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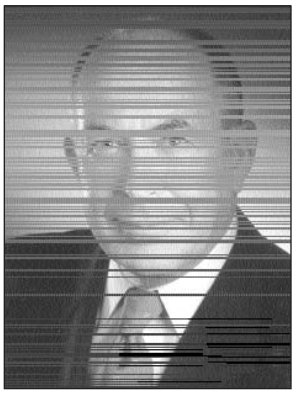
A Message from the Chair



I start my term as Chair of the Section asking what can we do to enhance the value of this Section for its members? That is a challenging question, easier asked than answered because of the high level at which the Section functions as a result of the outstanding work of our past Chairs and the dedicated and talented Committee leaders.

A bar association exists to further the interests of its members—to advocate and speak on behalf of its members, to foster professionalism, and to educate its members so that they may better serve their clients. In other words, we should be delivering value to our members, and I firmly believe that we do that. We are operating in the black; we had a very successful Annual Meeting in January attended by a record 253 Section members (an increase of 25% over the previous year) who were treated to a fine substantive program for CLE credit topped off by a memorably humorous and forthright talk by luncheon speaker NLRB Chairman Peter Hurtgen; and by the time this newsletter is published the Spring Meeting at the Sagamore (i.e., the rescheduled 2001 Fall Meeting) will have taken place. These events provide real value to members—and the remainder of this year promises even more with a fine program shaping for the Fall Meeting, October 4-6 at the Statler Hotel on the Cornell campus in Ithaca.

I hope during my term that our Section's value can be further enhanced. We can do that by nourishing our committees. We are blessed with many gifted and dedicated Committee Chairs and Co-Chairs—but all too often they are left to do an inordinate amount of committee work with the help of only a handful of members. I am told that this is not peculiar to our Section, but a challenge faced by all NYSBA Sections. I will call upon our Executive Committee and all interested Section members to examine how we can make the committee system—the lifeblood of our Section—work more effectively to encourage greater participation and attract new faces to committee activities.

Further, I believe the value of our Section to its members can be enhanced by increasing the opportunities for members to interact with government officials who administer and enforce the statutes which we interpret and apply for our clients. By way of example, the activities of two of our committees come to mind. The Labor Relations Law and Procedure Committee meets with the NLRB Directors for Regions 2 and 29 each January and with the Director of Region 3 in April. These meetings provide an opportunity for Section members and the government officials responsible for administering the NLRA in New York State to exchange ideas and discuss

Inside

substantive and procedural issues facing the Board and those who practice before it. Also, the Equal Employment Opportunity Law Committee has regular Committee meetings of a substantive nature which often include government officials as guest speakers.

I believe that more interaction among Section members and government officials and reinvigorated committees, which provides opportunities for member participation on an economical and practical basis, presents opportunities for making Section membership more valuable to our members.

Finally, my past experience as a Chair of the Monroe County Bar Association's Professional Performance Committee and member of the Seventh Judicial District's Grievance Committee made me a believer, long ago, that one of the greatest services a bar association can offer its members is education concerning the ethical standards and professional behavior expected of, and becoming, lawyers. Our Section has an Ad Hoc Committee on Ethics which we should consider elevating to standing committee status.

There is something special about our Section of able professionals representing the many facets of our practice—management, labor, individuals and neutrals—that coalesces into a remarkably congenial group. With the support of our immediate past Chair Linda Bartlett, Section Secretary Dick Adelman, Chair-Elect Jacqueline Drucker and a host of able and dedicated Committee Chairs and past Section Chairs, who would not look forward to serving as Section Chair? I welcome your comments and suggestions concerning our Section. You can e-mail me at rchapman@harrisbeach.com.

Richard Chapman

From the Editor

Many thanks to the contributors to this issue: Dick Chapman, our new Chair, with his inaugural address; Dick Adelman; Keith Corkan, author of our first international article; Greg Mattacola; Phil Maier; Katherine Parker and Adam Lupion; and, as always, the infinitely (well, almost) patient Publications Department.

Dick Adelman's speech takes its title from *Circuit City v. Adams*.[1] Since many of us have followed the *Circuit City* saga for years, I've decided to use this space to report on its latest twist, although its fate will not yet be clear by the time we go to press.

You may recall that when Mr. Adams applied for employment with Circuit City, he was required to sign a pre-dispute arbitration agreement to take employment disputes to arbitration. Under the Circuit City dispute resolution plan, damages and other remedies were limited, Mr. Adams was required to pay half of all arbitration costs and the company was not required to arbitrate claims against employees. No job applicant was considered for employment at Circuit City unless he or she signed the agreement.

In 1997, Mr. Adams filed employment discrimination claims against the company in state court, and a federal district court granted the company's subsequent motion to compel arbitration. The Court of Appeals for the Ninth Circuit reversed, finding that the employment contract was exempt under section 1 of the Federal Arbitration Act.[2] The Supreme Court found otherwise and remanded the case.[3]

On February 4, 2002, the Ninth Circuit found that the company had "devised an arbitration agreement that functions as a thumb on Circuit City's side of the scale," and that such an arrangement was unconscionable, and therefore unenforceable, under California law.[4] It relied on section 2 of the FAA, which provides that arbitration agreements must be "valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract."[5]

Since Adams argued that the agreement was an unconscionable contract of adhesion, the court said, it would look at state contract law to determine whether the agreement was valid. Citing state law and a recent case in the California Supreme Court, *Armendariz*,[6] and stating that few applicants are in a position to refuse a job because of an arbitration agreement, it found a contract of adhesion.

Furthermore, citing *Cole v. Burns Int'l Security Svcs.*,[7] and *Green Tree Fin. Corp. v. Randolph*,[8] it found that requiring an employee to pay half the arbitration costs was enough, by itself, to render the agreement unenforceable. The agreement, the court said, also imposed a one-year statute of limitations, depriving Mr. Adams of the continuing violation doctrine available under California law and forcing him to "arbitrate his statutory claims without affording him the benefit of the full range of statutory remedies."[9] The court found its decision to be consistent with the Supreme Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.*,[10] that "[b]y agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial forum."[11]

The following month, the Ninth Circuit came to the opposite conclusion in another Circuit City case. *Circuit City v. Ahmed*.[12] Unlike Mr. Adams, Mr. Ahmed was given an "opt-out" form along with the dispute resolution agreement. If he mailed in the form within 30 days, he would be allowed to keep his job despite opting out. After the employee failed to comply, the court held, he could not assail the agreement as an unconscionable contract of adhesion.

The decisions in these *Circuit City* cases, along with the *Armendariz* decision in the state court, show that a pre-dispute agreement in California must comply with the criteria for fairness and due process set forth by those courts and give a meaningful opportunity to opt out of the program. Whether that will stand remains to be seen, since Circuit City has asked the Supreme Court to take another look at this case.[13] The response is due on May 4, 2002. Stay tuned.

Janet McEneaney

Endnotes

1. 532 U.S. 105 (2001).
2. *Circuit City Stores, Inc. v. Adams,* 194 F.3d 1070 (9th Cir. 1999).
3. *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001).
4. 279 F.3d 889, 892 (9th Cir. 2002).
5. 9 U.S.C. § 2.
6. 99 Cal.Rptr.2d 745, 6 P.3d at 690.
7. 105 F.3d 1465 (D.C. Cir. 1997).
8. 531 U.S. 79 (2000).
9. *Circuit City v. Adams,* 279 F.3d 889, 893 (9th Cir. 2002).
10. 500 U.S. 20, 26 (1991).
11. *Id.* at 28.
12. 283 F.3d 1198 (9th Cir. 2002).
13. *Circuit City v. Adams,* petition for writ of *certiorari* filed Apr. 3, 2002, No. 01-1460.

The OWBPA: A 10-Year Retrospective

By Katharine H. Parker and Adam M. Lupion

I. Introduction

Companies continue to seek to control or reduce their labor costs by restructuring, reorganizing and downsizing and in doing so want to insulate themselves from liability or the threat of a lawsuit from affected employees. As companies are no doubt aware, there are particular requirements that must be satisfied in order to ensure a knowing and voluntary and, thus, enforceable waiver of claims against the company. With respect to waivers of claims under the Age Discrimination in Employment Act (ADEA), these requirements are enumerated in the Older Workers Benefit Protection Act (OWBPA), passed nearly a decade ago. Since its passage, however, there remain many open questions concerning how to comply with it, particularly in the group termination context.

The OWBPA was enacted in order to address a concern that older workers were being deprived of the opportunity to make informed decisions when signing releases, particularly in the context of group layoffs. Various individuals testified before Congress that their employers had threatened them with demotion or revocation of vested benefits in order to coerce them to sign waivers and participate in exit incentive programs. Congress responded by enacting the OWBPA, which among other things, requires that waivers be in writing in plain language and expressly refer to the ADEA; that employers advise employees to consult with an attorney before signing the waiver; that employers give employees twenty-one days (in the case of an individual) or forty-five days (in the case of a group) to consider the waiver and seven days to revoke the waiver; and that employers who request waivers in connection with "an exit incentive or group termination program" provide the employee with certain disclosure information about the "program" including, "[the] class, unit, or group of individuals covered by [the] program, any eligibility factors for [the] program, . . . any time limits applicable to [the] program, . . . the job titles and ages of all individuals eligible selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program."[1] However, contrary to the perception that there is a formula for securing bullet-proof waivers, the criteria are deceptive and there are few reported cases to guide employers. If there is a recognizable trend in the context of OWBPA jurisprudence, it is that employers are required to disclose more information than is expressly required by the statute.

II. Are the OWBPA Criteria a Floor or a Ceiling?

One of the issues that has been at the root of employers' confusion regarding waivers is whether complete compliance with the OWBPA shields an employer from ADEA claims. The recent trend in the case law has been to require employers to disclose more information than that required by the language of the statute, thus leaving employers unsure of whether or not they have obtained a valid waiver.

