued benefits (like vacation and retirement commitments). Beyond that, the specific severance obligations differ widely from country to country. Find out what the applicable obligations are.

- **Rank and status**. When investigating severance obligations under foreign law, begin by accounting for the targeted employee's *rank and status*. Employees serving lawful probation periods are always easier to dismiss—although in countries like Japan they may not be terminable at-will. Expatriates might have rights under both home and host country laws. Fixed-term employees enjoy special termination rights linked to the end date of their contracts. Many countries apply different termination rules to managing directors, directors, officers, and locally defined categories like *cadres* in France and *dirigenti* in Italy. In Sweden, Spain, and elsewhere a top executive is actually easier to fire than rank-and-file employees, because the law recognizes the need to staff leadership ranks as management deems necessary. Some countries boost severance pay for certain types of employee—Argentina, for example, gives fired pregnant / nursing women and the newly married an extra year's pay and traveling salesmen enhanced severance awards.

There are six categories of termination law obligations. In checking what applicable local rules control an overseas firing, find out what doctrines (if any) apply under each—the six categories are cumulative, not mutually exclusive:

1. **Notice pay**: Many legal systems (and employment agreements) require employers to give fired employees pre-termination notice or pay in lieu. Depending on the jurisdiction and on factors like service period that are specific to each employee, mandated pre-termination notice can be as short as a week or as long as several years. In some jurisdictions notice periods tend to run fairly short; in Mexico, statutory notice runs one month, in South Africa it runs up to four weeks, and in U.K. it runs one week per year of service capped at twelve weeks. But other jurisdictions let notice run surprisingly long—long enough that notice almost universally gets paid out in lieu. In long-notice jurisdictions, actual notice periods can get hard to calculate, subject to complex formulae (such as the Clayes formula in Belgium) or to various tiers (such as statutory versus common law versus contractual notice in Canada).
2. **Severance pay**: Countries impose very different types of individual severance pay obligations. Spain, Mexico and many others impose mandated severance payouts pursuant to simple formulas based on final pay rate and tenure / years of service. Arab countries require so-called end-of-service "gratuities" also based on tenure and pay rate, and which may be due even if an employee quits. UK, Germany and other jurisdictions give terminated employees an unliquidated cause of action for wrongful dismissal; a labor tribunal awards a "severance indemnity" for a successful claim. In Brazil, severance pay runs through a mandated system of bank-administered employee unemployment compensation accounts called "FGTS."
3. **Due process and discrimination claims**: Many jurisdictions (for example, Indonesia, Italy, Japan, New Zealand, Peru, South Africa, UK) recognize an additional cause of action where an employer fires an employee in a way that denies due process / good faith. These legal systems see the due process / good faith deprivation as a separate injury meriting damages over and above severance pay for loss of the job. Along with these unfair / arbitrary dismissal claims we can also include discriminatory dismissal claims that allege a firing was motivated by animus against an employee's protected status. Unfair / arbitrary dismissal and employment discrimination claims can entitle a successful claimant to enhanced remedies like greater or uncapped money judgments and reinstatement. For example, Sweden awards punitive damages when a dismissal is held procedurally unfair; South Africa raises the cap on a firing claim from 12 months' pay to 24 months' pay where a dismissal is deemed "automatically unfair"; in a

highly publicized May 2010 labor arbitration in Toronto, a unionized Canadian worker won $500,000 for "bad faith" firing.

4. **Procedural steps:** Many countries' laws require that employment terminations follow set procedures; in effect, these laws prohibit the direct "Donald Trump" approach ("*You're fired!*"). Some countries' termination procedure requirements are simple, such as Czech and Nicaraguan mandates that termination notice be in writing. Others are much more complex, such as the French mandate of pre-firing steps beginning with the registered-mail transmission of a French-language letter summoning the would-be terminated employee to a discussion meeting followed by subsequent meetings and rights of internal appeals. The U.K. imposes a similar multi-step procedure. Indonesia requires a negotiation session with would-be fired employees. Many countries grant *Weingarten*-like rights that let even non-unionized employees bring representatives to termination meetings.

