NYSBA WINTER 2014 | VOL. 39 | NO. 1

Labor and Employment Law Journal

A publication of the Labor and Employment Law Section
of the New York State Bar Association

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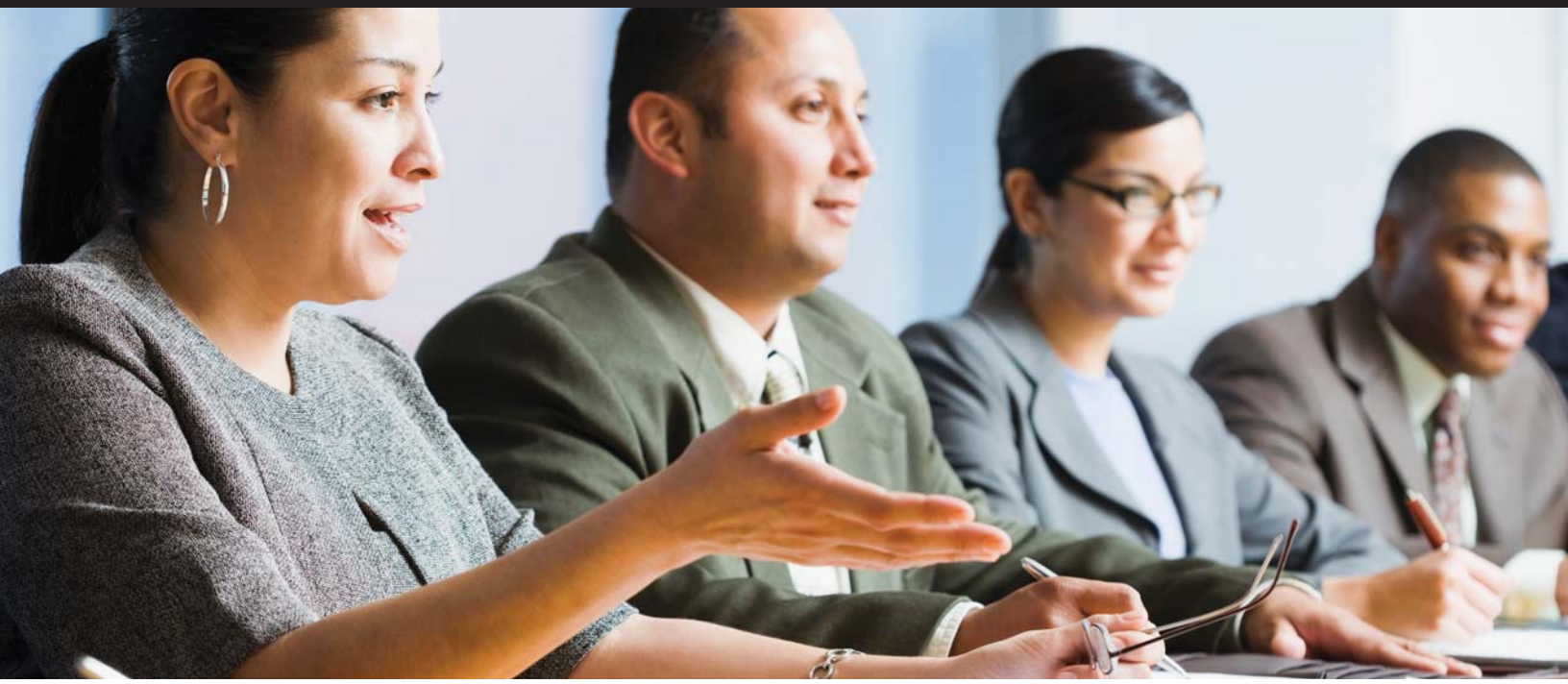

Arbitration and Mediation

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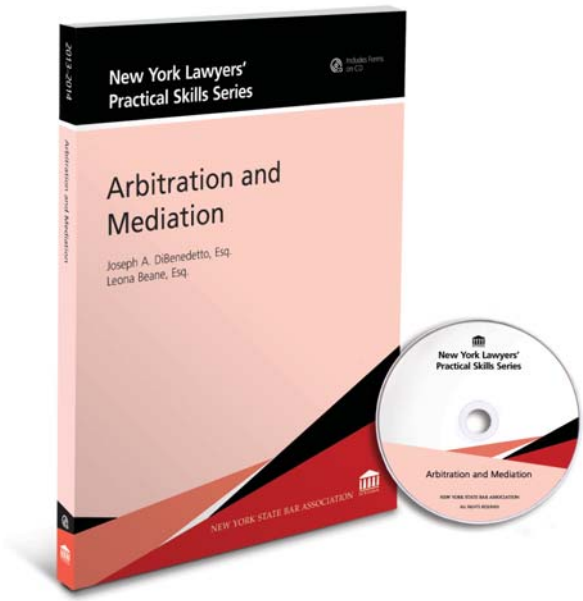

PRODUCT INFO AND PRICES

2014-2015 / about 154 pp., softbound
PN: 4024

NYSBA Members	**$110**
Non-members	$125

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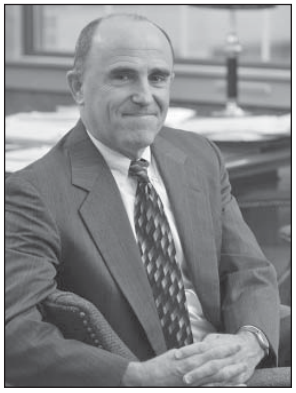

Over the last several months something typical happened that reminds us of the value of Section membership and participation.

In late May, the National Labor Relations Board announced it was considering merging Region 3, based in Upstate New York, with Region 6, covering western Pennsylvania, West Virginia, and parts of Ohio. Included was a proposal to move the Regional Office to Pittsburgh. The Section immediately assembled a work group to respond in the hopes of keeping Region 3 intact and the Buffalo Region Office open and accessible to our members and their clients. The end of the story is that the NLRB ultimately announced it was adding territory to both Region 3 and Region 6 and keeping Buffalo as the Region 3 home office.

This is an obvious good result for us and our clients. How we got there makes for a revealing example of the strength and value of our Section.

Immediately after the original announcement, the Labor Relations Law and Procedure Committee Co-chairs, Allyson Belovin and Peter Conrad, assembled a committee to educate the NLRB on our position as a Section on the value of locating the Regional Office in Buffalo. In short order, a comprehensive position statement was prepared that eloquently laid out the Section's position. A lot of joint effort, all *pro bono*, went into that position statement. We are told by our friends at the NLRB that our position statement made a significant difference. Allyson Belovin, Mairead Connor, Peter Conrad, Catherine Creighton, Louis DiLorenzo, James Gleason, Randall Odza, and Kenneth Wagner dipped into their own pockets to travel to Washington, D.C. to represent the Section in a meeting with the Board. It was an extraordinary effort by many Section members.

The work group was comprised of both senior and junior attorneys representing management and labor, upstate and downstate, all working for the common good of the Section and the clients we serve.

The effort was successful. But the process also accomplished other positive results.

First, it revealed just how much we have in common. Allyson and Peter as downstate lawyers with downstate clients had nothing to gain from the NLRB's decision either way. Yet both spent many hours working on this project. Management and labor attorneys worked together seamlessly to a common end. That shared mutual purpose will pay dividends later when our positions are not the same and our clients are not aligned.

Second, we had the opportunity to tell the Board and the longtime public servants that work there how much we value them as an agency and as dedicated professionals. That isn't always possible in the heat of battle when our clients are frustrated and want us to "kill the messenger" from government. Our friends at the Board were visibly moved by that.

Finally, the proposal and the effort to address it motivated the Section to invite the NLRB leadership to our fall meeting. They accepted and as a result we all were privileged to "break bread" with the NLRB leadership and each other in a setting where the mutual respect we share transcended the positions we take as advocates.

This example is repeatedly played out in our Section. Section membership reminds us that we have much in common even when we take passionate positions on behalf of our clients.

All of this is good. It shows the value of our Section. And it pointedly demonstrates why we owe it to the next generation of labor and employment lawyers to join our Section and participate in its many programs.

Do yourself and your colleagues a favor. Talk to a lawyer or two who is not active and invite them to the January meeting. If they cannot attend the meeting, encourage them to join a committee. Nothing but good will follow. Talk to a law student. Better yet, go to your alma mater and tell them why labor and employment law is a great career. If you haven't been active in the Section, change that. There are many committees anxious to have new and old faces join them. It is all good.

I hope to see you all in New York in January.

Best regards,
Ron Dunn

They're Human, Too: The Care and Feeding of Defendants in Employment Mediations

By Vivian Berger

At a recent training for mediators handling employment cases, the materials contained an introduction setting forth the two sides' perspectives on mediation. The employer contribution led off as follows:

> Keep in mind that settlement can also be emotional for employers. The tendency is to focus on the employee's emotions given what they alleged happened, and to assume for the employer it is simply a financial decision. However, many in-house lawyers or managers accused of misconduct take it very personally and need to have that recognized to get them to the point of settling.

These comments resonated with me. While I believe I give equal attention to both parties in my mediations, in the sense that I try to remain alert to emotions (and concerns and interests) of every participant in the process, it is likely correct that the seemingly needier, and often more vocal, plaintiff can at times monopolize the neutral's energy. This can be so outside the mediation as well: to some extent, my own scholarship has emphasized employees' viewpoints.[1] In addition, in my experience discussions among mediators about dealing with employment clients center more on the employee. Yet for reasons both practical and principled, employers have equal claim on the mediator's consideration. Neglect of defendants may scuttle the opportunity for settlement and, as important, violates the tenets of respect, impartiality and fairness underlying mediation.

The truth of this assertion is most evident in cases involving what I call "real people" defendants. Of course, the employer sends human representatives to every mediation, and most charges target at least one individual as the perpetrator of discrimination, wage theft, or other illegal conduct. More often than not, however, the accused employee, a low or mid-level supervisor or a co-worker of the complainant, does not even attend the session although he may be personally liable.[2] Prime examples of employers whose feelings and mindset may resemble that of the plaintiffs, and who come to the mediation, are small business owners: plumbers, dentists, architects, and so forth. Like employees, they are usually "one shotters" in litigation rather than repeat players[3] and thus share the former's anxiety and fear of the unknown. Because of the risk to their own money and reputation, such defendants frequently regard themselves as the "true" victims in the scenario; they can muster as much rage and sense of injury as any plaintiff—compounded by the perceived insult of being "extorted."