For example, in *Mahaffey v. Amoco Corp.*, the court denied the employer's motion for summary judgment despite the employer's compliance with the minimum requirements of the OWBPA.[2] In that case, the company had terminated a large number of employees in a layoff and limited the information on its disclosure to employees who were on the payroll on the day of the reduction in force. It excluded employees who were transferred to another department immediately before the group terminations. The court concluded that it was conceivable, as plaintiffs contended, that the employer manipulated its disclosure statement so as to conceal the transfer of a number of younger employees out of the unit affected by the layoff. The court noted that information concerning the transferees *may* have been material to an older employee's decision as to whether to waive his or her ADEA claims.

Employees also have argued that their releases were obtained through fraud, duress, or mutual mistake, even though the releases were facially compliant with the OWBPA. For example, the Tenth Circuit in *Bennett v. Coors Brewing Co.*[3] held that the OWBPA's requirements merely establishes a minimum for determining whether a waiver is knowing and voluntary. The court held that the factors enumerated in the statute are not exclusive, and circumstances outside the express statutory requirements (such as fraud or mistake) may impact the validity of a waiver.

In *Bennett*, the plaintiffs left their jobs as security guards as part of a voluntary reduction in force. As part of their departure, plaintiffs signed release agreements waiving all claims arising out of their employment, including ADEA claims. Although both parties agreed that the waiver agreements complied with the minimum OWBPA criteria, the plaintiffs argued that the waivers were invalid because they were obtained through fraud because the employer had falsely represented that the security department was going to be downsized, and

possibly outsourced, in order to induce the plaintiffs to accept the severance packages.

Based on the fact that the employer began to advertise for new employees only five days after the plaintiffs' official termination date, and the fact that the employer re-hired the security department to nearly the same level as before the downsizing, the court found that the plaintiffs could establish a prima facie claim of fraud under state law. Therefore, the court denied summary judgment holding that—despite the fact that the employer facially complied with all the enumerated OWBPA requirements—the waiver nevertheless may not have been knowing and voluntary.

The "totality of the circumstances" inquiry applied in *Bennett* has been applied by other courts to suggest that the OWBPA requirements are simply the floor from which to assess the validity of a release. For instance, in *Sheridan v. McGraw-Hill*, the court emphasized that in order for waivers of rights or claims under the ADEA to be knowing and voluntary, "*[a]t a minimum*, . . . waivers comply with the specific duties imposed by OWBPA."[4] In that case, the plaintiff did not argue that his waiver did not comply with the specific requirements enumerated in the OWBPA. Rather, he alleged that he was fraudulently induced into signing the waiver. Although the plaintiff was told that his position was being eliminated due to a reorganization, he argued that he was fired because the employer wanted to hire a younger replacement. After a careful examination of this allegation, the court concluded that the plaintiff had proffered no evidence to support his claim of fraud. In particular, the plaintiff did not dispute that the company engaged in a reorganization, nor did he deny that his replacement held a position with more authority than the position he previously held. The court determined that there was no issue of material fact with regard to whether the waiver was knowing and voluntary, and therefore affirmed summary judgment for the employer.

In sum, employers cannot expect to win summary judgment on claims challenging their waivers even if the waivers are facially compliant with the OWBPA.

III. EEOC Regulations—Waivers of Rights and Claims Under the ADEA

As stated above, after passage of the OWBPA there remained a number of open issues, especially in the context of waivers offered to groups of employees affected by layoffs or voluntary exit incentive programs. In response to widespread uncertainty about the OWBPA's requirements, the EEOC published final rules and regulations establishing, among other things, procedures and standards that employers must follow when offering waivers to a group or class of employees in connection with voluntary or involuntary termination programs.[5] These regulations, which became effective July 6, 1998, were the first formal EEOC guidance on the OWBPA since its enactment in 1990. Although these regulations purported to clarify the employer's disclosure obligations, they so far have fallen short of meeting that goal and there have been few reported cases to fill in the gaps.

A. Definition of "Program"

Immediately after passage of the OWBPA, a major issue that arose was the threshold determination of what constitutes a group termination "program" that would trigger an employer's obligation to provide the longer forty-five day consideration period and the detailed disclosure information. The regulations provide that the issue of "the existence of a 'program' will be decided based upon the facts and circumstances of each case. A 'program' exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees."[6] This particular provision did little to clarify the definition of a "program" other than to codify the existing case law that as few as two people might constitute a group.[7]

What the regulations left open is the question of whether two or three employees who simultaneously negotiate individual separation packages with their employer could be considered part of a "program" if other factors suggest they are leaving for similar and related reasons. Such a finding would necessitate the employer giving each employee disclosure information about the other discharged employees. Very few cases address this situation. However, in *Blackwell v. Cole Taylor Bank*, the Seventh Circuit observed that Congress appeared to be less concerned about individuals who negotiate waivers than those who are recipients of standardized, complex, take-it-or-leave-it severance offers tendered in connection with a reduction in force or other reorganization.[8] Nevertheless, the existence of a "program" depends on the facts and circumstances of each case, and employers should use common sense in determining whether the termination of two or three employees would be part of a "program" under the OWBPA. Absent compelling concerns, employers who err on the side of providing disclosure information to all affected employees can better ensure that their waiver agreements are not challenged.

Another issue related to the definition of a "program" is whether consecutive layoffs are part of a single program being implemented in waves or whether they are, in fact, separate programs. Thankfully, the regulations clarified how to format disclosure statements in the case of a program implemented in waves. Specifically, the regulations provide that when employers dis-

charge different groups of employees at different times pursuant to the same "program," the disclosure information must be cumulative—employees must receive information about all other employees who were previously affected by the same reduction in force. The later terminees should be provided with "ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all person[s] terminated to date. There is no duty, however, to supplement the information given to earlier terminees so long as the disclosure at the time it is given conforms to the requirements of [OWBPA]."[9]

However, neither the regulations nor existing case law shed light on how to determine whether consecutive layoffs are part of a single termination program or whether they are independent programs. For example, there is no set time period beyond which consecutive layoffs will be deemed presumptively separate programs.[10] Instead, the inquiry depends on the facts and circumstances of each case. For instance, in *Commonwealth of Massachusetts v. Bull HN Information Systems, Inc.*,[11] the employer instituted successive reductions in force in 1998, 1999 and 2000. Because the employer viewed each one as an independent termination program, it did not provide cumulative disclosure to employees who were laid off in 1999 and 2000. In denying the employer's motion for summary judgment, the court relied on the fact that the record did not "clearly establish" if the successive layoffs were part of a single program as opposed to being independent termination programs. Again, because the regulations provide no guidance in this area, employers that undertake successive group termination programs should carefully consider providing cumulative disclosure to the subsequently terminated employees.

In an effort to clarify what constitutes a "program" and to delineate the boundaries of the disclosure information required by the OWBPA, the regulations created a term of art—the "decisional unit." The regulations define the "decisional unit" as that "portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver."[12] The decisional unit may be comprised of several facilities, a subgroup of a department at one facility, a particular job classification or some other organizational unit.[13]

The description of the unit should reflect the process by which an employer chose certain employees for a "program" and by which it ruled out others. However, the definition provides no rule as to whether multiple facilities must be combined together. Thus, if the employer analyzes its operations at several facilities and concludes to focus its reduction in force at only one facility, then by virtue of the employer's decision-making process, the decisional unit would include all facilities considered—not just the one that was ultimately affected. As the court in *Griffin v. Kraft General Foods, Inc.* found, "to limit individuals in the same 'job classification or organizational unit' to a single plant would be to read the statute's words contrary to their naturally broad meaning and to insert an exception where none is written."[14] On the other hand, if there is no evidence that the employer considered other plants as part of its decision to close one plant—as was the case in *Adams v. Moore Business Forms, Inc.*—then the one plant affected is the proper "decisional unit."[15]

In sum, although the regulations provide some guidance to employers, there are many open issues inherent in a "facts and circumstances" determination required when waivers are challenged. The regulations are a far cry from the concrete guidance needed by employers seeking air-tight, un-challengeable waivers and peace of mind.

B. Time Periods

Another open issue under the OWBPA's group termination rules relates to whether an employee's decision to sign a waiver can be viewed as separate from a decision to resign such that the 45-day time period applies only to the decision to sign the waiver. Courts disagree as to whether this time limit applies solely to the decision to execute a waiver, or whether it is triggered by the employee's decision to participate in the "program" and leave his or her employment.

In *EEOC v. Sears Roebuck & Co.*, although the employees had the full 45 days to consider the release in connection with an exit incentive program, the employer gave employees only five days during which to consider whether to resign under that program. The court held that the 45-day time period applied to both the employees' decisions to participate in the program *and* the decision to release any ADEA claims in exchange for additional consideration.[16] The court reasoned that the required disclosure information affects an employee's perception of *all* the alternatives, especially whether or not to participate in the program, and not just the alternatives pertaining to the release.

On the other hand, in *Reid v. IBM Corp.*, the employees were asked to sign both a release and an irrevocable resignation letter. The court held that the company did not have to give employees the consideration and revocation periods specified in the OWBPA with respect to the resignation decision because the only irrevocable result of signing the resignation letter was the plaintiffs' departure from the company—not the release of ADEA claims.[17] Similarly, in *Blackwell v. Cole Taylor Bank*,

although the employees were given less than a day to decide whether to quit, they had the statutory minimum number of days within which to decide whether to sign the waiver in exchange for additional consideration.[18] Therefore, the waiver of ADEA claims was found to be valid.

C. To Whom Must the Disclosure Be Provided?

Another question employers confront in the group termination context is whether they must give an additional 45 days to an employee who, although terminated in a group program and offered a standard package, subsequently negotiates changes to the separation package. The regulations provide that an employer and employee who reach such an agreement may agree that changes do not restart the running of the 45-day period. However, at least one case has suggested that may not be necessary.

In *Carpenter v. General Motors Corp.*, the plaintiff, in addition to his severance package, negotiated a supplemental agreement providing additional consideration in exchange for a waiver of ADEA claims.[19] The employer gave him 21 days to consider the supplemental package and release although he was terminated as part of a group program. The court concluded that the supplemental agreement fell outside the scope of OWBPA's group termination rules because it was individually negotiated. Therefore, the waiver was valid after only the 21-day consideration period, and the plaintiff's supplemental agreement did not trigger the employer's obligation to disclose information about its group incentive program.