5. **Government/court approval:** While the U.S. is the world's only major employment-at-will jurisdiction, most countries do grant employers the right to decide, unilaterally, to fire individual employees even without cause. Yes, termination obligations abroad impose procedures and severance costs. But at the end of the day, in most countries an employer willing to follow mandated steps and willing to pay required costs is free to fire any individual employee. But not in all countries. In the Netherlands a court or government agency must approve an individual termination. Indonesian firings need to be approved by the Industrial Relations Court. Japan in effect grants employees lifetime employment during good behavior, in that Japanese law flatly prohibits firing an employee other than for demonstrable misconduct—Japanese judges award winning employee plaintiffs reinstatement and back pay, not severance pay. Governments from Colombia and Venezuela to China, Korea and the Philippines can also block firings. And many countries protect *certain classes* of workers from firing. For example, South Africa and much of Europe in effect all but bans firing union officers, strikers, and pregnant women—even when the employer harbors no discriminatory animus. Italy also insulates women within one year of marriage. Argentina imposes a pre-dismissal judicial approval procedure before firing a union official, even for good cause.

6. **Employment contracts and policies:** These five categories are severance restrictions imposed by legal mandate; our sixth category is severance restrictions undertaken by the employer itself, or its bargaining agents. Individual employment terminations must of course comply with termination-specific provisions in a targeted employee's employment contract and in any applicable collective agreement (including any industry-wide "sectoral agreement"), as well as with company-issued benefit plans, equity plans, and severance policies.

3. Employee settlements/releases abroad

We have been discussing overseas terminations against the backdrop of a fired employee asserting rights in local labor court, but in actual practice most firing disputes get resolved out of court. Of course, settlements are grounded in the parties' predictions of what a labor court would award on the facts.

Account for settlement-specific issues. Often employment separations get structured as resignations in exchange for severance payments, and perhaps also in exchange for a release, waiver, or (in the U.K.) a "compromise agreement." Employment-context releases raise issues of: enforceability under local law, ideal local boilerplate text, execution formalities, and consideration. Jurisdictions like Brazil will not enforce employment-context releases except to the limited extent they act as receipts proving amounts already paid (for a full release, those jurisdictions require a court dismissal with prejudice disposing of a court-filed lawsuit). Many jurisdictions, including Mexico and much of Central America, require that a binding employment-context release be ratified / "rubber stamped" by a local government labor agency, labor court or notary. A U.K. "compromise agreement" must be co-signed by the employee's solicitor.

France has recently recognized a unique and increasingly common category for mutually agreed terminations ("*rupture conventionnelle*") that falls between a firing and a resignation.

4. Reductions-in-force outside the U.S.

An essay on U.S. reductions-in-force declares that RIFs are "so ubiquitous in the American corporate landscape" because "[t]here are few options when business levels no longer support the size and scope of company operations." ("Your Next Reduction in Force: The Dirty Little Secret," *Employment Law 360,* Aug 11, 2008.) That essay cautions that U.S. RIFs "cost money rather than save money in the short run," "monopolize scarce management resources and cause significant hardship," and "in the worst circumstances" cause both "enormous legal liability" and "professional humiliation and financial ruin" for the "responsible executives." The fact that jurisdictions outside the U.S. regulate RIFs so much more comprehensively than does the U.S. means that these drawbacks to U.S. RIFs loom as even greater threats abroad. RIFs outside the U.S. (called "collective redundancies," "collective dismissals," "mass terminations," "retrenchments" or "restructurings") always seem to involve more costs, delays and problems than U.S. management anticipated at the outset. Multi-country RIFs can be hugely expensive,

with set-asides for "restructuring costs" easily reaching millions of dollars.

Before deciding to embark on an overseas staff reduction, take two preliminary steps: Reconsider RIFs abroad and put aside the U.S. approach:

- **Reconsider RIFs abroad**. With overseas RIFs so heavily regulated and expensive, the first step in doing a mass layoff outside the U.S. should be to reexamine the threshold RIF decision in the first place. Compared with their overseas-based competitors, U.S. businesses operating abroad can be too quick to resort to layoffs as a response to an economic downturn, an internal restructuring, or a merger / acquisition / divestiture. Within U.S. employment-at-will, a layoff may be a logical response in these contexts because, stateside, the main laws in play are the comparatively benign U.S. W.A.R.N. Act (29 U.S.C. Section 2101), state equivalents, and disparate-impact analysis under discrimination laws. Abroad, though, because laws regulating layoffs are much more comprehensive, expensive, and (from an employer's viewpoint) intrusive, locally based businesses reflexively try to avoid "collective redundancies" except as a last resort. The lesson for a U.S. multinational is that before deciding to do an overseas RIF, think about why locally based competitors might pursue a different strategy in the face of similar economic pressures. Are there cheaper, more streamlined alternatives to a RIF, like: incentivized voluntary RIFs, voluntary retirements, a hiring freeze, or government-funded reduced hours / furlough programs?
- **Put aside the U.S. approach**. When a U.S.-based employer decides it must do an outside-U.S. RIF, it should put aside its American toolkit of practices for conducting a RIF stateside. U.S.-honed RIF tools mostly get in the way overseas. For example, statistical adverse-impact-selection models and other U.S.-style non-discriminatory selection procedures are all but worthless in countries where RIF-selection laws affirmatively *require* factoring in age, marital status, or number of children. Any multinational project-managing a workforce reduction that simultaneously affects employee populations both in and outside the U.S. should consider bifurcating its RIF plan, using a dual U.S. / rest-of-the-world approach. Handle the U.S. prong like any U.S. RIF, but simultaneously engineer distinct, yet aligned, overseas strategies for each foreign jurisdiction.