Yet, as the quoted excerpt cautions, one should not assume that managers and in-house counsel, present as proxies for the employer, have no concern but the bottom line. They, too, are people, and whether on account of involvement in the triggering events or simple identification with their bosses, they may feel heavily invested in the dispute and its resolution. Human Resources (HR) officers, for instance, often desire, consciously or not, to see a decision to impose discipline or fire the complainant validated. (In one of my cases, that wish was plainly what caused the head of HR to veto more than a nuisance payment, to the detriment of our efforts to settle.[4])

"While I believe I give equal attention to both parties in my mediations, in the sense that I try to remain alert to emotions (and concerns and interests) of every participant in the process, it is likely correct that the seemingly needier, and often more vocal, plaintiff can at times monopolize the neutral's energy."

Hence, even in larger organizations, I have encountered sentiments similar to those described with reference to individual owners. High-ranking supervisory or legal personnel often resent what they consider Monday-morning quarterbacking. Sometimes, such feelings are painfully obvious, as when a white charter school principal ran into trouble after he fired almost all of the minority teachers on the ground of poor performance. (Racism charges always carry a special sting; that is even more so when the target possesses the self-image of a liberal "do-gooder" acting from the purest motives—here, advancing children's welfare.) The man regarded monetary concessions in bargaining as an implicit admission of fault and thus, for a long time, resisted making them, even though he understood the vulnerability of the defendant to second-guessing by diverse jurors. In other situations, the emotions are veiled and hard to unearth. Indeed, they may be lurking in the background, emanating from absent superiors or subordinates. In these circumstances, even a very seasoned neutral may not pick up on the need to address non-monetary issues.

What follows is my attempt to pinpoint types of employers tending to call for the mediator's special attention to emotional (or, more broadly, subjective or personal) motives, concerns or reactions.[5] The classes of defendant that have this characteristic in common are not

distinct but overlapping. That is natural since, to give one example, closely held or family ownership and relatively small size frequently correlate with each other. This linkage leads to their sharing one or more attributes such as intimacy with staff, lack of significant prior exposure to legal proceedings, or financial anxiety, which in turn conduce to susceptibility to influence by non-financial considerations in negotiation. Another major employer category, not-for-profit corporations, present in some ways a comparable profile, and comparable responses to litigation, while also exhibiting certain idiosyncratic features. Further, a few miscellaneous kinds of defendant bear mention because they require a disproportionate focus on psychological factors. Whenever possible, I suggest approaches the neutral might utilize to avoid derailment of settlement talks by defense sensitivities—whether expressed or below the surface.

When Special Attention to Employers Is Needed

I. "Real People" Defendants

I have already mentioned one archetypical instance of a kind of employer that "owns" the lawsuit in a way that the usual corporate proxies do not: small business people, including professionals. Unsurprisingly, those employers who *are* most involved *feel* most involved; they have invested not only their money but also their identity in their livelihood. They may therefore regard the case (quite often the first, at least of this sort, that they have encountered) as a grave existential threat.

At times, these defendants' financial anxiety is well-founded. Especially during the recent recession, I mediated with several such parties who were hanging on by a shoestring.[6]

But current pecuniary strain aside, this species of employer is much less likely than larger outfits to carry employment practices insurance. Moreover, "mom and pop" shops and many professional outfits lack the HR expertise and legal savvy that might have averted exposure initially. (They ordinarily do not maintain the detailed personnel records routinely kept by other businesses; they may have violated laws with which they were unfamiliar.[7]) Thus, they face a double whammy: a greater risk of being found liable and, regardless, the need to defray litigation expenses, which they can ill afford to pay.

Coupled with the fear of financial ruin, akin to that of discharged employees, such employers, who usually know their workers well, experience a sense of betrayal when sued; this sentiment again mirrors what plaintiffs feel toward the "heartless" company. They often volunteer stories embroidering the theme of "no good deed goes unpunished." For example, a company owner defending a wages and hours claim related how he had loaned one of the complainants money for an overdue home mortgage payment. A dentist said he had counseled his adversary's troubled son. A realtor whose wife, like the employee, had undergone fertility treatments—and who had bought the woman gifts when she finally conceived—voiced understandable anger that she had brought an action against him for pregnancy discrimination.

How do these circumstances affect the conduct of the mediation? Mainly, they tend to cloud the good business judgment the defendant uses in everyday life—making it hard to get the person to weigh realistically the costs and benefits of litigation versus settlement. "Millions for defense, not one cent for tribute!" is a maxim I have heard pronounced at least twice in this setting. Countless times, I have heard this sentiment uttered in slightly different words. One party asserted: "I love my lawyer, I'm happy to pay him; I don't want to pay that SOB anything!" Similarly, employers have insisted: "We did not do anything wrong—we don't settle when we are right" and, sweepingly: "We're not made of money." Such remarks are often accompanied by statements that a particular position, like refusal to pay more than nuisance value, is demanded by "principle"—a counterpart to plaintiffs' frequent avowals: "It's not about the money."[8] Sometimes, the context reveals that a feeling of victimization, being "extorted," most animates the speaker's comments. In other situations, the driving force appears to be primarily a sense of self-righteousness. Whatever their precise genesis, these emotions and their expression share (and reflect) a strong tendency to personalize the litigation.[9]

A. The Mediator's Task

As with any mediation participant, the neutral cannot "wish away" an employer's inconvenient emotions. Nor is there any "one-size-fits-all" approach to dealing with them. I find, predictably, that empathy goes a long way toward smoothing the path of communication. So do the usual mediation techniques like posing open-ended questions, following up with further inquiries designed to draw the person out, active listening, summarizing, reframing and spurring self-reflection.[10] One can acknowledge emotions such as anger and hurt without appearing to agree (or disagree) with the boss who tells you that the plaintiff is an ungrateful, dishonest shakedown artist.

For example, I may point out that counsel and client are not identical: in an opening statement, the employee's lawyer frequently adds his own spin to the basic account given by the plaintiff. I also remind the employer that the employee's charge may stem from ignorance or misunderstanding rather than conscious falsification; early in litigation, especially, he or she may not possess all relevant facts. Thus, when the only Latina in the office has been dismissed for excessive absences, she—viewing her job performance more favorably than the employer—may conclude that her national origin weighed against her. It is human nature, I add, to minimize one's flaws

and exaggerate one's virtues. Probably, too, she does not know that the white co-worker (and presumed comparator) who called in sick more often than she was taking intermittent Family and Medical Leave Act leave because of a serious medical condition, while she had claimed only minor upsets and not produced any doctor's notes. Once in a while, if I sense the party does not believe I can fully understand the employer's perspective, I may share some personal data. That would include my growing up in a family business or (as Vice Dean for Administration at Columbia Law School) overseeing personnel who sometimes repaid good will with bad.[11]

At times, as with plaintiffs, reality-testing requires "tough love." Because small businesses tend to lack sophisticated HR support, one may have to suggest that the owner bears some onus for the debacle. Failures to implement progressive discipline, to give timely and useful feedback, or to create and publicize avenues of complaint can sink a defense that the underlying facts, if the truth be known, would have sustained. When the employer has a sense of humor and we have established a good relationship, I may describe as a "virgin tax" the extra amount that must be paid to settle a case made problematic by the defendant's "newbie" mistakes. (That tax is especially high when the employer has countenanced substantively dubious conduct as opposed to merely poor procedures: I have seen mainly small employers, unschooled in current workplace standards, make errors like turning a blind eye to racist, sexist, vulgar or just plain stupid e-mails, videos and "jokes."[12]) That said, I attempt to stress the positive: with counsel's help, the company now has the chance to institute best practices that will help to insulate it against future exposure. Yet I acknowledge the force of the oft-expressed concern that such reforms will carry a price tag of their own—increased bureaucratization of the workplace. There is undeniably a trade-off between informality and self-protection.[13]

II. Family-Owned Businesses

Mediating with a family company presents all of the "real people" defendant problems that I have noted, often in an intensified form. For one thing, the owners may pride themselves on treating employees like kin. "We're all one big happy family" is a mantra that implodes, however, when a worker sues the business. The employer feels not just betrayed, but betrayed by someone thought to owe a quasi-familial duty of loyalty. In particular, a founding owner and self-perceived paterfamilias will tend to exaggerate his own victimhood. (Paraphrasing Lear: "How sharper than a serpent's tooth it is to have a thankless employee!"[14]) One also finds in suits involving this type of firm that intra-defendant emotions run high. For both these reasons, the neutral must be especially alert to the need to recognize and respond to non-financial considerations on the defense side of the table.

A. Dealing with Emotions Evoked by the Employee

It is worth repeating that the mediator can validate feelings without intimating a view on the soundness of their holder's underlying notions. But validation alone will not suffice to advance the negotiations: the neutral will at least need to counter any penchant to demonize the employee. Anger and other negative emotions are frequently more complex, however, than they appear; at times, they are shot through with ambivalence. Sensing this to be the case, the mediator might want to elicit anything positive the defendant can say about the plaintiff. While such an approach may not be required to resolve the matter (defusing the employer's active ire will likely suffice), it constitutes a stronger form of humanization than merely undercutting resentment and, as such, might promote the employer's healing process.[15]

When I perceive mixed feelings on both sides of the litigation, I sometimes go even further. Illustratively, in an unusual mediation in a family company setting, I arranged a one-on-one meeting between the employer and the fired employee. To my amazement, the women flew into each other's arms, then spoke alone for forty-five minutes. Whatever took place between them in private did not produce a Hollywood-style happy ending like withdrawal of the complaint or reinstatement of the complainant. It did, however, seem to have made each party calmer, more objective, and more focused. Later that day, they reached a settlement.[16]

B. Addressing Intra-Family Tensions

Given the usual sorts of loyalties, it can be difficult enough to throw an accused wrongdoer to the wolves, via discipline or dismissal, when that person is unrelated to the corporate decision maker. How much more complicated, then, the task when the named "perp" is Cousin David, Uncle Joe, or a parent, child or sibling! Even mounting an investigation into an employee's complaint may be contentious if the target belongs to one's family. This is true in spades when the employee has alleged egregious or highly salacious misconduct.[17]

When the defense representative attending the mediation is a family member, that individual, torn by conflicting fiduciary and personal obligations, may react over-protectively, warding off challenges to the defendant's position posed by reality-testing inquiries. The mediator must help the spokesperson for the company deal with the issue of warring attachments. Recognition and acknowledgment of the predicament constitute necessary first steps to moving beyond it. In the end, a relative might actually have less trouble conceding the potentially warping influence of family ties on business judgment than would an unrelated agent. The latter may fear that admitting less than sterling behavior by an "insider" or ceding ground in negotiation—moves encouraged in mediation—could lead to her loyalty being questioned.