On a somewhat related note, the regulations suggest that employers who are offering severance packages in exchange for releases to a group of employees that include employees over age 40 must provide disclosure information to all employees selected for the "program" regardless of age. This regulation conflicts with the reach of the ADEA, which extends protection to only those 40 and over. Nevertheless, conflicting authority pre-dating the regulations leaves employers in a quandary. In *Allen v. American Home Foods, Inc.*, the plaintiffs alleged that the employer's decision to close the plant was motivated by the fact that there was a predominance of employees whose pensions were near vesting.[20] The court held that the plaintiffs under age 40 had standing to bring an ADEA claim because they were within the "zone of interest" protected by the statute. Other courts, however, have rejected the "zone of interest" test as a basis for standing under other employment statutes.[21]

III. Stakes Are High

Amidst the continuing uncertainty as to how to secure an unchallengeable waiver, the stakes for employers have risen. In *Oubre v. Entergy Operations, Inc.*, the Supreme Court held that a plaintiff who fails to tender back consideration paid as part of a waiver agreement that does not comply with OWBPA is still entitled to bring suit under the ADEA.[22] The Court rejected arguments that by retaining severance benefits, an employee effectively ratified an invalid release. Instead it found that the OWBPA displaced common law contract principles of tender back and ratification in the context of ADEA waiver agreements.

After *Oubre*, the EEOC promulgated regulations expanding its holding.[23] The regulations, which became effective January 10, 2001, provide that "retention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement; nor does the retention constitute the ratification of any waiver agreement, covenant not to sue, or other equivalent arrangement."[24] The goal of these regulations is to prevent employees from being deterred from seeking judicial determination of whether their release complied with the OWBPA.[25]

The only relief for employers in this context is that where an employee successfully challenges a waiver agreement (and is thereby permitted to bring his or her ADEA claim on the merits), courts have the discretion to determine whether the employer may deduct the amount of severance already paid from any damages awarded.[26] This relief, of course, is no more than established mitigation relief and no consolation to employers who have in earnest attempted to comply with the OWBPA only to have their waivers challenged by a disgruntled employee.

The practical effect of the tender-back regulations is to discourage employers from offering ADEA waivers in exchange for severance unless they are prepared to do more than the minimum required by the OWBPA to secure a valid waiver.

IV. Conclusion

In sum, the stakes are high for employers in the face of a challenge to a waiver under the OWBPA. Notwithstanding the purported goal of the OWBPA to provide a roadmap to employers for securing peace of mind and air-tight releases while ensuring that employees receive certain minimum information needed to make an informed and voluntary decision to enter into such an agreement, securing an air-tight waiver is more difficult than ever. Employers, nonetheless, are still wise to try to secure waivers in exchange for valuable severance because the vast majority of waivers are not challenged. Moreover, employers can have some confidence that the waivers will be valid and less subject to challenge if they provide employees the facially minimum amount of

information required under the OWBPA and any additional information that arguably might be material to the employee signing the release.

Endnotes

1. 29 U.S.C. § 626(f)(1).
2. 1995 U.S. Dist. LEXIS 13766 (E.D. Ill. Sept. 8, 1995).
3. 189 F.3d 1221 (10th Cir. 1999).
4. 2001 U.S. App. LEXIS 25197, at *4 (2d Cir. Nov. 20, 2001) (emphasis added).
5. 29 C.F.R. § 1625.22 (2002).
6. 29 C.F.R. § 1625.22(f)(1)(iii)(B) (2002).
7. *See Oberg v. Allied Van Lines*, 11 F.3d 679, 681 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *EEOC v. Sara Lee Corp.*, 923 F. Supp. 994 (W.D. Mich. 1995).
8. 152 F.3d 666 (7th Cir. 1998).
9. 29 C.F.R. § 1625.22(f)(4)(vi) (2002).
10. This is in contrast to the WARN Act, which provides a 90-day window period for determining whether an employer has met the threshold number of layoffs to trigger the statute's requirements. 29 U.S.C. § 2102(d), 20 C.F.R. § 639.5(a).
11. 143 F. Supp. 2d 134 (D. Mass. 2001).
12. 29 C.F.R. § 1625.22(f)(3)(i)(B) (2002).
13. The regulations give several examples of decisional units at 29 C.F.R. § 1625.22(f)(3)(iii)(A)-(E) (2002).
14. 62 F.3d 368, 372 (11th Cir. 1995).
15. 224 F.3d 324 (4th Cir. 2000).
16. 857 F. Supp. 1233 (N.D. Ill. 1994).
17. 1997 WL 357969, at *5 (S.D.N.Y. June 24, 1997).
18. 152 F.3d 666, 670 (7th Cir. 1998).
19. 1999 U.S. App. LEXIS 20303, at *9-10 (6th Cir. Aug. 19, 1999).
20. 644 F. Supp. 1553 (N.D. Ind. 1986).
21. *American Fed'n of State, County and Mun. Employees v. County of Nassau*, 664 F. Supp. 64 (E.D.N.Y. 1987).
22. 522 U.S. 422 (1998).
23. 29 C.F.R. § 1625.23 (2002).
24. 29 C.F.R. § 1625.23(a) (2002).
25. *See* 65 Fed. Reg. 77438 (Dec. 11, 2000).
26. 29 C.F.R. § 1625.23(c)(1) (2002).

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Directors' Duties and Corporation Governance in the Light of Enron

By Keith Corkan

Enron is perhaps the most spectacular corporate failure in recent years, but it is one of a number of such failures and almost certainly will not be the last. Its demise raises issues as diverse as deregulation of markets, accountancy standards, campaign finance and corruption. It has also given the opportunity of re-visiting the nature and scope of directors' duties including the potentially crucial role of the non-executive director. This article will consider various duties and obligations of directors including recent developments in corporate governance and steps which can be taken to minimise the possibility of corporate failure. It will also consider the impact Enron has had upon the role of the non-executive director and some of the practical problems the affair has highlighted.

Directors' Duties

Despite their differing roles, neither statute nor case law has required a higher standard of executive directors than that which applies to non-executive directors. Financial responsibility rests with all directors who face personal liability or disqualification if fraudulent or wrongful trading prejudices creditors. Directors are not permitted to make a personal profit from their position unless agreed in general meeting or allowed by the company's constitution. The standard of skill and care set out in section 214 of the Insolvency Act is defined as that to be expected from a director in his or her position together with any additional skills and qualifications that the director has.

This standard has now been applied to solvent companies (*D'Jan and Norman v. Theodore Goddard 1992*). Although this standard is higher than that imposed by a series of 19th century cases which allow directors to avoid liability for errors of judgment and possible negligence, it remains difficult to attribute liability for a company's poor performance to an executive director. The lack of fear of dismissal engendered by the combination of a lucrative benefits package and an extensive notice period has also arguably contributed to indifferent performance by directors. Various corporate governance committees have attempted to persuade companies to reduce notice periods but with limited success.

Disqualification of Directors

The collapse of Barings Bank in 1999 resulted in the successful disqualification of at least one director based upon a failure to supervise and oversee trading activities of a lone trader in an overseas branch. By the time of disqualification, however, damage to customers and employees had already been done. The Enron pensioners and employees will take small comfort from any successful prosecutions of the Enron directors. (There are some fifty claims to date, with the insurance industry preparing for a catastrophic loss in the DO sector this year, with cover being denied where there has not been full disclosure.) Following Enron, claims against directors have become extraterritorial with Lord Wakeham, the British non-executive director, being subject to possible proceedings in the United States. Enron, like Barings, involved the directors' failure to understand the nature and scope of complex financial activities undertaken in such a way as to make them difficult to monitor.

Corporate Governance

The problems in establishing directors' culpability underscores the importance of corporate governance principles, and the Enron experience provides the opportunity of examining how supervision and monitoring of management can be improved. It may well be that effective corporate governance is the only way creditors and investors can protect themselves against the activities of executives. In the light of Enron, however, this must remain debatable since the outside directors were effectively prevented from scrutinising the activities of the executive directors. The case illustrates the fact that it is difficult for any outsider to establish what is happening inside a company.

There are, in fact, signs of greater shareholder activity in recent months with a number of chief executives of European companies having been forced to resign following poor performance. The European Commission is considering whether to harmonise EU standards of corporate governance, and the United Kingdom government recently announced a formal review. This will be the fourth enquiry within the last ten years. Shareholder activism nevertheless remains an important component of corporate governance, and dialogue with the non-executive directors is crucially important.

The Combined Code (*Principles of Governance* and *Code of Best Practice*) requires listed companies to include a statement in their annual report on the extent to which they have complied with the corporate governance principles, in particular Cadbury, Greenbury and Hampel's best practice requirements. Nevertheless, sanctions remain weak where there is a failure to comply. A number of the committees' recommendations relate to the role of non-executive directors.

Non-Executive Directors

Non-executive directors have an important policy role in enforcing fair dealing and need to bring their experience and judgment to bear on key issues. This includes the monitoring of management, particularly where executives make mistakes and seek to cover their tracks. The non-executive directors should be drawn from a wide range of backgrounds, have broad experience and a range of skills. They should be rewarded according to these criteria.

Non-executive directors, however, are not well remunerated in the U.S. and the U.K. Many hold directorships in competing companies and their commitment and independence is sometimes called into question. Cross-directorships in each others' companies can also affect independence, but is not unlawful in the U.K. Directors in many public companies are permitted to vote on matters in which they have a personal interest. This can also affect the independence of the non-executive directors and appears to have been an issue in Enron, where there were a number on the board. There was, however, no effective monitoring of the excesses of senior executives, many of whom received substantial bonuses which were linked to projects the company was involved in. Some of the non-executives also acted as consultants to the company.

It is for such conflicts of interest as these that the Hampel Committee on Corporate Governance recommended that the majority of the non-executives should be independent in the sense of having no financial ties to the company. Partly as a result of Enron, directors are now being forced to step down where there is a financial connection. The role of a non-executive chairman or a senior member of the board in monitoring of management has proved to be effective in both the U.K. and the U.S. and should be encouraged.