To avoid a chaotic, reactive cross-border "collective redundancy" fraught with compliance problems and unnecessary costs, manage the global RIF project proactively. Create a project plan. Work out the timing, the steps, the employee consultation issues, and the costs on a jurisdiction-by-jurisdiction basis. Account for six tiers of laws that could affect a RIF, factoring in all six tiers in each affected jurisdiction:

1. **Laws reaching individual terminations:** We have looked at the six categories of termination rules that affect *individual* employment dismissals outside the U.S. Each employee dismissed in a *collective layoff* presumptively has those same rights, unless some exception applies in the collective layoff context—but exceptions are rare.
2. **RIF-specific severance pay and procedure mandates:** Laws in many jurisdictions impose special costs and procedures on employers doing collective layoffs. For example, laws may require enhanced notice or severance pay in a RIF—although, as discussed above, there are jurisdictions where an employer that can show economic necessity might actually *reduce* per-employee severance pay exposure. Some countries (Germany, for example) impose statutory selection procedures for determining who gets laid off; in those countries an employer may have to account for factors that would be inappropriate to consider in the U.S., like family status, pregnancy, and age. Some countries (Sweden, for example), require a last-in / first-out selection model by job category.
3. **Worker representative involvement:** Where an employer has a workplace bargaining relationship, a proposed layoff is likely a mandatory subject of bargaining. In Europe, an employer that merely *considers* a RIF must first sit down and talk to (inform, consult, sometimes "co-determine" with) worker representatives. That means that in Europe it is illegal to decide to do a layoff without first consulting representatives of the very people who would get fired. The EU Collective Redundancy Directive (75 / 129 / EEC; 92 / 56 / EEC; 98 / 59 / EC) requires EU states to mandate "consulting" in good faith with employees with a view to reaching agreement—even if the employees have no union or representative—on "avoiding," "reducing," and "mitigating" a contemplated RIF. "Social plans" or written guarantees memorializing pacts with workers are usually necessary. This EU directive expressly reaches an RIF decision made by higher-ups at an overseas headquarters, and so to this extent the EU rule reaches right into U.S. boardrooms. In conducting these required RIF "consultations," an employer must demonstrate so-called "economic technical and organizational" reasons for the RIF. Worker groups and government officers may push back, challenging the business case. And these consultations must be about the underlying decision to do a RIF, not merely the effects (the U.S. labor law distinction between "decision" and "effects" bargaining does not apply). These consultations take time—up to 75 days, in Italy—

and can be document-intensive. Enforcement of the bargaining obligation can be serious: Belgium once famously launched *criminal* proceedings against Renault executives who shut down a plant before telling employees. Account for bargaining obligations of this sort across all levels of European employee representatives, from trade unions to works councils to EU-wide European Works Councils, even to health and safety committees (which increasingly argue that layoffs are stressful and hence bad for employees' health). Outside Europe, the same core issue applies: Bargain, where mandatory.

4. **Notice to government agencies:** The U.K. requires that certain large-scale staff reductions be notified to the U.K. Secretary of State; Spain requires RIF approval from its "Autonomous Community" labor agencies; Argentina requires notice to its Ministry of Labor. China, Colombia, and other countries also impose government disclosure or approval mandates in the RIF context. Check on and comply with government RIF disclosure / approval requirements across every affected jurisdiction. And expect these government notices to open a dialogue, as the local labor agency seeks to temper or avoid job cuts.
5. **RIFs in the M&A context:** The European Union flatly prohibits dismissals motivated by a merger, acquisition, or divestiture by asset sale or outsourcing. (EU Transfer of Undertakings directive, 2001 / 23 / EC, at art. 4(1).) Beyond that, any post-merger RIF must account for the stock or asset purchase agreement: Sellers increasingly negotiate post-merger layoff restrictions into M&A agreements.
6. **RIFs in the insolvency/bankruptcy context:** Most RIFs get done for economic reasons. Where economic pressures push an employer into insolvency or bankruptcy, special RIF rules may apply. Check applicable bankruptcy / insolvency law.