(Outsiders often feel insecure notwithstanding fancy titles because, in a pinch, "blood" will trump everything else, or so they believe.) Yet such concerns might well be unconscious or, if perceived, awkward to confess.

Even the most experienced neutral will find it a challenge to navigate these perilous shoals. Perhaps the most effective strategy is to air the problem before the scheduled session. Especially if the defense lawyer has previously represented the client, he should be attuned to the role that family dynamics plays in the company. With this knowledge, he can advise the mediator how best to address the relevant issues when they arise. Moreover, he can probably furnish useful input on who should attend the mediation for the defendant. That is always an important question. In this setting it is crucial to identify someone who both commands the family's respect and dares to speak truth to power.

III. Not-For-Profits[18]

Not-for-profit corporations, such as charities, often personalize the dispute and act in "non-businesslike" ways even though neither their representatives' money nor family relationships are typically at stake. They do, however, resemble "real people" defendants in frequently having a close-knit staff and lacking litigation experience as well as, relatedly, state-of-the-art HR procedures. Moreover, since they frequently operate under severe financial constraints, they pay attention to the bottom line as closely as do small entrepreneurs. Like the latter, they fear the outlay entailed by a settlement more than mounting legal fees, which can be deferred, or a potentially ruinous verdict, which may never come to pass. Their livelihoods, too, depend directly on the financial health of the enterprise. Thus, the extent of their emotional investment in the lawsuit is unsurprising.

One common trait of such defendants is their proclivity for self-righteousness. Unlike ordinary business people, they believe that they are engaged in "the Lord's work." Every nickel lost to litigation detracts from their benevolent mission. Accordingly, whether or not they feel that the plaintiff has personally betrayed them, they tend to regard the employee as an apostate to their cause. Such a viewpoint can make it extremely hard to resolve the matter at hand, especially as it goes along with a penchant to frame every issue as a matter of principle—and hence, unsusceptible to compromise. Implications that people whose whole careers consist of doing good would never discriminate only compound the difficulty.

A heightened example of the problems posed in such a context was a case of mine involving a charity established by a well-known entertainer to fund research into the potentially fatal disease, an extremely rare form of cancer, suffered by his daughter. When the dismissed employee, a Muslim, threatened to sue on the grounds of religious discrimination and retaliation, the founder-employer perceived the action as a form of treason against his mission and his child—since the needs of both were, to him, inextricably intertwined. (It did not help that the plaintiff had been seen as something of a slacker, who lacked dedication to the search for a cure.) Because of his anger as well as his very busy schedule, the employer strongly resisted attending the mediation. Yet the plaintiff, desiring to deliver a statement to the "top gun," was insisting on his presence. I thought we would surely accomplish nothing in his absence, and even when he finally agreed to come, I doubted that the dispute would settle.

In the end it did, but only through follow-up after the session—and not, I believe, on account of my efforts. I never succeeded in getting the defendant to see the plaintiff as anything but a traitor to the cause, looking to obtain something for nothing. Fortunately, defense counsel had a longstanding and close relationship with the employer. The lawyer played a crucial role in persuading the client that the possibility of liability should trump the latter's righteous refusal to "reward" a subverter of his cause.[19]

A. Possible Mediator Moves

No magic bullet will breach a solid wall of "principle." As usual, the mediator should begin by displaying empathy with the party and understanding of the role that the organization and its aims play in the representative's life. (It ought not be tough to do this sincerely since most charities and similar entities have laudable goals and try to achieve them.) Yet gaining that person's confidence and trust, while necessary, is hardly sufficient. Usually, push comes to shove when the neutral must try to persuade him to raise an initial, de minimis offer; at this juncture, he digs in and invokes principle. How should the mediator respond?

This quandary immediately calls to mind a story attributed to George Bernard Shaw. As told by blogger Robert Lindsay:

> [The author] was talking to some famous woman at a party. He asked her, "Would you have sex with me for a million dollars?"
>
> "Of course I would!" she smiled.
>
> "Well then," he said. "Would you have sex with me for a dollar?"
>
> "Of course not!" she huffed. "What do you think I am?"
>
> "We have already established what you are, dear," he said. "Now we are just haggling over the price."[20]

Applied to the not-for-profit's position, this anecdote implies that once a bargainer has crossed the Rubicon of of-

fering any money, remuneration has ceased to be a matter of principle. Theoretically, the final amount placed on the table should mainly depend on pragmatic factors: basically, the risk-discounted value of the plaintiff's case, the defendant's own litigation costs, the potential for negative publicity, and so forth.

Although simply telling the tale would almost always make the point, many listeners might not be thrilled to hear themselves compared to prostitutes! Thus, the neutral must find a means to convey a similar insight with tact. While there is no single way to do so, I ordinarily turn to the tried and true technique of probing for underlying feelings and interests or, if possible, reverting to ones already expressed. For example, if the employer harbors considerable anger toward the employee and dislikes paying her for that reason, develop the theme of not cutting off one's nose in order to spite one's face. Attempt to refocus the conversation on what will be good for the organization, instead of what will hurt the plaintiff. Emphasize the obligations the not-for-profit owes its constituency—all who benefit from its work—who could lose needed support if the defendant insists on basing decisions regarding the litigation on emotion rather than reason.

Finally, as revealed by the entertainer's case, managing contacts between the parties and, more broadly, the presence or absence of particular employer agents can assume great importance when dealing with a mission-driven defendant, whose chief may identify very strongly with the institution's aims. That individual will usually want to attend the session and will be desirable to have if only because he controls the purse strings. Yet if he is too personally involved to make a business determination to resolve the dispute, he may scuttle the mediation. A viable compromise may be to have the principal there for part of the time and then available to his lawyer and the neutral by phone. He will have had the opportunity to air his concerns and vent his feelings; the mediator will have reality-tested him in at least an initial caucus. From that point on (and after the session, if need be), his attorney might better serve as the mediator's point of contact.

IV. Defendants from Different Worlds

Two remaining kinds of employer deserve brief mention as they, at times, need special attention: prominent individuals and foreigners. (The latter have either been charged individually or appear as representatives of companies based in other countries.)

A. The Famous

The case of the entertainer posed a difficulty I have not yet mentioned: the challenge of dealing with famous defendants.[21] These parties tend to behave in an entitled manner. When they say "jump," they are used to people responding: "How high?" A neutral's insistence that their appearance at the mediation matters a lot may cut little ice with executives who have very busy schedules and who habitually reject demands on their time by others. They may also feel little compunction at canceling dates so as to reschedule at their convenience. At the mediation, they often display extreme self-confidence and more resistance to reality-testing than less self-important defendants. In addition, to the extent their lawyers might fear annoying or upsetting the "big man," counsel may, consciously or not, undermine the mediator's efforts.

I do not have a surefire solution to these problems. But I attempt to anticipate them and plan ahead. Above all, I work hard to locate and get to the table someone to whom the decision maker listens. Ideally, that person would be his attorney. If not, however, or if an additional attendee can help the lawyer and neutral to "tag team" the person in charge, he or she should be enlisted to round out the defense contingent.[22]

B. The Foreign

It is widely accepted that people from diverse cultural backgrounds bring different world views and styles to conflict resolution. This broad subject has been much mooted in the mediation literature.[23] What I wish to highlight here is narrower: the tendency of some foreign nationals to make missteps in the minefield of laws barring employment discrimination—and then to resist "correction," through settlement, of the claims their conduct produced, on the ground they "did nothing wrong."

Sometimes, problems arise because a particular actor's ingrained attitudes, shaped by his upbringing, contradict statutory mandates. For example, a French chef who persisted in making unwanted comments and advances to the women who worked in his kitchen simply could not understand the concept of sexual harassment. He honestly felt that through his attentions he was paying his subordinates a compliment! (Happily, the American hotel for which he worked did "get it"; they forced him to hire his own attorney.) The situation is even worse when top management flouts legal prohibitions in the service of contrary values, as in the case of a Japanese client that reserved its high-level jobs, including in the United States, for its own nationals.

More often than blatant violation of our laws I have witnessed insensitive or unwise behavior, caused by a cultural tin ear. For instance, a top-level Swiss executive, visiting her outfit's New York office, remarked on the number of pregnant "girls," rhetorically inquired "what shall we do?," and fired one in her ninth month. A Belgian company terminated an employee just after she announced that she would need a three-month leave in order to obtain treatment for cancer. While both matters arguably presented legitimate reasons for the discharge, the firms' imprudence, even recklessness, virtually guaranteed litigation and serious exposure for the company. Yet notwithstanding the advice of seasoned outside coun-

sel, representatives at the mediations acted as though in a state of denial. In one instance, these were foreigners; in the other, although locals, they had imbibed the home office's imperviousness to matters of appearance—and perhaps substance—arising under American laws.[24] Further, likely because of the cognitive dissonance between external standards and internal (personal or company) mores, they displayed an emotional attachment to their positions and a fair degree of self-righteousness.

Such reactions complicate the neutral's task, especially since the officer really calling the shots may be far away, in Paris, Zurich, Rome or Taiwan.

The mediator will frequently say to people in conflict that they do not have to agree on the facts in order to agree to resolve their dispute. By the same token, she can remind foreign employers (or any party) that assent to settlement should not depend on agreement with the law or its likely application in court. Furthermore, she can display empathy with a defendant's feelings of having been skewered by "political correctness" without suggesting her own concurrence with the underlying viewpoint.

Doubtless reinforcing counsel's advice, I occasionally stress what the party can do so as to forestall further difficulties: for example, training managers in the differences between local law and culture and that of the company's home country and ensuring good communication between headquarters and American H.R. Giving defendants a sense of control over the future may make them more receptive now to taking measures they deem distasteful, like paying money to the plaintiff when they regard themselves as blameless. Finally, as always, grasping where a party is "coming from" (and making it evident that you do) will help you to take them where you want to go.