Despite such improvements, it remains crucially important that information given to the non-executives is understandable and should ideally include input from customers and employees. In addition to assimilating this information, non-executives should be prepared to devote a certain amount of time each month to company business, including making their own enquiries of customers and employees. It is important that they do not rely exclusively on reports from executives and that they talk to shareholders. Non-executives should also appreciate that they have a right of inspection of all records and accounts of the company and that it is not limited to information tendered by the executive directors. This is particularly important post-Enron, where the control of information by the executive directors had disastrous consequences.

Assuming these standards are complied with, can it be guaranteed that a situation like Enron would not occur in the U.K.? Probably not, since the question of independence and stature of those who act as non-executive directors and what contribution they make is of crucial importance. There is, post-Enron, a growing recognition of the importance of attracting non-executives of sufficient calibre to challenge the executives and the external auditors who often have a close relationship with the finance director. They should be prepared to probe and challenge the actions of the executive directors to a greater degree, and through the audit committee they need to deal with the key accounting issues.

One consequence of Enron is that non-executives now feel that they are obliged to assume considerable responsibility. There is a fear that good quality candidates will be deterred from participating, particularly with the prospect of further legislation. Claims against non-executives in the U.K. are highly unusual, but Enron could witness the emulation of U.S.-style claims in the U.K.

Audit Committees

The Cadbury Committee recommended that audit committees should include independent non-executive directors. Nevertheless, in the U.K., former executives and advisors to a company remain legally entitled to sit on audit committees, thereby creating a potential conflict of interest. Following the apparent failure of the audit committee in Enron, however, it is noticeable that in many companies the audit committee is meeting more frequently. The Financial Services Authority is holding banks' audit committees directly accountable for audit failures. These trends are laudable, but given the complexity of financial issues in large multinationals, however, (including Enron) there is a view that senior accountants from the major accountancy firms should serve on audit committees. Accountants could use their expertise to deal with the external auditors, and senior members of the profession have the required knowledge, experience and stature to challenge the board in relation to financial transactions. At the very least, the audit committee should be entitled to obtain accountancy advice and the committee itself should have an enhanced role. In essence, the board has to decide whether to bring an accountant onto the board or retain such a professional on a consultancy basis. The audit committee should, in any event, be allowed to monitor the performance of the chief financial officer and should be receptive to internal whistleblowers.

Conclusion

In-house counsel and external legal advisers should be familiar with these standards and guidelines to ensure that they are fully implemented by the board of directors. Non-executive directors are often separately represented upon their appointment and quite often the terms of their engagement include reimbursement for professional advice during their period of office. Steps should be taken to ensure that non-executives are aware of standards of corporate governance through their terms of engagement and additional guidance. Recent events have highlighted the importance of effective training of non-executive directors and this is where legal advisors can fulfill a vital role. Too often, directors and non-directors act in what they perceive to be mutual interest. Legal advisers can assist in ensuring that non-executives are genuinely independent, are well remunerated and—in conjunction with an enhanced audit committee—exert a controlling influence on the excesses of the executive directors.

Keith Corkan is Head of the Employment Group at Collyer-Bristow, a firm in the United Kingdom. He concentrates in employment litigation and discrimination, representing a wide range of companies and executives in London. He is Vice-Chair of the Discrimination Committee of the General Practice Section of the International Bar Association. Keith can be reached at keith.corkan@collyerbristow.com.

Navigating the Filing of Employment Discrimination Claims

By Gregory Mattacola

Possibly more so than any other area of law, the realm of employment discrimination is a minefield of procedural hoops and obstacles. There are two administrative agencies which a plaintiff or defendant must normally negotiate previous to the action ever being filed in state or federal court. On the federal side, there is the Equal Employment Opportunity Commission (EEOC). On the state level, there is the New York State Division of Human Rights (NYSDHR). Both have different areas of government, enforcement procedures and requirements. The following will provide a summary of the process one would go through if he or she was filing or responding to a charge with the EEOC or the NYSDHR or both.

The EEOC

The EEOC is the federal agency charged with investigating and enforcing claims brought under Title VII of the Civil Rights Act of 1964,[1] the Age Discrimination in Employment Act (ADEA),[2] and the Americans with Disabilities Act (ADA).[3] The EEOC only has jurisdiction over employers who are covered by the respective laws. Title VII and the ADA define an employer as having at least 15 employees working in each of 20 or more calendar weeks in the current or preceding calendar year. The ADEA requires 20 employees. The EEOC has no direct powers of enforcement under Title VII and can't conduct its own hearings or impose sanctions if an employer is found in violation. The EEOC can, however, investigate charges, determine whether there is reasonable cause to believe that discrimination has occurred, bring discrimination suits in federal court, issue "Right-to-Sue-Notices" to the complainants and intervene in a charging party's private lawsuit.

If a complainant wishes to file a charge with the EEOC, it must be done in a timely manner. Generally, a charge of discrimination must be filed with the EEOC within 180 days of the discriminatory practice. However, New York has a Fair Employment Practices Agency (the NYSDHR), thus the EEOC deadline to file is 300 days, not 180. Technically, if a complainant files with the EEOC first, the EEOC must defer the charge to the NYSDHR for 60 days, shortening the 300-day limitation to 240 days. However, a work-sharing agreement exists between the EEOC and the NYSDHR which allows the EEOC to receive waivers of the 60-day referral period, extending the deadline up to 300 days. The practical end result is that a charging party has 300 days from the alleged discriminatory act to file with the EEOC. This is viewed as a statute of limitations and is subject to waiver, estoppel and equitable tolling. However, the charge must be a written statement that sufficiently identifies the parties and describes the actions or practices complained of. Several courts have ruled that the intake questionnaire, which the EEOC has prospective charging parties fill out, will not constitute a valid charge under Title VII for purposes of tolling the statute of limitations. Hence, the questionnaire is not enough. An actual written, attested charge statement must be submitted to the EEOC within the 300 days.

After receiving a charge, the EEOC must provide written notice of the charge to the employer within 10 days of the filing of the charge. It was previously the case that once a charge was filed, the EEOC would begin its investigation process. However, the EEOC began implementing mediation programs in 1996 and increased its mediation efforts after fiscal year 1999 when Congress appropriated additional funds for the EEOC's mediation program.

Since 1999, the EEOC's mediation efforts have become significant. Now, when a charge comes in, the EEOC decides whether that charge is appropriate for mediation. If so, the charging party is mailed an invitation to mediate along with an agreement to mediate. The charging party has 15 days to respond in the affirmative if it wishes to mediate. Concurrently, an invitation to mediate is sent to the respondent along with an agreement to mediate. The respondent also has 15 days to respond. If either the charging party or the respondent decline to participate in mediation, the charge is referred to an investigative unit for investigation. If both parties agree to mediate the charge, the charge is assigned to a mediator. A mediator must complete the mediation within 45 days of the date of assignment.

If the mediation does go forward, it is non-binding and confidential. Parties, previous to mediation, submit to a confidentiality agreement which agrees, *inter alia*, that all notes, records or documents generated during the mediation shall be destroyed at the conclusion of same. Moreover, mediation certainly falls under settlement negotiations which would not be admissible in court. If mediation is successful, a settlement agreement is prepared and the dispute is over. If the mediation is unsuccessful or it does not transpire within the set time period, then the case is referred back to the investigative unit.

Once back in the investigative unit, or if it never left there at all, the charge will undergo investigation. The EEOC's investigatory powers are broad and it may investigate any employment practice that is like or related to the practice alleged in the charge or that grows out of those allegations. The EEOC may also conduct a fact-finding conference with the parties. This is not considered mediation, but it is not uncommon that settlement can be discussed at this conference. Also, the EEOC may ask the respondent to submit a position statement regarding the charge. More often than not, the charging party is not given this position statement or asked to respond to it. Occasionally, the EEOC will also conduct an on-site investigation. It will also regularly call prospective witnesses and/or get statements from these witnesses.

After the investigation is completed, the EEOC makes a determination. There are only two possibilities after a full investigation has transpired. A "no cause" determination means that the EEOC has concluded that discrimination did not occur. A "cause" decision means that the EEOC found that discrimination did occur. If the EEOC found cause, it could bring suit on behalf of the charging party in federal district court. This does not often happen. There is no appeal process for when a "cause" or "no cause" determination is made, unlike the NYSDHR. Regardless of its determination, the EEOC will usually issue a "Right-to-Sue-Notice" to the charging party which is a prerequisite to a private lawsuit. Once this notice has been issued, the charging party has 90 days to file its lawsuit in federal court.

Another common result is that 180 days have passed from the date of the filing of the EEOC charge without a determination having been made one way or the other. If 180 days have passed, a party can simply request the "Right-to-Sue-Notice." This happens often because the EEOC is still an overworked agency which is deluged with more charges than it can handle on a timely basis. If a party is represented by an attorney, the usual result is to get the notice after 180 days have passed and to proceed to court. However, if you are representing the complainant, make sure that 180 days have indeed passed! Some courts have ruled that getting an early notice will deprive the action of jurisdiction (the Western District has gone both ways on this issue). It is better to be patient and wait out the whole six months. Once you have gotten the notice, all that remains is to get the summons and complaint filed within 90 days. Again, this is not a time limit that you want to dance around. Get the claim filed on time.

The New York State Division of Human Rights

The NYSDHR is a state agency which enforces the New York State Human Rights Law.[4] The NYSDHR, unlike the EEOC, does have powers of enforcement and can hold its own hearings and order relief, sanctions, etc. The NYSDHR only has jurisdiction over those employers with at least four employees. The time limit for filing a complaint with the NYSDHR is within one year of the alleged discriminatory act.

A complaint will not be accepted by the NYSDHR unless it is based on more than mere speculation. The facts alleged should be accompanied by documentation or information capable of verification after investigation.[5]

After a complaint is filed, the employer is notified and asked to submit a written response. After a response is submitted, the case is assigned to an investigator who will gather more information and documentation. Also, the complaining party is usually sent the written response of the employer and asked to submit a rebuttal. The NYSDHR differs from the EEOC in that the EEOC rarely shares the employer's position statement with the charging party.

Also, early in the process, the NYSDHR will try to schedule a conciliation conference to see if the case can be resolved, similar to the EEOC's mediation efforts. If conciliation fails, the investigation continues—during which other employees and witnesses are often interviewed. The New York Human Rights Law does have time periods by which the NYSDHR is supposed to investigate a complaint, but they are rarely met. The NYSDHR, like the EEOC, is deluged with complaints and simply cannot keep up with the volume. The Court of Appeals has ruled that failure to uphold the deadlines does not deprive the NYSDHR of jurisdiction but unusually excessive delay can result in a prejudice to the employer and provide a defense of *laches*.