After inventorying, on a jurisdiction-by-jurisdiction basis, these six types of laws that can govern a particular overseas RIF, the next " best practice" step is to craft a local RIF "field guide" for each affected country that includes:

- Directory of the company's own on-the-ground local human resources staff and labor liaisons
- Checklist of applicable local laws affecting RIFs in the jurisdiction
- Local timetables and list of required processes *(who must be consulted? whose approval is required? when and how early?—a global RIF may launch on a single start date, but inevitably local issues will cause timing to differ by jurisdiction)*
- Inventory of applicable local individual and collective employment agreements and policies, including industry-wide "sectoral" collective agreements and company HR policies addressing severance
- Local consultation strategy (how to confer with employees, representatives, government agencies?—inventory the worker representative bodies that must be consulted; comply with consultation / bargaining obligations with each)
- Local public relations and employee communications strategy (never announce a downsizing as a fait acompli before completing legally required consultations / negotiations with employee representatives)
- Local selection criteria (what RIF selection rules apply under local law / local agreements?)
- Quantify severance pay, separation pay / benefits, and outplacement packages to be offered locally; determine whether the RIF context or demonstrable economic necessity allows for employer credit under local law
- Alignment: Synchronize each country "field guide" with the global project plan

Individual employment terminations outside U.S. employment-at-will are heavily regulated in ways that surprise those experienced mainly with the U.S. A U.S. multinational in the difficult position of having to reduce staff overseas needs to get familiar with the ins and outs of applicable termination laws. Come up with a viable strategy for employees who agree to separation packages in exchange for releases. In the reduction-in-force / "collective redundancy" context, jettison any U.S.-honed approach. Craft a comprehensive project plan that accounts for overseas laws and labor relations realities.

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Ethics Matters

By John Gaal

Q Several months ago I agreed to represent a client for a flat fee. Although it seemed reasonable at the time, now that I am into the case, it is obvious to me that I am being underpaid. I would like to tell my client that in order to be more fair to me, I need to increase the fee we originally agreed upon by about 30% and, if that is not acceptable, I will have no choice but to withdraw. (There has been no court appearance, so I know I do not need court approval to withdraw and since we are still in the early stages of this matter, there would be no prejudice to the client from my withdrawal, so I think I am allowed to withdraw.) Can I do this?

A Abraham Lincoln is often quoted as having said "The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client." *See* Libby, *Changing Times*, ABA Journal at page 26 (August 2011) (quoting from Lincoln, *Notes from a Law Lecture*).

As lawyers, try as we might to set a fee that is fair to both us and clients, at one time or another we have all had cases in which the fee we quoted at the outset of the representation proved to be too low once we came to realize what was involved. When that happens, we are permitted to seek a change in that fee agreement. The Rules of Professional Conduct clearly contemplate as much. See Rule 1.5(b) ("Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client."). However, this does not mean that we have the right to unilaterally change that fee arrangement.

The ABA's Committee on Ethics and Professional Responsibility recently opined on this very issue. In Formal Opinion 11-458, the Committee recognized that fee arrangements are contracts between lawyers and their clients and ordinarily can be modified by mutual consent of the parties, "provided they follow appropriate formalities." The Committee also noted, however, that "[e]ven with client consent…modifications of existing fee agreements are usually suspect because of the fiduciary nature of the client-lawyer relationship." And, "an agreement that is not made roughly contemporaneously with the formation of the client-lawyer relationship will have to bear an extra burden of justification." *Id.*, quoting from Hazard & Hodes, *The Law of Lawyering* §8.11 (3d ed. 2001).

There are several reasons why a client might feel compelled to accept a lawyer's proposal for a fee modification after representation has started, even though he or she does not really agree with it, thus explaining why this extra burden is imposed. For example, a client might acquiesce in a fee modification because a change in lawyers mid-representation is simply too burdensome or because the client might fear the lawyer's resentment throughout the remainder of the representation. *See Restatement (Third) of the Law Governing Lawyers* §18.