Coda

Virtually all the employment matters with which I have dealt involved money damages. But they were never just about money even if, as is often true, this was all that the employee seriously demanded. Anyone at all familiar with the field realizes the critical role of the employee's feelings: the plaintiff is suing for respect, vindication, vengeance, what have you—in other words, to satisfy deep-seated emotions. Even the ultimate payday, should it materialize by way of verdict or, likelier, settlement is generally regarded by the complainant in other than purely financial terms.[25] What many people, including lawyers and neutrals, may not fully appreciate is the non-rational factors' importance in the actions and reactions of some employers. The mediator must recognize and respond to the psychological needs of both parties in order for employment mediation to fulfill its humane and pragmatic goals.

Endnotes

1. *See, e.g.,* Vivian Berger, *Get a Bigger Bang For Fewer Bucks: Pick Meaningful Numbers*, *in* Definitive Creative Impasse-Breaking Techniques In Mediation 157 (NYSBA 2011); Vivian Berger, Respect in Mediation: A Counter to Disrespect in the Workplace, 63 Disp. Resol. J. 18 (Nov. 2008-Jan. 2009), republished in AAA Handbook on Mediation 719 (2d ed. 2010).
2. *Compare Feingold v. New York*, 366 F.3d 138, 157-59 (2d Cir. 2004) (individual liability under the New York State and City Human Rights Laws) *with Spiegel v. Schulmann*, 604 F.3d 72, 79-80 (2d Cir. 2010) (no individual liability under Title VII and the Americans With Disabilities Act).
3. *See* Marc Galanter, *Access To Justice In A World Of Expanding Social Capability*, 37 Fordham Urb. L.J. 115, 119 (2010).
4. When I make more than a bare-bones mention of real events, I alter details or meld facts from different cases in order to preserve confidentiality.
5. This is not to say that the needs of other employers can be ignored. The specific facts of the case at hand as well as the personalities involved must always determine the mediator's moves. My "typology" merely attempts to flag certain recurrent instances in which the mediator's antennae should be attuned to the probability that the defendant has special needs.
6. Employees' understandable skepticism when employers cry poverty and try to use their purported lack of financial resources to settle the claim on the cheap can sometimes put the mediator into an uncomfortable position. First, insistence on verification will generally delay resolution of the case: the plaintiff's side generally wants to examine more proof than the defendant has brought to the table. Second, where the applicable law permits individual liability—as do, e.g., the Fair Labor Standards Act and the New York Labor Law, *see Sethi v. Narod,* 974 F.Supp.2d 162, 185-86, 188-89 (E.D.N.Y. 2013)—defendants ordinarily resist revealing personal financial data to the employee. This reluctance may result in the parties' asking the mediator to review documents and "vouch" for the employer's lack of funds.
7. I once had a wage and hour case with two electricians operating a small business. They claimed that they had never heard of overtime laws! Even their own attorney refused to believe them at first. They then produced hourly records documenting in perfect detail all they had failed to do correctly. It turned out that, as former members of a union, they thought that workers' right to overtime derived solely from the collective bargaining agreement. (Their present shop was non-union.) Less uncommon was the more limited misunderstanding of a furniture business owner, who used trucks to deliver his wares. Not wishing to pay overtime, he told his drivers to "knock off work at 5:00 p.m." He failed to realize that the 60 to 90 minutes spent returning the trucks to the warehouse had to be paid at time and a half. Wages and hours verdicts and settlements can be daunting even to companies with deeper pockets. (Small companies, however, are less likely than larger ones to confront collective and class actions.)
8. It usually *is* about the money. But money has many meanings for plaintiffs—not only, or always primarily, relating to financial gain.
9. Some of these comments bear, directly or indirectly, on the merits of the complaint, which naturally have a lot to do with a rational litigant's settlement position. But in the circumstances under discussion, they plainly stem from genuine emotion—not from either rational analysis or strategic posturing.
10. *See generally* Rosabelle Illies, Naomi Ellemers & Fieke Harinck, *Mediating Value Conflicts*, 31 Conflict Resol. Q. 331, 338 (Spring 2014).
11. Mediators may disagree about when, if ever, it is appropriate to introduce our own experiences into the discussion. I do occasionally, but never at length. We have to remember: "It's not about you."

12. The worst I have seen, "A Charlie Brown Kwanzaa," is a racially offensive spoof of the popular Peanuts character, which went viral in one office setting. Perhaps the most surprising entry in the idiocy sweepstakes was a series of sexually explicit e-mails sent by a priest in a religious order to the plaintiff, the only female employee.

13. Fair and transparent processes have inherent virtue, which is why the law "rewards" the employer that adheres to them. *See, e.g., Faragher v. City of Boca Raton*, 425 U.S. 775 (1998) (affirmative defense to hostile environment claim available when employer instituted practices to prevent and eliminate workplace harassment and employee unreasonably failed to take advantage of them); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) (same). *Cf. Jiao v. Chen*, No. 03 Civ. 0165, 2007 WL 4944767, at *2-3 (S.D.N.Y. Mar. 30, 2007) (in action for unpaid minimum wages or overtime, employer's failure to maintain adequate records shifts burden of proof to defendant under both federal and New York law).

14. The word in the original is, of course, child—not employee. William Shakespeare, KING LEAR I, iv.

15. Mediators should not forget that some employers, like employees, need to heal. Nor should we, even in "money" cases, fail to explore whether we can enhance parties' well-being in ways transcending dollars and cents.

16. I have found that enabling litigants to moderate extreme views of the relationships and events that led up to the litigation seems to make them if not happier, at least less acutely upset.

17. *See, e.g., Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659 (S.D.N.Y. 2005) (owner's nephew made sexually explicit comments to plaintiff, who was fired in retaliation when she complained), *aff'd*, 225 Fed. Appx. 3 (2d Cir. 2006). These circumstances generally call for the use of an outside investigator.

18. I do not deal with government entities, which present special problems, under this heading. I also omit from consideration large entities like some private hospitals, which tend to react like regular businesses when they are sued by employees. (Hospitals, notably, have plentiful experience with litigation related to their medical services as well as with employment lawsuits.)

19. While the employee did get to address the employer, doing so failed to advance his interests. The entertainer took everything the young man said about his devotion to the foundation's aims with a grain of salt, describing it later as "total B.S." But on account of wretched timing—the organization fired the plaintiff, allegedly so as to save money, days following his complaint—the defendant definitely had exposure.

20. See https://robertlindsay.wordpress.com/2012/10/25/ (last visited, May 27, 2014).

21. Well-known actors, sports heroes, and chefs, for example, may be household names. By contrast, certain business or professional figures are celebrities within a certain community. For my purposes, the distinction makes little or no difference. The relevant point is that the person in question regards himself, and is viewed by relevant others, as a "VIP."

22. Recall that I counseled similar tactics in dealing with certain family-owned companies: "[I]t is crucial to identify someone who commands the family's respect and dares to speak truth to power."

23. *See, e.g.*, Alessandra Sgubini, *Mediation and Culture: How different cultural backgrounds can affect the way people negotiate and resolve disputes*, http://http://www.mediate.com/articles/sgubinia4.cfm (last visited, June 4, 2014); Donna M. Stringer & Lonnie Lusardo, *Bridging Cultural Gaps In Mediation*, 56 DISP. RESOL. J. 29 (2001).

24. The Swiss case settled in the wake of the mediation session, in response to a mediator's proposal; the Belgian case, only a long time later, after the court had denied the employer summary judgment.

25. *See supra* note 8.

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Electronic Signatures and the "Paperless Office" in International Human Resources

By Donald C. Dowling, Jr.

Back in the decades before information technology marginalized hard-copy HR documents, paperwork containing employee signatures and staff sign-offs continually expanded—think of job applications; offer letters; tax/social security and immigration forms; employment agreements and amendments; restrictive covenants; invention assignments, non-disclosure agreements; benefit-plan enrollments; time cards; safety logs; training attendance logs; job change notices; expatriate/secondment assignment agreements; performance reviews; equity/compensation plan enrollments and grants; expense reimbursement forms; acknowledgements of handbooks, codes of conducts, work rules and whistleblower hotlines; data privacy consents; severance releases—and many others.

"Technology changes quickly while laws evolve slowly. High-technology paperless HR documentation systems are pulling out ahead of slowly evolving legal doctrines."

Now, of course, multinationals strive to avoid generating, archiving and retrieving paper HR documents, which are so cumbersome to track across borders. As organizations migrate to electronic recordkeeping and virtual HR documents that exist only on intranet servers or in the cloud, hard-copy HR paperwork—even documentation bearing staff signatures—is in steep decline. Paper HR documentation becomes increasingly superfluous as employers adopt high-tech HR information systems from vendors like SAP, Citrix, Workday, Ultimate Software/UltiPro and Oracle/PeopleSoft, and as employers start using specialty paperless HR providers like PeopleDoc (which calls itself "the number one global digital HR solution company").

In addition, of course, the "paperless office" is also an environmental issue—"green" employers save trees.

Not surprisingly, a new hire these days has less and less need for a pen when onboarding and signing onto routine HR documentation. It is so much easier just to have staff click "I agree" on online tools and intranet forms and to confirm agreements and acknowledgements by email or text message. For that matter, many of the HR documents that still originate on paper now get imaged and stored electronically, just as libraries microfilmed periodicals.

But we need to tap the brakes here. Technology changes quickly while laws evolve slowly. High-technology paperless HR documentation systems are pulling out ahead of slowly evolving legal doctrines. As technology, internationalization and environmentalism marginalize paper HR documentation and physical signatures from a *human resources process* point of view, centuries of ossified jurisprudence around the world remain embedded in old-school document execution and authentication formalities—paper originals, wet-ink signatures, signing witnesses, notarizations, even (in some countries) government stamps and seals.

It has been said that "[d]ecades after computers took over the office environment, the paperless human resources department remains an enticing goal, but those who pursue it incautiously may come to regret their haste."[1] The challenge is that in most every country, legal doctrines predating the Internet remain stubbornly relevant in deciding questions of the enforceability of electronic employee signatures, assents, acknowledgements and verifications. (Most legal issues around document enforceability in the "paperless office" implicate *signed* paperwork—duly issued electronic business records that do not bear any signatures can always simply be printed out.)