If a" no probable cause" determination is made by the NYSDHR, the complaint is dismissed. A right of appeal does exist[6] but an adverse decision will have a *res judicata* effect on subsequent litigation. If probable cause is found to exist, the NYSDHR will attempt settlement and if that does not work, a hearing will be held before an administrative law judge. After the hearing, the ALJ will submit a recommendation to the Commissioner of the NYSDHR. The Commissioner will either accept, change or reject the ALJ's recommendation and either party can appeal to the courts.

Interplay Between EEOC and NYSDHR

As mentioned previously, there is interplay between the EEOC and the NYSDHR and nowhere is this more evident than when a charging party seeks to preserve both state and federal rights. This is necessary because an "election of remedies" provision in the Human Rights Law bars complainants from utilizing both the NYSDHR and the courts. If one files a complaint with the NYSDHR and the complaint is investigated and a

determination is ultimately made, the complainant loses his or her right to sue in court under the Human Rights Law since the election was made to stay within the NYSDHR. Conversely, an individual could elect to skip the NYSDHR process and file a lawsuit directly in court. The statute of limitation under the Human Rights Law is three years from the alleged discriminatory act.

A complainant can, however, save all rights under state and federal law while still obtaining the benefit of having an agency first investigate the claim. To do this, the charging party will first file a charge with the EEOC within 300 days of the discriminatory act and request that the charge be "cross-filed" with the Division of Human Rights. The charging party may also want to request the waiver of the 60-day deferral period but this normally happens whether or not it is requested by the actual charging party.

As stated in an amendment to the Human Rights Law, a charge filed this way—first with the EEOC and deferred to the NYSDHR as allowed under Title VII, the ADA and the ADEA—does not constitute an election of remedies and will not bar the charging party from bringing a subsequent court action under the Human Rights Law. The other way to go about it would be to file a complaint with the NYSDHR and have it cross-filed with the EEOC. If the complainant asks for an administrative dismissal of the complaint before a determination is made by the NYSDHR, he or she will still hold on to the Human Rights Law cause of action. An administrative dismissal will be normally be given by the NYSDHR if the complainant seeks to initiate an action in state or federal court.

Conclusion

Whether representing the complainant or respondent in an EEOC or NYSDHR proceeding, you have to be mindful of the time limits and the procedural process, lest you forego one of your client's rights. If done properly, you can preserve all of your client's rights as you make your way through this administrative process and find out very useful information about your opponent in the process. Settlement, via mediation, is also a possible outcome. However, if this administrative process is done poorly, you run the risk of sacrificing the rights of your client, hurting the eventual lawsuit, ending up with jurisdictional problems or worse. My words of wisdom are to treat this process as seriously as you would the actual lawsuit since what happens here invariably has lasting effects on any subsequent litigation.

Endnotes

1. 42 U.S.C. § 2000 *et seq*.
2. 29 U.S.C. § 621 *et seq*.
3. 42 U.S.C. § 12101 *et seq*.
4. N.Y. Exec. Law. § 290, *et. seq*.
5. *See* 9 NYCRR § 465.3(c)(6).
6. *See* N.Y. Exec. Law §§ 297, 298.

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Scenes from the
Labor and Employment Law Section

Spring Meeting

April 26-28, 2002

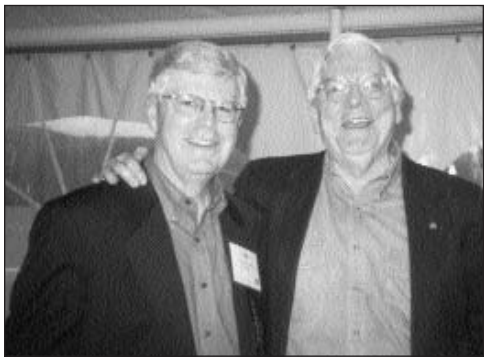
The Sagamore
Bolton Landing

CLE Chair and Chair-Elect Jacquelin Drucker and past Chair Margery Gootnick

(standing l-r)
Chair Dick Chapman and past Chair Mike Harren
(seated)
Katherine Chapman

Young Lawyers Section Chair Barbara Samel, Greg Amoroso, Timothy Benedict

Bert Pogrebin, Dan Silverman and Barbara Deinhardt



Tom Grooms and Tom Maroney

(l-r) John Sands (past Chair), Tammy Renea Mays, Deborah DeCuevas, Edna Torres

Terry O'Neil, Jr. and Mom Colleen O'Neil

Mark Your Calendars Now!!!

Labor Law Section Fall Meeting

October 4-6, 2002

The Statler Hotel
Ithaca, NY

Spin City: A Result-Oriented Court Clears the Dockets

By Richard Adelman

The following is the text of the speech on recent case law given by the Section's Secretary, Richard Adelman, at the Annual Meeting of the Labor and Employment Section in New York City on January 25, 2002.

I have two preliminary things to say before I get into the substance of my talk. First, my disclaimer. I am here, not because I have any special expertise, but because I am Secretary-Elect of the Section, and, as such, I have the responsibility to review the labor and employment cases from the last Supreme Court term. Although I was a practicing lawyer for many years, and I have been a member of this Section for over 20 years, I have been a full-time arbitrator for more than ten years, and this talk brings the perspective of an arbitrator, someone who tries to avoid spin to reach a result, rather than an advocate's point of view. It is fortuitous that the major cases this term deal with arbitration. I can remember my law professors referring to result-oriented courts. As a law student, I tended to dismiss comments like that. Now I know better. Of course, judges do some spinning, and I would not be surprised to hear advocates say that arbitrators do some spinning of their own, but at least the advocates get to pick the arbitrators. But I do have to confess there is a little spin in the title of this talk.

Second is my captive audience speech, which some of you have heard before and which actually has some relevance in light of the increased number of cases that will be arbitrated as a result of the Court's opinions this term, especially *Circuit City*.[1] I should note that the title of my talk, which comes primarily from the *Circuit City* case, is not meant to suggest that I disagree with the increased number of cases that will be arbitrated. After all, I am an arbitrator, and a beneficiary of these decisions. I just have some difficulty with how the Court has gotten there. I'll talk about the cases in a moment after my captive audience speech which is to remind the advocates that as the number of arbitration hearings increase, the arbitration process will get bogged down like the courts unless we do a better job in two areas.

One, parties need to prepare cases as soon as possible, so those cases that should be settled will be settled early in the process, clearing hearing dates for the cases that cannot be settled. Too many cases are not settled until shortly before the hearing date, or at the hearing, because the parties have not investigated the case sooner. As a result, many cases are not settled until the last minute, and the hearing date cannot be used for another pending case. Again, I may be the beneficiary of late cancellation fees, but the process is the loser. Two, the parties need to use newer arbitrators such as those who successfully complete our Section's Arbitrator Mentoring Program so that more arbitrators will be available to hear cases. I suspect that some of you will find what I am about to say hard to believe, but every arbitrator has had a first case, and a second case, and a third case, and it was only because advocates were willing to give us a chance when we were new arbitrators, that we are able to serve you today. If we don't do these things, I am afraid that the parties may go to other ADR methods such as flipping a coin. Many of you say that's what arbitrators do anyway; cutting a deck; rock, paper, scissors; or—my personal favorite, and appropriate this term where the Court decided two cases involving baseball—fist on the baseball bat.

Now to the cases. I'll begin with the ERISA case. I was a practicing lawyer in the early days of ERISA, and I could never understand why what reads like a tax statute is handled by labor lawyers. I guess, since the "E" in ERISA stands for "Employee," ERISA became the responsibility of labor lawyers, and so we discuss ERISA cases in this Section. In *Egelhoff v. Egelhoff*,[2] Mr. Egelhoff, a resident of Washington, died intestate shortly after he divorced his second wife, leaving her the named beneficiary of his company life insurance and pension plan, both covered by ERISA. The Washington State statute provided that the designation of a spouse as the beneficiary of a non-probate asset was revoked automatically by divorce, and Mr. Egelhoff's two children from his first marriage sought the benefits of these assets based on this statute. The children prevailed in the state court, but the Supreme Court held that since ERISA specifically governs how plans are to be administered, it preempted the state statute because ERISA requires uniformity of plan administration in accordance with plan documents. I personally thought the dissent by Justice Breyer made more sense, i.e., that the Washington statute logically concluded that a decedent would prefer that such assets go to his/her children rather than to a former spouse. In any event, now lawyers know to make sure to tell their clients—and perhaps companies will tell their employees—to change beneficiaries when they get divorced.

Another case of limited significance is the ADA case, *PGA TOUR, Inc. v. Martin*,[3] involving professional golfer Casey Martin who suffers from a degenerative circulatory disorder, a disability as defined in the ADA, which causes atrophy of his right leg, and makes it impossible for him to walk 18 holes of golf. In a questionable public relations move, the PGA (Professional Golfers Association) would not permit Mr. Martin to use a golf cart in the third stage of the qualifying tournament known as the Q-School, just as carts are not permitted on the regular PGA tour—although carts can be used in the first two stages of Q-School, and on the senior tour. When Mr. Martin turned

pro, he requested permission to use a golf cart during the third stage. When the PGA denied his request, he filed suit and the District Court granted him a preliminary injunction enabling him to play in the final stage of the Q-School and, when he qualified, in tournaments on the pro tour.

The PGA litigated the matter, and Mr. Martin prevailed all the way, perhaps due to the sympathetic nature of his case. In what I think is a questionable opinion, the Supreme Court held that since the public has the right to get to compete in PGA tournaments by paying $3,000 to compete in the Q-School, golf courses are public accommodations during PGA tournaments and qualifying rounds. Thus, at these events, the PGA may not discriminate against either spectators or competitors on the basis of disability. The Court further held that a waiver of the walking rule for Mr. Martin would not alter the fundamental nature of the game since walking is at best peripheral to the nature of these events. As a result, Mr. Martin was permitted to utilize a golf cart on the PGA tour. In his dissent, Justice Scalia stated that the majority decision distorted both the ADA and common sense since Mr. Martin was "not a customer buying recreation, but a professional athlete selling it," and so the golf course in this case was not a covered place of public accommodation. I think the spinning by the majority in this case may be an example of the old adage that hard cases make bad law. However, this is a *sui generis* case, and it appears that in the recent *Toyota*[4] case, the Court has given notice that it intends to interpret the ADA rather strictly.