Several ethics provisions come into play when considering a fee modification. First, any modification must of course be agreed upon. Unilateral changes in fee arrangements—such as the imposition of a "success fee" after the fact—are not permissible. (Of course, the client and lawyer may mutually agree to such a fee add-on, but it cannot be unilaterally imposed.) Second, as provided in Rule 1.5 of the Rules of Professional Conduct, the modified fee, even if voluntarily agreed to, cannot be unreasonable. ABA Formal Opinion 11-458 recognizes that while the reasonableness of a fee arrangement is typically to be judged at the outset of the representation, the reasonableness of a fee modification should be assessed in light of the circumstances at the time of the modification. Under Rule 1.5, among the factors to be considered generally in assessing the reasonableness of a fee are: (1) the time and labor involved, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood that acceptance of the representation will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent. Ultimately, the fee must be objectively reasonable under the circumstances.

The Committee also observed that Model Rule 1.4 (which is identical to New York's Rule 1.4), requiring a lawyer to explain a matter to a client to the extent reasonably necessary to permit the client to make an informed decision regarding the representation, demands not only that the lawyer explain the proposed modification of the fee arrangement fully to the client, but the lawyer must also advise the client that he or she need not agree to pay the modified fee as a condition of continue representation by the lawyer. In other words, a lawyer may not ethically

threaten to withdraw, or withdraw, from representation of a client because the client refuses to agree to a fee modification.

If these requirements are met, the fee modification is permissible and may even be significant. For example, Formal Opinion 11-458 explicitly notes that circumstances could justify moving from an hourly fee to a contingent fee. Certain types of modifications, however, may require compliance with Rule 1.8(a), which applies to business transactions with a client. (A fee arrangement agreed to at the outset of representation is generally viewed as not falling within this provision.) Thus, a fee modification which involves a lawyer acquiring an interest in a client's business, real estate or other non-monetary property must comply with Rule 1.8(a). So too must a modification by which a lawyer seeks new or additional security for payment under an existing fee agreement. Under Rule 1.8(a), these changes in the fee arrangement must be fair and reasonable to the client; they must be fully disclosed and transmitted in writing to the client; the client must be advised in writing of the desirability of seeking, and must be given a reasonable opportunity to seek, the advice of independent legal counsel with respect to the modification; and the client must provide informed consent to the modification in a writing signed by the client and which contains the essential terms of the modification.

Thus, while mid-representation fee modifications might be justified under certain circumstances, care must be taken to comply with the Rules of Professional Conduct and continued representation cannot be conditioned on the client's acceptance of the modification.

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.

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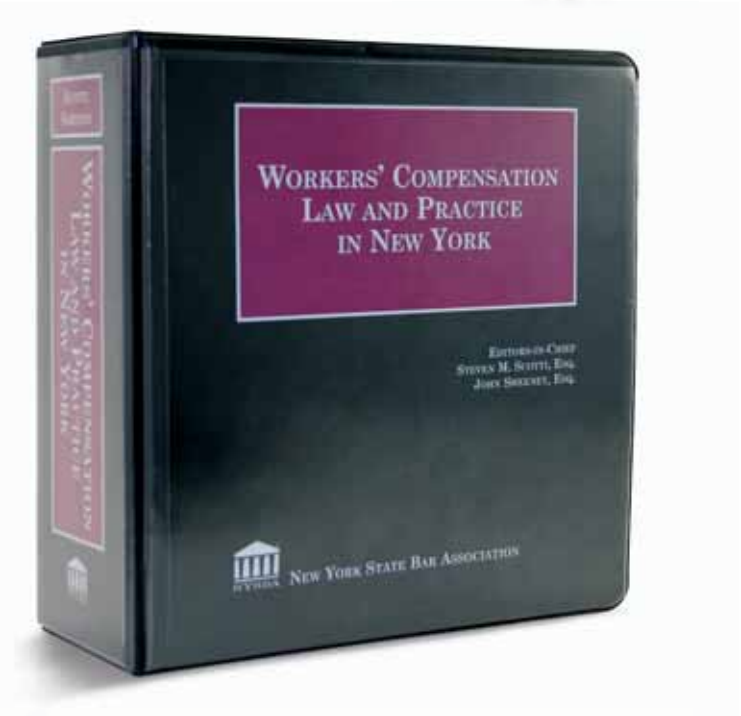

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