Imagine a hypothetical boss, in any country, who just fired two employees for violating the organization's code of conduct. Imagine both employees deny ever having seen the code, and their disputes end up in a local court. Employee #1, hired first, had signed a hard-copy code of conduct acknowledgement in wet ink agreeing to abide by the code, which the employer duly filed away for safekeeping. Employee #2, hired later, must have at some point clicked "I agree" to an electronic code of conduct acknowledgement—the organization's Information Technology department insists that all employees who onboarded since before employee #2's hire date have had to click past a code of conduct acknowledgement screen to sign onto the company intranet system. We do not need a formal legal opinion from the country at issue to understand why this employer will have a far stronger case holding employee #1 to his code of conduct acknowledgement as compared to employee #2.

And yet legal systems around the world are opening up to workplace-context electronic assents and acknowledgements. Law may change slowly, but it does change. Beginning in the 1990s, governments have been passing formal electronic signature authorization laws

like the U.S, E-SIGN (Electronic Signatures in Global and National Commerce) Act, European Union directive 1999/93/EC (which is expected to be replaced in July 2016), Singapore's Electronic Transactions Act 2011, South Africa's Electronic Communications and Transactions Act 2002, and Mexico's Law of Advanced Electronic Signature 2012. Now courts in many countries are getting acquainted not only with email but even with the various types of electronic signatures including digital signatures (asymmetric cryptography/private computer keystrokes), manual signature-capture devices (tablet/stylus and finger-signature pads), identity verification services (email validation)—even biometric signatures (fingerprints, retina scans).

Yet these formal statutory electronic signature protocol laws—which in Europe, Mexico and elsewhere are called "advanced" electronic signatures laws—are not always viable or practical in the human resources context. In fact, many of the authorizing statutes that allow "advanced" electronic signatures do not address or contemplate the workplace context. And so only a minority of real-world assents and acknowledgements in the workplace meet the strictures of formal electronic signature authorizing statutes. Even an employer that may go to the trouble to have its staff execute "advanced" electronic signatures on overtly contractual documents like employment agreements, invention assignments and stock option award grants is much less likely to use formal electronic signature protocols when collecting electronic sign-offs on routine workplace documents like time cards, expense reimbursement submissions, performance evaluations and acknowledgements of conduct codes and work rules.

Multinational HR groups want to know: *How can we efficiently collect binding electronic employee assents and acknowledgements across borders, and maintain enforceable employee-facing electronic records?* The answer breaks into two sub-issues: Enforceability of formal statutory ("advanced") employee electronic signatures versus enforceability of informal employee electronic assents, acknowledgements and HR records. And then there are several additional issues as well.

Formal Statutory ("Advanced") Employee Electronic Signatures

The U.S, E-SIGN Act, European Union directive 1999/93/EC, Singapore's Electronic Transactions Act 2011, South Africa's Electronic Communications and Transactions Act 2002, Mexico's Law of Advanced Electronic Signature 2012 and formal or "advanced" electronic signature statutes across many other jurisdictions authorize verifiable electronic signature protocols. Therefore, whether a given employee's electronic signature complies as an authorized "electronic signature" depends on whether it meets the local authorizing law in the country at issue. Electronic signature law compliance is inherently local.

As to what these electronic signature-authorizing laws mean in the workplace, we might look at Mexico as an example. Electronic signature law in Mexico evolved erratically by case law over a number of years. The status of Mexican electronic signatures used to be uncertain, subject to the reasoning of whatever Mexican judge decided a dispute over an electronic document execution. Then in 2012, Mexico consolidated its electronic signature case law into its Law of Advance Electronic Signature 2012, setting out specific protocols for what Mexico will enforce as an electronic signature equivalent to wet ink. Unfortunately, though, Mexico's 2012 statute seems to presume negotiable instruments or bilateral contracts—this law does not expressly address workplace-context employee assents. And so Mexico's 2012 law may not revolutionize electronic assents in the Mexican workplace; relatively few employee assents or acknowledgements in Mexico are likely to meet the law's strictures.

While only a minority of employee assents and acknowledgments in day-to-day human resources likely qualify as "advanced" electronic signatures consistent with local authorizing protocols, some HR teams sometimes do cross their *t*'s, dot their *i*'s and get their staff to execute compliant electronic signatures conforming to local "advanced" electronic signature laws, as if they were executing negotiable instruments. Usually HR teams go to this trouble only with overtly contractual documents like employment contracts, invention assignments and equity/stock option grants. (Worldwide, most employers still execute most *severance releases* with wet ink.)

Theoretically, electronic affirmations that comply with authorizing laws replace wet-ink signatures in every respect. For example, in the recent case *Woods v. Victor Marketing Co.*, a U.S, federal court upheld without question an employment agreement that had been executed electronically using DocuSign.[2] Courts around the world might be expected similarly to uphold "advanced" electronic employee signatures, just as those courts would enforce compliant formal electronic signatures in the commercial and negotiable instrument contexts. But this said, "electronic signatures are easier to forge and harder to authenticate than handwritten signatures."[3] As a practical matter, a wet-ink-signed paper document usually amounts to the best proof of all.

As the *Woods* case shows, compliance with formal electronic signature statutes often gets outsourced to qualified third-party providers like DocuSign, which claims to be "the global standard for digital transaction management." But again, in practice employers seem to turn to DocuSign-type systems mostly for overtly contractual employee-executed documents. Indeed, the "Human Resources" page on DocuSign's own website emphasizes

that value of the company's electronic signatures on "I-9 verifications," "NDAs," "separation agreements" and only a few other formal HR documents—it says nothing about staff expense reimbursements, performance evaluations, time cards, safety logs, training attendance logs or dozens of other, less formal employee-attested documents.

A basic but confounding challenge with electronic assents in the workplace is *semantics*. HR professionals who talk about employee electronic assents, acknowledgements and verifications tend to use the term "electronic signatures" loosely, confusingly and imprecisely. Strictly speaking, only a small subset of electronic employee assents and acknowledgments qualify as "advanced" or formal statutory electronic signatures compliant with local authorizing statutes like U.S, E-SIGN, EU directive 1999/93, the 2011 Singapore law, the 2002 South Africa law and the 2012 Mexico law. HR teams confuse things when they use the phrase "electronic signature" colloquially to include both formal, compliant electronic signatures and also informal electronic employee assents that might better be called "intranet affirmations," "online click acknowledgements," "email confirmations" or "informal employee electronic assents."

Informal Employee Electronic Assents

The more common and more difficult enforceability challenge as to electronic employee affirmations internationally is the problem of *informal* electronic employee assents that fall short of formal "advanced" electronic signatures. Multinationals in their day-to-day employment operations often sidestep formal electronic signature authorizing protocols and take shortcuts, collecting informal electronic assents and using electronic recordkeeping tools like "I agree" mouse clicks, intranet forms, emails and text messages. Every day countless employees around the world informally assent to many routine workplace documents, particularly less overtly contractual ones like payroll registrations, benefits enrollments, time cards, shift requests, policy/code/handbook acknowledgements, changes in position/compensation, job reassignments, expense reimbursement requests, performance evaluations and expatriate assignments—but sometimes even employment contracts, invention assignments, restrictive covenants and other overtly contractual documents.[4]

Employers want to know whether these informal employee electronic assents (again, often confusingly and colloquially called "electronic signatures") are binding. This is tough to answer because by definition informal electronic assents fall short of the strictures in "advanced" electronic signature authorizing statutes. In a sense, we are asking about the enforceability of something that is inherently non-compliant. If an assent is non-compliant, can it ever be binding?

Sometimes it can. The analysis is subject to arguments and depends on facts and circumstances. Whether an informal HR- context electronic assent binds the employee who (purportedly) made it depends on variables including the issue assented to, the extent to which the employee later challenges or denies his own assent, the in-house IT staff's capacity to prove the assent and the rules of evidence in the forum that would decide a dispute. An employer that cannot tolerate this ambiguity and needs an ironclad enforceability guarantee should either have its staff execute their acknowledgements with wet ink on paper or else comply with the strictures of local "advanced" electronic-signature authorizing statutes.

- **Example.** As an example of the strategic trade-offs inherent here, think of routine employee expense reimbursement forms. These are so ubiquitous in day-to-day HR that employers have a keen need that expense reimbursement requests be submitted expeditiously and hence (often) informally and electronically, such as with "I agree" computer clicks online, or emails. Fortunately, informal electronic assents on reimbursement requests rarely cause problems. But what if one day a boss catches an employee cheating on an expense reimbursement? That boss will then have to hold the employee to his online click or email. What if that employee denies having affirmed the fraudulent expense submission, claiming it was a mere draft, or was submitted accidentally, or blames his secretary? Better proof would have been to collect the employee's wet-ink signature on each expense reimbursement form, or at least to have collected formal electronic signatures that comply with the local authorizing statute. Yet the convenience of using online forms for routine reimbursement requests may outweigh the risk of losing a hypothetical future dispute over a fraudulent expense submission.

And so each employer must make strategic choices. An employer that needs the practicality and efficiency of informal electronic employee assents—and that is willing to tolerate some ambiguity as to enforceability—can take comfort in the fact that most informal electronic workplace assents end up being good enough for their intended purposes. Only a tiny fraction later get challenged and litigated in court. On the other hand, the "acid test" of any informal employee electronic assent is whether it would be admissible, persuasive evidence in a local court. An electronic workplace assent that local courts will not enforce is worthless as soon as some employee denies or challenges it.

When strategizing in this context, consider what would happen if some employee executes an informal electronic consent that, later, the employer needs to hold him to—but then the employee denies having executed it. If this dispute lands in a local court, how will the

employer prove the assent? Even if the assent might be admissible, surely it will be weaker evidence than a wet-ink signature on paper. For example, in the recent Canadian case *Free v. Municipality of Magnetawan*,[5] the Ontario Superior Court of Justice held that a would-be email employment contract (which may have been tampered with) did *not* amount to a binding employment contract. (In that case it was the would-be employee who tried to hold the would-be employer to the alleged email employment contract.)