I will discuss the NLRA case, *Kentucky River Community Care*,[5] together with the *Cleveland Indians* case,[6] an employment tax case, because they show the Court's inclination to defer to an agency's expertise unless the agency's decision clearly runs afoul of the statute. In the NLRA decision—by the way, I am Secretary-Elect of the Section because a long time ago Dick Chapman, the Chair-Elect, and I worked together in the Enforcement Section of the National Labor Relations Board (the "Board") in Washington, DC. In those days, the Board was the place where many labor-management practitioners got their start. In *Kentucky River*, the Supreme Court, agreeing with the Board, unanimously held that employers have the burden of proving that employees—nurses in this case—are supervisors. However, in a 5-4 decision, the Court held that the Board erred in determining that the nurses were not supervisors as defined by the Act, rejecting the Board's interpretation of the words "independent judgment" as contrary to the language of the Act. The Court pointed out that the definition of supervisors includes the responsibility to direct employees if it "is not of a merely routine nature, but requires the use of independent judgment," and that the Board's conclusion that nurses were not supervisors, even though they used independent judgment, because of their professional training and expertise, was an erroneous interpretation of the statutory language.

The Supreme Court is usually inclined to adopt an agency's interpretation, perhaps as a way of clearing the dockets, as the dissenters would have done in the *Kentucky River* case, and as the Court did in the *Cleveland Indians* case, but since the Board's conclusion was contrary to the plain language of the Act, the Court would not let the Board's interpretation stand. The *Cleveland Indians* case presents the question whether back wages are subject to Federal Insurance Contributions Act and Federal Unemployment Tax Act taxes in the year the wages are paid, or in the year in which they should have been paid. The Indians owed several million dollars to a number of ballplayers resulting from the collusion case against baseball teams, and sought to pay taxes at the lower rates in effect in the years the money should have been paid, rather than at the rates in effect when the money was actually paid, which was five or six years later. The Court deferred to the reasonable interpretation by the Internal Revenue Service which has consistently maintained that back pay awards are taxed based on the rates in effect in the year in which payment is made. This seems obvious, and only became an issue because of previous decisions holding that, for eligibility benefits for social security purposes, back pay payments were counted in the year they were earned rather than paid.

The Court issued two unanimous decision relating to civil rights laws, one under Title VII of the Civil Rights Act of 1964, and one under the Civil Rights Act of 1991. The Title VII case, *Clark County School District v. Breeden*,[7] is significant because the Court said "enough" to frivolous sexual harassment cases. In this case, the plaintiff, a woman, regularly reviewed sexually explicit statements as part of her job screening applicants. At a meeting for this purpose, a male supervisor read aloud from an applicant's report that the applicant had said to a co-worker, "I hear making love to you is like making love to the Grand Canyon." The supervisor then looked at the plaintiff and stated, "I don't know what that means," another male employee said, "Well, I'll tell you later," and both men chuckled. The Court held that under these facts, no reasonable person could have believed that this single incident violated Title VII standards, and that the incident the plaintiff complained about was isolated and cannot remotely be considered "extremely serious" as the cases require.

The plaintiff also alleged that the employer transferred her because she had complained about alleged sexual harassment and because she filed charges and a lawsuit. In what looks like another effort to help clear the dockets since there appeared to be facts in dispute, the Court upheld the granting of the employer's motion for summary judgment by the District Court, which had been reversed by the Ninth Circuit, finding that the facts did not establish that the employer's action in transferring the plaintiff was causally related to the filing of charges or the filing of the lawsuit. I doubt the Court would have

reached this result ten years ago, before the flood of sexual harassment litigation.

The other civil rights case, *Pollard v. E.I. du Pont de Nemours & Company*,[8] presented the question of whether an award of so-called front pay is subject to the statutory cap for compensatory damages, $300,000 in this case. The Court, reversing the Sixth Circuit, held that the language of the Civil Rights Act of 1991 did not include front pay as compensatory damages subject to the various caps, whether the plaintiff was reinstated or not. The Court found that front pay is excluded from the statutory cap because Congress, when it enacted the Civil Rights Act of 1991, permitted plaintiffs to recover compensatory and punitive damages, subject to the cap, in addition to statutory relief previously authorized, and front pay had been permitted by prior statutes, notably the NLRA. This decision appears to be of some substantive importance since it provides plaintiffs with the potential for greater monetary relief.

The final four cases I will discuss involve arbitration. These are the cases that made this term so interesting for me. It was hard to decide which cases to discuss first, the labor or non-labor cases, but since the labor ones do not change what has always been right, I'll start with those. In *Eastern Associated Coal Corp. v. United Mine Workers*,[9] the Court almost closed the public policy loophole left open by the *Grace*[10] and *Misco*[11] cases. The employer discharged the grievant—a truck driver who was subject to DOT regulations which required random drug testing because he drove truck-like vehicles on public highways—when he tested positive for marijuana, and the union took the discharge to arbitration. The arbitrator found no just cause for the discharge, reinstated the grievant with a 30-day suspension, and required the grievant to participate in a substance abuse program and to undergo drug testing for five years.

The grievant returned to work and passed several random drug tests, but a year later again tested positive for marijuana. Again the employer discharged him, again the union took the matter to arbitration, and again an arbitrator reinstated him. I'm not sure, but I think it was a different arbitrator. The arbitrator imposed a suspension of three months, and required the grievant to continue to participate in a substance abuse program and to undergo random drug testing. But the arbitrator also required the grievant to reimburse both the employer and the union with the costs of arbitration, and to provide the employer with a signed undated letter of resignation to take effect if the grievant tested positive within the next five years. Obviously, the arbitrator had some concerns about reinstating the grievant, but did so nevertheless.

This time, the employer sought to have the arbitrator's award vacated, asserting in court that the decision contravened a public policy against allowing workers who test positive for drugs to operate dangerous machinery, an issue I thought was decided in *Misco*. The District Court enforced the arbitrator's award, finding no violation of public policy, and the Fourth Circuit affirmed. Even the courts in the South are catching on that they can reduce their workload by following the Supreme Court's decisions. The Supreme Court held that since the arbitrator acted within the scope of his contractual authority, the award must be treated as if it represented an agreement between the company and the union as to the proper meaning of the words "just cause" in the agreement.

The Court then decided the basic issue, which was not whether the grievant's use of drugs was a violation of public policy, but whether his reinstatement by the arbitrator violated public policy. The Court, affirming the Fourth Circuit, could not find in the Omnibus Transportation Act of 1991, or in the regulations, or in any other law "an 'explicit,' 'well-defined,' 'dominant' public policy to which the arbitrator's decision 'runs contrary'." However, the Court left open a narrow loophole by holding that "the public policy exception is not limited solely to instances where the arbitration award itself violates positive law." In a concurring opinion that I think makes more sense, Justice Scalia would have closed the public policy loophole entirely by holding that an arbitrator's award can be set aside only if the award itself violated positive law. I suggest that advocates ask themselves this question: could the employer have reinstated the grievant without violating the law? If the answer is yes, there can be no violation of public policy if the arbitrator reinstates the grievant.

The other labor arbitration case is *Major League Baseball Players Association v. Garvey*,[12] where the Court reiterated its strong support for the finality of awards by labor arbitrators. As part of the collusion case against baseball teams, Steve Garvey, a star first-baseman during the 1980s, alleged that his team, the San Diego Padres, refused to negotiate with him to extend his contract for the 1988 and 1989 seasons because of the collusion, and he sought $3 million in damages. The arbitrator, based on his credibility determinations, denied the claim and concluded that the Padres had refused to extend Mr. Garvey's contract because of his age and his recent injuries, not due to any collusion among the baseball teams.

The District Court denied Mr. Garvey's motion to vacate, but the Ninth Circuit, finding that the arbitrator's credibility findings were "inexplicable" and "border(ed) on the irrational," reversed the District Court with directions to vacate the award. When the District Court remanded the case to the arbitrator for further hearings, Mr. Garvey appealed. This time, the Ninth Circuit not only reversed the District Court, but it directed the District Court to remand the case to the arbitrator with instructions to enter an award for Mr. Garvey in the amount he sought. The Supreme Court summarily reversed without receiving briefs or hearing oral arguments on the merits of the case.

In a *per curiam* decision, to which Justice Stevens dissented primarily because of the summary procedure used by the Court, the Court found that the Ninth Circuit erred both in reversing the District Court's order denying Mr. Garvey's motion to vacate the arbitration award, and in deciding the case in favor of Mr. Garvey. The Court held that the parties bargained for the arbitrator, not the court, to decide the dispute. The Court stated that as long as the arbitrator is resolving disputes regarding the application of the agreement, courts are not permitted to overturn the arbitrator's decision simply because the court disagrees with the facts found by the arbitrator, particularly credibility determinations, "no matter how erroneous," and even if the findings by the arbitrator are "improvident," "silly," "irrational," "bizarre," or constitute "serious error." It sounds like the Court thinks that "final and binding" really means final and binding. As a result, it will be very hard to set aside an arbitrator's award except for dishonesty, for conflict of interest or where an arbitrator exceeds his/her authority.

Now to the two non-labor cases involving arbitration. In *Green Tree Financial Corp.-Alabama v. Randolph*,[13] the plaintiff purchased a mobile home, and she financed the purchase through Green Tree. The finance agreement contained a broadly worded provision which stated that all disputes relating to the contract, statutory or otherwise, would be resolved by binding arbitration. Thereafter, the plaintiff brought a class action against Green Tree alleging various statutory violations. Green Tree, among other things, filed a motion to compel arbitration, which the District Court granted, and the plaintiff requested reconsideration on the ground that since she lacked the resources to arbitrate, she would have to give up her statutory claims. The District Court denied her request for reconsideration, and the plaintiff appealed. The Eleventh Circuit held that the District Court's order compelling arbitration was a final, appealable order under the FAA. Of more significance, the Eleventh Circuit held that since the arbitration agreement was silent with respect to the payment of filing fees, arbitrators' costs, and other arbitration expenses, the agreement to arbitrate was unenforceable because it failed to provide plaintiff the ability to vindicate her statutory rights.

The Court agreed, unanimously, with the Eleventh Circuit that the District Court's order compelling arbitration was a final, appealable order. However, in a 5-4 decision, the Court reversed the Eleventh Circuit's ruling that the agreement to arbitrate was unenforceable. The Court noted that the purpose of the FAA was to encourage courts to enforce arbitration agreements, and while recognizing that the large costs of arbitration could prevent a litigant from vindicating her statutory rights in arbitration, the Court held that the party seeking to invalidate an arbitration provision on the grounds that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs. Since the plaintiff had made no showing with respect to the costs of arbitration, the Court reversed the Eleventh Circuit and held that the arbitration agreement was enforceable.

In the dissenting part of the minority opinion written by Justice Ginsburg, she states that she would have remanded the case to the Eleventh Circuit on the question of whether the costs of arbitration under the circumstances of this case were prohibitive. In the minority's view, it was Green Tree, not the plaintiff, who should bear the burden of demonstrating whether the arbitration forum was accessible before the plaintiff should be required to submit to arbitration without knowing how much the proceedings might cost. The Court did not set any standards for making this determination, but we can be sure that plaintiffs will present such evidence in the future. I thought that if the Court really meant that the arbitration of statutory disputes is simply using a different forum to hear these disputes, then plaintiffs should not have to pay any more than filing fees, and the burden should have been on Green Tree to show that the costs of arbitration were insignificant. This case shows how far the Court is willing to go to require arbitration of statutory disputes.

The other non-labor case is *Circuit City Stores v. Adams*.[14] In 1995, when the plaintiff applied for a job with Circuit City, he was required to sign an application that contained a broadly worded agreement which included a provision that all disputes relating to his employment, including statutory disputes, would be resolved by binding arbitration. He was hired, and two years later he filed an employment discrimination suit against Circuit City in California state court. In response, Circuit City filed a suit in District Court to compel arbitration pursuant to the FAA.

The District Court granted Circuit City's motion to compel arbitration based on the plaintiff's agreement to arbitrate all his employment claims against Circuit City, and plaintiff appealed to the Ninth Circuit. The Ninth Circuit, which apparently is less interested in clearing its docket than in properly applying the law, followed one of its earlier decisions which had held that the FAA does not apply to contracts of employment, and ruled that since the arbitration agreement in question was in a contract of employment, the arbitration agreement was not subject to the FAA. The Ninth Circuit's decision was contrary to that of every other Court of Appeals that had addressed the matter, so it was not surprising that the Supreme Court, in another 5-4 decision, concluded that contracts of employment are subject to the provisions of the FAA.

The Court majority interpreted the exemption clause of the FAA, which states that the FAA shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," to exempt only employment contracts of transportation workers, and rejected the construction of the Ninth Circuit which, relying on its reading of the legislative history, had excluded all employment contracts of

workers engaged in interstate commerce. The Supreme Court noted the benefits of enforcing arbitration provisions in employment contracts, such as avoiding the high costs of litigation, and reiterated its holding in *Gilmer v. Interstate/Johnson Lane Corporation*[15] that "(b)y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum."

This is a glaring example of spinning the language of a statute to effectuate docket clearing. I think the language of the FAA is clear when it says it does not apply to "employment contracts of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." But if there is ambiguity, the legislative history seems to make clear that Congress did not intend the exemption to apply only to transportation workers as the majority of the Court found. I don't think I would last long as an arbitrator if I ignored bargaining history or past practice, or if I rewrote language the way the Court did in *Circuit City*, or the way Judge Edwards did in the *Cole*[16] case. The Court's desire to clear the dockets is obvious, but how is this going to play out in the future?

Most of the cases which have extended the reach of arbitration have dealt with procedural-type issues, i.e., whether an agreement to arbitrate disputes is enforceable. The Supreme Court has clearly answered yes to the enforceability question, but the Court has not yet been faced with the substantive decisions of arbitrators. So far, the Court has said that anything goes, but when it starts getting terrible decisions on the merits of cases, I think the Court is going to have to set standards for review of arbitration awards for non-labor cases. I have been reminded that the Court's decisions in the Steelworkers Trilogy were docket-clearing decisions, to prevent the courts from getting bogged down with thousands of labor disputes. I think the docket-clearing concept makes sense for labor disputes, and it also makes sense for disputes of contractual employment issues where the parties have agreed to arbitrate these disputes.

However, statutory disputes are clearly different, and I think there need to be stricter standards for reviewing arbitrator decisions in statutory matters. In the labor field two excellent paradigms have served us well for many years. One is found in *Alexander v. Gardner-Denver Co.*[17] where the Supreme Court gave grievants who lost in labor arbitration a bite at a second apple, the statutory apple, but permitted the courts to give consideration to the arbitrator's decision. The effect of *Gardner-Denver* was to clear the dockets because most losing grievants do not go any further, but they are not prevented from filing a statutory claim if they want. The other paradigm is the NLRB's *Collyer-Spielberg* [18] deferral doctrine. The Board defers to the arbitrator's decision unless it is "repugnant" to the Act. The courts could use the same principle to clear the dockets, but still make sure that statutory rights are protected by deferring to the arbitrator's decision only if it is not repugnant to the statute involved in the case.

The New York courts have royally screwed up the "manifest disregard of the law" concept by holding that if an arbitrator doesn't know the law, he/she cannot be found to have disregarded it. That is not the standard for judges, and it cannot sensibly be the standard for arbitrators ruling in statutory disputes, not if the Court is serious about its claim that the only difference is that the statutory dispute is being resolved "in an arbitral rather than a judicial forum." It appears to me that the Supreme Court, in its fervent desire to clear the dockets, has not thought this through, and when the courts start hearing appeals from bad arbitration decisions, the Supreme Court, or Congress, will have to change direction. Perhaps the recent *Waffle House* [19] decision is an indication that the Court has begun to think about this. I recently spoke to a group of management advocates about arbitration of employment disputes, and I was surprised to hear so many of them express a reluctance to advise their clients to agree to arbitrate statutory disputes. In any event, stay tuned. The arbitration of statutory disputes is going to be a topic of discussion at many of our Section meetings in the future.

Endnotes

1. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001).
2. 121 S. Ct. 1322 (2001).
3. 121 S. Ct. 1879 (2001).
4. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
5. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001).
6. *United States v. Cleveland Indians Baseball Club*, 121 S. Ct. 1433 (2001).
7. 121 S. Ct. 1508 (2001).
8. 121 S. Ct. 1946 (2001).
9. 531 U.S. 57 (2000).
10. *W.R. Grace & Co. v. Local 79, International Union of United Rubber, Cork, Linoleum & Plastic Workers*, 361 U.S. 757 (1983).
11. *United Paperworkers International Union v. Misco*, 484 U.S. 29 (1987).
12. 121 U.S. 1724 (2001).
13. 531 U.S. 79 (2000).
14. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001).
15. 500 U.S. 20 (1991).
16. *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. 1997).
17. 415 U.S. 36 (1974).
18. *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1963); *Collyer Insulated Wire*, 192 NLRB 837 (1971).
19. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

Richard Adelman is an arbitrator and Secretary of the Section. He gratefully acknowledges the assistance of Jennifer Broomfield, a fourth year evening student at Brooklyn Law School and a law clerk at Klein, Zelman, Rothermel & Dichter, LLP, in the preparation of this article, which Mr. Adelman presented at the Annual Meeting of the Labor and Employment Section in New York City on January 25, 2002.

PERB Update

By Philip L. Maier

The following is a digest of recent decisions of interest issued by the Public Employment Relations Board (the "Board"). This article reviews decisions issued during the period October 2001 until present.

Discrimination/Interference

Bd. of Educ. of City Sch. Dist. of City of New York (Miller), 35 PERB ¶ 3002 (2002)—The Board affirmed a decision dismissing a charge which alleged that the employer violated § 209-a.1(a) and (c) by instituting a § 3020-a proceeding against Miller due to her exercise of protected activity. The Board held that the reason for her discharge was not related to the exercise of protected activity, but was due to her unsatisfactory performance evaluations. Since she failed to show any nexus between her protected activity and her evaluations, and the employer was able to demonstrate that the institution of the § 3020-a proceeding was due to her unsatisfactory evaluations, the charge was dismissed.

Town of Poughkeepsie, 34 PERB ¶ 3043 (2001)—The Board affirmed the decision of the Assistant Director, finding that the town violated §§ 209-a.1(a) and (c) of the Act by terminating an employee due to his organizational activities. The employee had been asked for a union card by a fellow employee and gave him one while on work time. The Board found that the employee was engaged in protected activity and that the employer knew of the protected activity. The Board restated the test under *Town of Independence*, 23 PERB ¶ 3020 (1990): the burden of persuasion lies with the charging party to demonstrate by a preponderance of the evidence that the public employer acted with improper motivation.[1]The Board followed NLRB precedent for the proposition that "a violation may be found on the theory that not all parts of the employer's premises nor all hours of the work day constitute workplace or work time,"[2] and that an employer's prohibition on break time may be overly broad, even though the work breaks were paid time.[3] Finding that the employer did not have a legitimate reason for the termination, the Board found the Act violated.

Roswell Park Cancer Institute, 34 PERB ¶ 3040 (2001)—The Board affirmed the ALJ's dismissal of a charge, as amended, alleging a violation of §§ 209-1(a), (c) and (d) of the Act, when the employer unilaterally promulgated an administrative and procedure manual. The exceptions to the Board addressed the propriety of the performance evaluation procedure. The Board reiterated that an ALJ has the discretion to order the production of an offer of proof in the processing of a charge. The timing of an event, while sufficient to raise a suspicion, alone does not establish the "but for" element of § 209-.1(a) or (c). The charge was dismissed for failure of proof.