In short, this comes down to risk tolerance. Choosing informal employee electronic assents over both wet-ink-on-paper signatures and "advanced" statutory electronic signatures always poses at least some risk of non-enforceability. The risk gets bigger where the HR document is more overtly contractual. The risk is less, and more manageable, for routine HR acknowledgements. The best way to make employee assents enforceable is to get wet-ink signatures (ideally with a signing witness). The second-best way is to get formal electronic signatures that comply with the local electronic signature authorizing law. The worst option is informal electronic assents. So use informal electronic assents only where their practicality and efficiency outweigh their (dubious) enforceability. Overtly contractual workplace HR documents may cry out for formal execution—employment agreements, invention assignments, stock awards, restrictive covenants and severance releases, for example. But informal employee electronic assents often make sense for routine HR documents—training attendance logs, shift-change notices, expense reimbursement requests, vacation requests, performance evaluations and the like. This means that a multinational's optimal strategy for how to get an employee electronically to execute a binding payroll form or time card may differ from its ideal strategy for getting that same employee electronically to acknowledge a handbook or code of conduct; that, in turn, may differ from the organization's preferred strategy for electronically enrolling staff in a new benefits plan, which may differ from its best strategy for granting employee stock options or for getting an employee to execute an amendment to an employment agreement—or for getting an expatriate to execute a secondment agreement, or for getting a fired employee to execute a severance release. In each situation where an employer needs a staff sign-off, think through how an electronic acknowledgement will look if some employee later sues and holds management to its burden to prove he assented. Ask: *How likely is a dispute over this electronic acknowledgement to go to litigation? How difficult will it be, later, for our IT team to prove this employee really did electronically agree to this assent years ago? How receptive—or hostile—are this jurisdiction's rules for admitting and weighing evidence of an electronic assent, especially one that is less than an "advanced" electronic signature?*

Other Issues

Having distinguished statutory electronic signatures in the HR context from informal employee electronic assents and acknowledgements, several other issues play into a multinational's electronic employee recordkeeping across borders.

- **Archiving and proof problems:** A vital part of electronic HR assents and recordkeeping that transcends legal analysis is the always tricky matter of *electronic archiving*. A lawyer in any jurisdiction advising on the viability of employee electronic assents in some HR context or other will inevitably assume that the client, years later, is going to be able to retrieve a given employee's electronic assent and demonstrate that, at whatever moment in the past, that employee really did electronically agree. But in fact meeting the employer's burden to prove that years ago an employee clicked some box on his computer or signed with a finger or stylus, or sent an email or text message, can be surprisingly difficult.

  Where the employee will not stipulate to his electronic assent—and sometimes even where he will—the employer needs sufficiently rigorous electronic archiving and retrieval practices to be able to prove the authenticity of electronic records. Beware if the best proof the IT team will be able to muster is generic and systemic, along the lines of: *This employee must have agreed—otherwise he would never have been able to log onto his computer and click through to the next screen*. This explanation may not amount to conclusive proof in a court of law because it is mere evidence of system operation, not evidence of an actual employee execution of a specific document on a given date. Similarly, proving an employee agreed to something by *email* may be impossible years later, especially if the email system routinely purges old correspondence or if the parties to the email deleted it and cleaned out their "trash" files. And old text messages are never easy to retrieve and prove.

  Before embarking on any cross-border initiative to collect employee assents or acknowledgements (electronic or on paper), first work up a rigorous archiving practice that ensures assents and signatures will be readily retrievable and provable years later.

- **Electronic imaging of wet-ink-signed documents:** We have been considering employees electronically assenting to HR documents in the first instance. A separate issue is electronic/pdf imaging of wet-ink-signed paper documents—retaining the electronic image and destroying or losing the original. (Obviously there is no electronic proof problem where an employer images a wet-ink-signed document and

also retains the paper original as backup.) When a dispute over a signed document may be headed to court but only a pdf image of the document exists, the best the employer will be able to do is print up the imaged document and produce the print-up. As with electronic assents, the "acid test" of enforceability is the question of admissibility in court and weight of the evidence.

This issue will be fairly straightforward in the United States and certain other common law jurisdictions where the so-called "best evidence rule" should admit a printed pdf, if the original was destroyed and the pdf is the best extant evidence. But under the "best evidence rule," where an HR document was executed in counterparts and the employee's original is available, the employee's version likely controls, absent evidence of tampering or forgery.

The "best evidence rule" is a common law doctrine. Civil law countries more rigorously emphasize document formalities; expect them to be significantly stricter, often requiring original hard copies. Expect civil law courts to hold employers to their burden to authenticate documents claimed to have been duly executed. Plus, in these countries employees are less likely to stipulate to or concede document authenticity.

- **Government filings at agencies:** Some jurisdictions require that certain employee-signed HR documents get executed at or filed with government agencies. For example, employers in Guatemala must file employment agreements with Guatemala's General Directorate of Labor within 15 days of execution, and binding employment releases in Mexico must get executed before a Mexican labor agency. Obviously these documents will have to be signed with wet ink on paper until the local agencies start accepting electronic filings. That said, though, the "paperless office" trend is for the employer to file the paper original with the agency, retaining only an electronic image in employer archives.

- **Document execution and retention laws:** Some jurisdictions impose laws that require written employment contracts. Otherwise, though, laws outside the United States tend *not* to force employers to draft and retain many specific HR documents. But such laws do exist. For example, the UAE requires that employers with five or more staff maintain personnel files[6] and also requires that employers with 15 or more staff maintain a "remuneration register."[7] Tax laws also tend to require retaining some HR documents. A best practice here is usually to maintain statutorily mandated documents in hard copy—but, of course, electronic versions can always be printed up on paper later, when needed. The legal issue therefore becomes statutorily mandated documents (like employment contracts) that *contain signatures*. Be sure to archive statutorily mandated documents bearing signatures in some way that complies with local document-mandating statutes and retention laws.

- **Data protection law compliance:** Jurisdictions from Europe to Argentina, Canada, Hong Kong, Israel, Mexico, the Philippines, Uruguay and beyond (but not the United States, Brazil, China, India or many others) impose tough omnibus data protection laws that, among other sweeping ramifications, require employers to confine access to HR records about individual employees, preventing access by anyone without a business need. These omnibus data protection laws usually reach both electronic and paper records, signed or not signed, that identify individuals; to that extent, these laws are not specific to employee-executed documents, but they reach workplace documents (except in Australia).

  For our purposes, the point is that while electronic documents containing employee signatures and assents must comply with applicable data protection laws, nothing about the electronic assents per se changes the data law compliance analysis. This said, electronic HR data storage can be more susceptible to data breaches. As one example, some "cloud storage" systems allow data mining and are notoriously susceptible to breaches. Be sure that documents identifying employees, whether employee-executed or not, get archived in ways that comply with local data protection laws. Ensure good confidentiality and data security practices. Comply with restrictions on data exports.

Endnotes

1. Bloomberg BNA *Privacy & Security Law Report*, vol. 12 no. 45, "Special Report," Nov. 18, 2013.
2. U.S. N.D. Cal. 8/28/14.
3. SHRM Legal & Regulatory Report: *What Is an Electronic Signature and How Is It Used by HR Professionals?*, 6/1/2011.
4. This distinction between formal ("advanced") electronic signatures versus informal assents can be vital abroad, but it tends to be less of an issue domestically within the U.S., because U.S. electronic signature laws tend to be relaxed enough to enforce informal assents. *See, e.g., Cameron Int'l Corp. v. Guillory* (Texas 1st Dist. Ct. App., case no. 01-14-00452-cu (9/25/14) (enforcing employment non-compete assented to by mouse-click).
5. 2014 ONSC 3635, 9/8/14.
6. UAE Federal Law no. 8 of 1980, art. 53.
7. UAE Labour Law art. 54.

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Arbitrability Issues Under the New York City Collective Bargaining Law

By Philip L. Maier

The arbitration of disputes under collective bargaining agreements (CBAs) between employee organizations and employers has been one of the major components of labor relations since the advent of collective bargaining. The New York City Collective Bargaining Law, New York City Administrative Code, Title 12, Chapter 3, §12-301 *et seq.* (NYCCBL) explicitly states that it is the policy of the City of New York to have grievance and arbitration procedures ending in impartial binding arbitration in agreements entered into between the City and unions.[1] A significant portion of the decisions issued by the New York City Office of Collective Bargaining (OCB) resolve petitions challenging the arbitrability of these grievances. This article reviews the framework and process by which challenges to arbitrability are determined at the OCB, the analysis utilized in making such determinations, and common contexts in which these issues arise.

I. NYCCBL §12-312; Rules of the City of New York, Title 61 §§1-06, 1-07

Section 12-312, of the NYCCBL, entitled *Grievance procedure and impartial arbitration*, requires the OCB to maintain a register of arbitrators and to establish procedures for impartial arbitration. It expressly provides that CBAs and executive orders may contain grievance procedures which end in binding arbitration, and that the costs of an arbitration are allocated in accordance with the terms of §1174 of the City Charter.[2] The procedure to challenge the arbitrability of a grievance is set forth in Rules §§1-06(c) and 1-07. Reading these provisions together, a party must file and serve a petition challenging arbitrability (PCA), absent an approved extension of time, within ten business days after service of the request for arbitration and a waiver required pursuant to §12-312(d), or will be precluded from contesting the arbitrability of the grievance.[3] Thereafter, the opposing party shall file an answer in accordance with the Rules, and the petitioner may file a reply.[4] Section 1-06 governs the procedure to file the initial request for arbitration, and addresses issues such as consolidation of arbitration proceedings, the appointment and power of an arbitrator, and the form and publication of an award.[5]

In *Doctors Council SEIU*,[6] the Board of Collective Bargaining ("Board") dismissed a petition filed 11 days after the filing of the request for arbitration and the waiver on the grounds that it was untimely. The Board stated that the City did not provide an explanation for the delay, and rejected the contention that the late filing constituted harmless error. The Board noted that filing deadlines are not mere technicalities and that the Rule explicitly states that PCAs shall be filed within ten business days. While reserving the discretion to extend the deadline in exceptional circumstances, the Board found that none was proffered by the City and dismissed the Petition.

As stated above, a grievant is required pursuant to §12-312(d) to file a waiver of the right to submit the contractual dispute to any other forum except for the purposes of enforcing an award.[7] In 2012, this section was amended to explicitly state that the waiver filed at OCB applies only to contractual claims.[8] As made evident by the legislative history, the amendment was in response to an Appellate Division decision that effectively reversed OCB precedent that had held that the waiver only related to contractual claims.[9] In that case, three unions filed for arbitration to contest certain layoffs, and also brought an Article 78 proceeding alleging a violation of local law. The Court affirmed the dismissal of the Article 78 proceeding on the basis that the unions had filed the required waiver, interpreting the language of §12-312(d) to preclude such a proceeding. The amendment effectively reinstates the prior Board precedent and renders the Appellate Division decision a nullity.