County Of Wyoming, 34 PERB ¶ 3042 (2001)—The Board reversed the ALJ's dismissal of a charge alleging a violation of §§ 209-a.1(a) and (c) of the Act when the employer terminated a unit member due to the protected activity of filing a grievance. An employee's discharge may violate the Act absent a showing of animus, which is essentially an evidentiary finding. Its presence or absence is relevant to a determination of motive. A close proximity in time between a protected activity and an adverse action may be sufficient to raise a suspicion of a causal relationship. The Board found that the reasons for the termination advanced at the hearing were pretextual and disingenuous. No reasons for the termination were given when the employee was fired and her performance had not been evaluated.

Bd. of Educ. of the City Sch. Dist. of the City of New York (Freedman), 34 PERB ¶ 3046 (2001)—The Board affirmed the dismissal of a charge alleging that the employer interfered with the protected right of filing an improper practice charge. The Board affirmed the finding by the ALJ that the charging party failed to demonstrate that any representative of the employer knew of the protected activity, or acted because of the protected activity. The charge was therefore appropriately dismissed at the close of the charging party's case. The charging party does not have the right to prove its case through the cross-examination of the adverse party's witness.[4]

State of New York (State University of New York at Oswego), 34 PERB ¶ 3035 (2001)—The Board reversed an ALJ decision to the extent that it found a violation of the Act when the state included in two notices of discipline a specification that the member intended to contact his bargaining agent regarding a dispute over the use of a certain room within one of the campus buildings. The specification also stated that the supervisor felt threatened and confused when the employee stated he was going to the union. The Board agreed that an employee has the right to seek the assistance of the union, and a statement of an intent to do so is also protected by the Act. The ALJ in effect concluded that these facts constituted a *per se* violation of the Act. In *Greenburgh UFSD*, 33 PERB ¶ 3018 (2000), however, the Board reversed prior case law holding that there could be *per se* violations of the Act, and that certain conduct could be irrebuttably presumed to have been done for the purpose of depriving employees of such rights. In this matter, there was evidence in the state's case which demon-

strated that the state did not act deliberately to deprive the employee of a protected right.

County of Suffolk Legislature and County of Suffolk, 34 PERB ¶ 3034 (2001)—The Board affirmed an ALJ decision finding that an employer violated § 209-a.1(a) of the Act when the legislature adopted a resolution waiving the one-year service eligibility requirement for tuition reimbursement for a unit employee. The employee's application for reimbursement was denied by the county because he did not meet service requirements. The employee then appealed to the legislature, which, over the Director of Labor Relations' objection, adopted a resolution granting reimbursement. The Board stated that payment to an employee in excess of a CBA provision is inherently destructive of a union's rights under the Act. While there is no showing of animus in the record, no showing is necessary in a case when the conduct involved is so destructive of the union's status that "the Legislature must be deemed to have actual or presumptive knowledge that its action would be coercive." A legislature is subject to the Taylor Law when acting in an executive capacity.

Representation

Rockland County Bd. of Coop. Educ. Services, 34 PERB ¶ 3032 (2001)—The Board reversed an ALJ decision which dismissed a portion of a petition seeking to designate three employees confidential. One employee is responsible for opening all mail received in the Human Resources office, which includes mail dealing with negotiations, grievances, arbitrations, and litigation. The Board stated that such exposure is sufficient by itself to conclude that the employee met the first prong of the *Dewitt* test, 32 PERB ¶ 3001 (2000). The other employee met the first prong of the test because she has access to all files in the Human Resources office, and works with them on a regular basis without restriction. They both meet the second prong of the test in that they act in a confidential nature since the managerial employee had confidential discussions with them. The third employee is properly designated confidential since she opens the mail on a regular basis, included in which are materials relating to negotiations, litigation and grievances. She serves in a confidential capacity as is evidenced by the assignment to her of responsibility for sensitive, confidential materials.

State of New York, 34 PERB ¶ 4013 (2001)—Council 82 filed a petition seeking to represent certain employees at the Department of Environmental Conservation and the Department of Parks, Recreation and Historic Preservation currently represented by NYSCOPBA. At the outset, the Board stated that it is not bound by the parties' stipulation as to a proposed unit. A representation proceeding is in the nature of an investigation, and the Board determines which is the most appropriate unit. The Board found the *County of Erie and Sheriff of Erie County*, 29 PERB ¶ 3031 (1996), applied to the state. In that case, the Board fragmented deputy sheriffs with exclusively or primarily law enforcement duties from a unit of deputy sheriffs with custodial duties. Reversed ALJ, in part, and included university police officer titles in newly created unit.

County of Washington (Public Health), 35 PERB ¶ 3001 (2002)—The Board issued an order decertifying an intervenor as the certified representative on a petition filed by an individual unit member.

New York City Transit Auth., 35 PERB ¶ 3008 (2002)—The Board affirmed the Director's dismissal of a charge alleging that the Transport Workers Union (TWU) violated § 209-a.2(b) of the Act by repudiating a portion of the parties' collective bargaining agreement. The parties agreed to broadbanding provisions which were included in the negotiated CBA. The provisions was thereafter challenged by members of the unit in court and the TWU wrote to the court stating that it believed the petition had merit. The Board rejected the argument that these facts evidence a repudiation of the agreement. Both parties recognize the existence of the agreement and rely upon provisions in the agreement in support of their respective positions. A disagreement over the interpretation of a clause does not constitute a repudiation.

Beaver River Central School District, 34 PERB ¶ 3039 (2001)—The Board remanded the case to the Director, who recommended certification of the union without an election. The Board stated that since it had not yet issued a certification, and it had been advised of evidence which may indicate that the union no longer meets the requirements of Rule 201.9(g)(1), the case was remanded.

Beaver River Central School District, 35 PERB ¶ 3003 (2002)—On remand, the Director determined that the union submitted sufficient proof pursuant to Rule 201.9(g)(1) to be certified without an election as collective bargaining representative. The Director relied principally upon the association's list of current members to establish its majority status. The Board affirmed, stating that the two types of documentary evidence referred to in Rule 201.9(g)(1), current dues deduction cards or individual designation cards signed within six months of the Director's decision, was descriptive only of the type of proofs to be submitted. The Act does not preclude other types of evidence, including current membership lists, to determine the employees' choice of representative.

County of Rockland, 35 PERB ¶ 3004 (2002)—The petition sought a determination that the newly created title of undercover unit supervisor is, or should be, included in the unit of criminal investigators. The Board

stated that the unit clarification petition was properly dismissed since the title was not listed in the recognition clause. In *State of New York*, 34 PERB ¶ 3038 (2001), the Board stated that titles not having the same dispute resolution mechanism should not be included in the same unit. Section 209.4 of the Act sets forth the titles eligible for interest arbitration and undercover unit supervisor is not one of them. The unit placement portion of the petition was dismissed because "the most appropriate unit" cannot include titles subject to different dispute resolution mechanisms. The Board stated that the ALJ properly processed the case, and that an ALJ has the right to determine that a hearing is not necessary to resolve dispute.

Practice and Procedure

South Nyack/Grand View Joint Police Administrative Board, 35 PERB ¶ 3007 (2002)—The administrative closure of the petition for a declaratory ruling was affirmed by the Board. The petitioner was advised that the petition was deficient because it was not on a form provided by the Director, or sworn to in compliance with Rule 210.1. The petition was thereafter amended, but the original filing was deemed a nullity and the amendment treated as a new filing. Since the "new filing" was not filed before the date of the filing that a response to the petition for interest arbitration was due, as required by rule 205.6(a), the petition was dismissed. The rules expressly require that a PERB form be used and the original was therefore a nullity. Untimely petitions are not accepted or processed.

New York State Court Clerks Association (Haughey), 34 PERB ¶ 3041 (2001)—The Board affirmed the dismissal of Haughey's charge alleging a violation of a DFR claim on the grounds that the charge was untimely. Haughey asked his union representative to file a grievance on his behalf on November 19, 1999, but the request was refused. Thereafter, on October 17, 2000, Haughey requested representation in a proceeding and alleged that the union failed to respond to his request. The Board stated that the time within which to file a charge ran from November 19, and that the instant charge, filed four months after the November 19 date, was time barred.

Bd. of Educ. of the City of NY & UFT (Fearon), 34 PERB ¶ 3031 (2001)—A motion for reconsideration was denied. There was no newly discovered evidence or overlooked proposition of law to justify granting of motion. Adherence to rules is not sacrificed for the benefit of *pro se* parties.

City of New York, 34 PERB ¶ 3033 (2001)—The Board confirmed the designation of a mediator made by the Director of Conciliation. The city excepted to the determination that an impasse existed in negotiations for a successor CBA between the city and the PBA and to the appointment of mediator. Having reviewed the procedural history, the Board confirmed the appointment of the mediator.

Good Faith Bargaining

Newark Valley Cardinal Bus Drivers, 35 PERB ¶ 3006 (2002)—A declaratory ruling was sought as to the negotiability of following demand: "the District will reimburse the cost of fingerprinting for new hires as well as current employees who are required to provide fingerprints." Educ. Law § 305.30 and VTL § 509-d(2) require that school bus drivers be fingerprinted to allow districts to comply with mandatory criminal background checks. As such, the fee involved in this case is a pre-employment expense applicable to the public at large. Since it applies to the public and to unit employees, it is a nonmandatory subject. The Board distinguished this case from those in which a union can bargain for employees once they become unit employees.

Strike Charge

City of New Rochelle, 35 PERB ¶ 3005 (2002)—The Board approved a stipulation between the parties in settlement of a strike charge. The Assistant Director had found, pursuant to § 206.5(d) of the Rules, that the failure of the association to file an answer constituted an admission of the material facts alleged in the charge. In light of attempts by the parties to repair relations, limited inconvenience to the public, and no previous strike activity, the dues and agency shop fee deduction of six months were reasonable.

Endnotes

1. State of New York (SUNY-Oswego), 34 PERB ¶ 3035 (2001).
2. *Sweet Street Deserts, Inc.*, 319 NLRB 307, 312; 152 LRRM 1102 (1995).
3. *Filene's Basement Store*, 299 NLRB 183 (1990).
4. *See State of New York*, 33 PERB ¶ 3024 (2000).

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Thank you for your cooperation.

Janet McEneaney
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