In its prior decisions, the Board had held that this section prevents duplicative litigation and prevents a grievant from litigating the same claim in different forum, and that the waiver prevents the arbitration of a matter that had been adjudicated on its merits by a court.[10] In *PBA*,[11] the Board granted a portion of a PCA on the grounds that the waiver filed by the PBA was invalid since the same claim had previously been litigated in federal court resulting in a court order. Because one purpose of the waiver is to prevent duplicative litigation and the relitigation of the same claim in different forums, that portion of the grievance was deemed not arbitrable.[12]

Section 12-312.g.(1) explicitly states that while an employee may present his or her own grievance personally or through a representative, only an employee organization may present certain matters to arbitration. Grievances related to matters "which must be uniform for all employees subject to the career and salary plan,"[13] those "which must be uniform for all employees in a particular department,"[14] and all matters affecting police, fire, sanitation and correction, and, at certain listed agencies, involving employees in listed titles[15] may only proceed to arbitration at the insistence of an employee organization. Further, the arbitration procedure provided by executive order or in a CBA for any other grievance may only be invoked by a certified employee organization.[16]

II. Procedural and Substantive Arbitrability

A. Challenges Based on Procedural Grounds

Challenges to the arbitrability of a grievance are made on both procedural and substantive grounds. The Board does not preclude grievances from arbitration on the basis of an alleged failure to comply with procedural requirements, but will examine the substance of a grievance to determine whether it is arbitrable.

In a series of cases, in a variety of contexts, the Board has repeatedly held that it will not sustain a challenge to the arbitrability of a grievance on technical or procedural grounds. In *New York State Nurses Association (NYNSA)*,[17] the Board denied a petition challenging the arbitrability of a grievance on the grounds that it was precluded from arbitration because the union did not contend at the underlying stages that the action taken was disciplinary. The employer claimed that it was surprised by the union's claim at the arbitration stage. The Board, reversing prior cases, held that a PCA will not be granted on the grounds that claims and contract provisions were not properly raised or cited during the grievance procedure, and that technical omissions are not a basis upon which to preclude a grievance from proceeding to arbitration. The Board followed the rationale of *Matter of Board of Educ. (Watertown Educ. Assn.)*,[18] in which the Court of Appeals recognized the widespread utilization of arbitration in the public sector.

The Board has therefore held that, in accordance with its rationale in *NYSNA*, if a petitioner has sufficient notice to prepare for, or to respond to, a request for arbitration, technical omissions are not a basis to grant a petition challenging arbitrability.[19] The notice is sufficient if it enables an employer to be apprised of the facts asserted, and to determine whether to resolve the matter short of arbitration. One of the purposes of the step process—to allow the parties the opportunity to resolve the matter informally—is fulfilled when the allegations are sufficient to allow the parties to be aware of the issues in dispute.[20] Accordingly, and as an example, that a union identifies for the first time in its answer the specific contract clause allegedly breached is not fatal to its pursuit of arbitration.

The Board has rejected challenges to arbitration based upon allegations of noncompliance with procedural requirements, including the time limits of the grievance process, because they require a construction of the contract.[21] The Board has similarly rejected assertions raised by employers that a grievance is barred by laches based upon the passage of time without a showing of prejudice. The assertion that evidence may be more difficult to produce due to a union's delay is insufficient to establish laches. Such a defense may be established, however, if an employer demonstrates that the grievant was responsible for a significant delay after having knowledge of the claim, the delay was unexplained or inexcusable, and that it caused injury and or prejudice to the ability to present a defense.[22]

The Board has rejected the contention that participation in the lower steps of a grievance process constitutes the waiver of a right to challenge the arbitrability. In *Local Union, No. 3, I.B.E.W.*,[23] the union alleged that the City waived its right to challenge the arbitrability of a grievance due to its participation in the step grievance process. In rejecting this contention, the Board stated that participation in the lower steps of the grievance procedure does not estop a party from challenging the arbitrability of a claim since such a conclusion would discourage utilization of all aspects of the grievance resolution process.

B. Challenges Based on Substantive Grounds

OCB, like the New York State Public Employment Relations Board (PERB), does not have jurisdiction to enforce contractual rights.[24] As a result, the Board will not inquire into the merits of a contractual dispute.[25] Because it is the policy of the City to favor the use of impartial arbitration to resolve disputes,[26] however, the "Board is charged with the task of making threshold determinations of substantive arbitrability"[27] in order to carry out this policy.

Consistent with the analysis used by the Court of Appeals, the Board employs a two-prong test to determine whether a grievance is arbitrable. Specifically it considers (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions,[28] and if so, (2) whether the obligation is broad enough in its scope to include the particular controversy presented. Put somewhat colloquially, the first prong of the test asks, *May the parties arbitrate?*, while the second prong asks, *Have they agreed to arbitrate*?

1. May the Parties Arbitrate?

The Board granted a PCA in *District Council 37, AFSCME, AFL-CIO*[29] because the clause which the union alleged was breached was itself found to be in violation of public policy. The union had filed a request for arbitration on behalf of a provisional employee. The clause that would serve as a basis for the union's grievance, however, was unenforceable by application of the Court of Appeal's decision in *City of Long Beach v. Civil Service Employees Assn., Inc. Long Beach Unit*.[30] In *City of Long Beach*, the Court of Appeals held that contractual disciplinary protections for provisional employees were statutorily barred, and the relevant contract clauses for provisional employees unenforceable. In light of this restriction, the Board granted the PCA.

The Court in *City of Long Beach* affirmed decisions to stay two arbitration proceedings resulting from the termination of provisional employees. CSEA filed grievances on behalf of the employees, alleging that under the

terms of the CBA the employees were "tenured" and had a right to be rehired to a different position. The Court held that "the terms of the CBA that afford tenure rights to provisional employees after one year of service are contrary to statute and decisional law and therefore any relief pursuant to those terms may not be granted by an arbitrator."[31] In reaching this conclusion, the Court relied upon the constitutional mandate to establish a civil service system based upon merit and fitness, and statutory and decisional law which preclude an employer from appointing an employee to a provisional position for a period which exceeds nine months, and only when there is no eligible list available to fill vacancies in the competitive class.[32] Because the CBA granted tenure rights to provisional employees which were contrary to statute and decisional law, no relief could be granted pursuant to those terms by an arbitrator.

The analysis used by OCB under the first prong is the same as utilized by the courts when addressing whether a grievance is precluded from arbitration. Once a prohibition to arbitration is found to exist, the Board's inquiry ends and an arbitrator is precluded from acting.[33]

A further example of when a grievance is barred from arbitration is *County of Chautauqua v. Civil Service Employees Association, Local 1000, et al.*[34] In that case, the Court of Appeals granted, in part, the County's application for a stay which sought to preclude arbitration over the layoff of certain employees. The Court found a "plainly irreconcilable" conflict between language in the parties' CBA that seniority shall determine the order of layoffs, and Civil Service Law §80(1), which states that the abolishment of positions in the competitive class among employees holding the same or similar positions shall be in inverse order of seniority. The Court stated that the CBA requires seniority to control the abolition of positions, while under the statute seniority controls only after the employer decides which positions will be affected. The Court did grant, however, that portion of CSEA's petition to compel arbitration concerning displacement rights under the CBA that granted employees the right to displace employees in another department in the event of a layoff. According to the Court, Civil Service Law §80(4) does not contain explicit language which could "be read to prohibit, in an absolute sense, a public employer from agreeing to permit employees to 'bump' less senior employees in another department or division within the same layoff unit."[35] Further, the Court did not find any implicit public policy reason to preclude giving effect to such an agreement. An arbitration award would not inevitably contravene the statute, and to the extent that such a possibility existed, an award could be fashioned to take into consideration other statutory provisions.[36]

This same analysis was recently applied by the Court of Appeals in *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*.[37] In that case, the Court, citing *City of Johnstown v. Johnstown Police Benevolent Ass'n*, *supra*, reiterated that a grievance is arbitrable if it is lawful to do so and if the parties agreed to arbitrate. According to legislation enacting Tier 5, a new retirement tier, new employees would be required to pay a three per cent pension contribution after a CBA was no longer "in effect." The Court determined that whether a CBA is in effect is decided by reference to the term of the contract, not by application of the Triborough Law (which maintains the *status quo* of expired agreements). Because under this interpretation the CBA was no longer "in effect," the Court affirmed the stay of arbitration on the grounds that the retirement provision rendered the applicable clause prohibited.

2. Have the Parties Agreed to Arbitrate?

With regard to the second prong, the Board decides whether there is a nexus between the grievance and a contractual provision. A "nexus" may be defined as the existence of a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA.[38] A union has the burden to demonstrate that the required relationship exists, and therefore, that there is an arguable relationship between the employer's actions and the contract provisions that are claimed to have been breached.[39] The allegations must be supported by probative, factual evidence, and not merely conclusory allegations.[40] If such a relationship is established, "the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide."[41]

The Board has stated on a number of occasions that its function "is confined to determining whether the grievance is one which, on its face, is governed by the contract,"[42] and that the "presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration."[43] It is also clear, as the Board has frequently stated, that it cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties.[44]

Within the broad contours outlined above, the Board has decided numerous challenges to the arbitrability of grievances. The following discussion sets forth some of the common areas in which these challenges have arisen.

a. Written Statements

In determining the arbitrability of a grievance, the Board draws a distinction between written policies or rules, on the one hand, and written statements that are stated in general and precatory language, on the other. In accordance with a long line of cases, a written pronouncement by the employer will be considered arbitrable if it:

> [G]enerally consists in a course of action, method or plan, procedure or guideline, which [is] promulgated by the employer, unilaterally, to further the employer's purposes, to comply with the requirements of law, or otherwise to effectuate

> the mission of an agency.… Nevertheless, a policy must be communicated to the union and/or the employees who are governed thereby.[45]

Accordingly, guides, manuals, informationals, and other documents have been held to be grievable written policies when they impose specific standards and requirements and are communicated to affected employees.[46] For example, in *DC 37, L. 768*,[47] because the reassignment of the grievant had a reasonable relationship to an agency guide, there was a sufficient basis for finding a nexus and the PCA was therefore denied.

On the other hand, written policies and procedures couched in general and precatory language are generally not grievable.[48] The Board has held that documents which merely inform employees of their statutory rights and follow a method of redress are not arbitrable. Further, documents that do not grant substantive rights, maintain compliance with lawful requirements, or establish an agency course of action are not arbitrable. For example, in *SSEU, L. 371*,[49] the union argued that an agency procedure was an arbitrable written policy under the parties' CBA. The Board disagreed, finding that the procedure was advisory. Its purpose was to inform employees of their rights and urge them to follow certain methods of redress, not to maintain compliance with the law or to create independent substantive rights. Further, it did not establish a departmental course of action. [50]

In *District Council 37, AFSCME, AFL-CIO, Local 2507 & 375*,[51] the Board recently granted a petition challenging arbitrability on the grounds that there was no nexus between the subject matter of the grievance, gainsharing, and the terms of an agreement between the parties. The Board reiterated that a document will not be accorded the status of a written policy or rule unless it sets forth a generally applicable policy. The memorandum relied upon by the union only addressed the specific employees at issue, was not directed to future employee rights, and was only a recommendation as opposed to a plan of future action.

b. Reverse Out of Title

The Board holds that when an agreement defines a grievance to include a "claimed assignment of employees to duties substantially different from those stated in their job specifications," such out-of-title claims are arbitrable. However, when an agreement defines a "grievance" to include a "claimed assignment of a grievant to duties substantially different from those stated in his or her job specification," the claim has been precluded from arbitration.[52] The Board in *DC 37, Local 1549*,[53] therefore found arbitrable that portion of a grievance which alleged that the employer assigned bargaining unit work to non-unit employees when the assigned work was substantially different from that which was in the non-unit employees' job specifications. This "reverse out of title" claim was able to proceed to arbitration.[54]

c. Discipline

Petitions challenging the arbitrability of a grievance alleging that a disciplinary action violated the parties' agreement may raise the issue of whether the complained of action is in fact disciplinary in nature. The Board has stated that "[w]hether an act constitutes discipline depends on the circumstances surrounding the act, and, therefore, the Board examines whether specific facts have been alleged that show that the employer's motive was punitive."[55] In examining these circumstances, the Board will look at factors such as whether charges of misconduct, incompetence or insubordination were served, and the course of conduct which preceded the complained of action.[56]

In *District Council 37, Local 375, AFL-CIO*,[57] the Board stated that a transfer that may be disciplinary in nature had a sufficient nexus to the parties' agreement so as to be arbitrable. The union established a nexus because it alleged facts that, if proven, would show that the transfer was disciplinary in nature. Factors such as a transfer to a distant location after a series of work-related conflicts, a salary decrease, and a change in job title supported the finding that a substantial issue was created.[58]

In *Local 333, United Marine Division, International Longshoreman's Association, AFL-CIO*,[59] the Board denied a petition challenging the arbitrability of a grievance alleging that the City violated the parties' CBA by refusing to expunge informal discipline resolved under Executive Orders 16 and 78 from the grievant's personnel file. The City argued that there was no nexus between the CBA and the subject matter of the grievance. The City also argued that the Grievant waived his right to challenge the discipline and failed to reserve any right he may have had to expunge the disciplinary record from his personnel file. The Board found, however, that the grievant did not waive his right to arbitration, and that a plausible nexus between the Executive Orders and his right to have the disciplinary action expunged from his personnel file was shown.

While actions that are disciplinary in nature have been held to be arbitrable, not all grievances challenging adverse consequences suffered by employees may proceed to arbitration. The Board has held that an adverse consequence suffered by an employee due to a lack of a required qualification is not arbitrable.[60] It therefore has granted PCAs challenging employer actions taken due to an employee not having a driver's license and for an employee not being in compliance with residency requirements.[61]

d. Past Practices

By definition, a past practice is a mandatory term and condition of employment that is not governed by the parties' contract. Accordingly, petitions challenging the arbitrability of a past practice are granted because, absent the CBA defining a grievance to encompass a past practice and or a past practice clause, there is no nexus between the grievance and a contract right. In *Dist. No. 1 MEBA*,[62] the Board stated that in order for a past practice to be arbitrable, "the party seeking arbitration must demonstrate that the alleged violation of past practice is within the scope of the definition of the term 'grievance' which is set forth in the parties' agreement." The Board, however, has rejected the contention that the cessation of a longevity payment violating past practice is arbitrable since it did not find a nexus to the parties' agreement.[63]

In *District Council 37, Local 1505, AFL-CIO*,[64] the Board granted a PCA concerning a grievance which claimed a violation due to the employer's failure to consider certain seasonal employees for rehire. Notwithstanding the union's attempt to characterize the issue as a contract violation, the Board granted the petition. The Board stated that, in essence, the union was alleging a violation of a past practice, and that the agreement did not encompass such alleged violations.

e. "Final" Actions

The Board has held that when a contract states that certain employer actions or decisions are "final," such actions or decisions are not subject to arbitration.[65] This principle has been applied to executive memorandum and agency rules, regulations, and written policies.[66] Accordingly, in *United Probation Officers Ass'n*,[67] the Board held that the language of an executive memorandum involving involuntary transfers, which specifically stated that "all transfer decisions…shall be final," removed the substantive result of the managerial decision from arbitration. The Board also granted a PCA when the parties agreed in a stipulation of settlement of disciplinary charges that future misconduct during the stated period would constitute a basis for summary dismissal.[68] In reaching this conclusion, the Board examined the scope of the parties' stipulation in order to determine whether it encompasses the issue at hand.[69]

In *United Marine Division, Local 333, ILA*,[70] the grievant executed a stipulation of settlement to dispose of charges that he had neglected to perform his assigned duties. This stipulation stated that he agreed "to serve a one (1) year probation period" and agreed "that any violation of the agency's Code of Conduct during the probationary period would result in his immediate termination."[71] During his probation, the grievant received a letter stating that he violated the agency Code of Conduct by talking on his cell phone during work hours and was terminated immediately pursuant to the stipulation of settlement. The union challenged the grievant's termination, arguing that these allegations were false and that an arbitrator should determine their veracity. The Board stated that because the "grievant expressly waived his right to arbitration by agreeing to a nearly unrestricted probationary status," the matter was not arbitrable.[72]

f. Section 12-308

The NYCCBL itself contains a management rights clause, codified in §12-308.[73] Often, an employer will contend that this clause grants it the right to take unilateral action. The Board has held, however, that rights encompassed within that section may be limited by the parties' agreement. In *Correction Officers Benevolent Association*,[74] that Board stated:

> [W]e have long-held that when an action falls within an area of management prerogative, but also arguably conflicts with the rights granted to an employee under a collective bargaining agreement, the City is not insulated from an inquiry into its actions by claims of management prerogative. Where the City has voluntarily negotiated and reached agreement on a subject which arguably limits the exercise of a management right, controversies concerning the subject are arbitrable under an agreement to arbitrate a "claimed violation, misinterpretation or inequitable application of the provisions of this Agreement."

While the variety of factual scenarios giving rise to requests for arbitration will only be limited by the interplay between unions, employers, and employees, the analysis used to resolve petitions challenging arbitrations is applicable to all such contexts.

Endnotes

1. Section 12-312(f).
2. Sections 12-312(b) & (c).
3. Rule 1-06(c)(1) states, "A petition for a final determination by the Board as to whether the grievance is a proper subject for arbitration shall be filed and served within 10 business days after service of the request for arbitration and the waiver upon the other party to the grievance, or the party so served shall be precluded thereafter from contesting in any forum the arbitrability of the grievance."
4. Rules 1-07(c)(3) & (4). The answer is to be served and filed within ten business days after service of the petition, and a reply may be filed and served within ten days after service of the answer.
5. Rule 1-06(d)-(h).
6. 4 OCB2d 1 (BCB 2011).
7. Section 12-312(d) states:

   > As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said griev-

ant or grievants and said organization to submit the contractual dispute being alleged under a collective bargaining agreement to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award. *This subdivision shall not be construed to limit the rights of any public employee or public employee organization to submit any statutory or other claims to the appropriate administrative or judicial tribunal.* (Italicized portion added by amendment).

8. NYC LL RPT 39 Int. 658-A (2012).
9. *Roberts v. Bloomberg*, 83 AD3d 457, 921 N.Y.S.2d 214 (1st Dep't 2011).
10. *PBA*, 23 OCB 8, at 4 (BCB 1979).
11. 3 OCB2d 41 (BCB 2010); *IBT, L. 237 (Moore*), B-21-2005.
12. *See also DC 37, L. 376*, 1 OCB2d 36 (BCB 2008).
13. Section 12-307a(2).
14. Section 12-307a(3).
15. Section 12-307a(5).
16. Section 12-312g(2). *See Manish Garg*, 6 OCB2d 11 (BCB 2013).
17. 69 OCB 21 (BCB 2002).
18. 93 N.Y.2d 132 (1999).
19. *NYSNA*, 2 OCB 2d 32, 11 (BCB 2009); *SSEU, L. 371*, 3 OCB2d 53 (BCB 2010).
20. *See CWA,* 51 OCB 27, at 14 (BCB 1993), *aff'd*, *City of New York v. MacDonald*, No. 405350/93 (Sup. Ct. N.Y. Co. Sept. 29, 1994), *aff'd*, 223 A.D.2d 485, 636 N.Y.S.2d 793 (1st Dept. 1996).
21. *CWA, Local 1182*, *supra*; *Civil Service Bar Ass'n*, 2 OCB2d 32 (BCB 2009) (Board referred to the arbitrator the issue of whether claims were properly raised during step proceedings).
22. *See CWA, Local 1182*, *supra.*
23. 31 OCB 19 (BCB 1983). *See also City Employees Union, Local 237*, 9 OCB 20 (BCB 1972).
24. *See* CSL § 205(5)(d); *NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010) (citations omitted); *NYSNA*, 69 OCB 21, at 7-9.
25. *See DC 37*, 27 OCB 9, at 5 (BCB 1981).
26. NYCCBL § 12-302 provides that it is "the policy of the city to favor and encourage…final, impartial arbitration of grievances between municipal agencies and certified employee organizations." *See ADW/DWA,* 4 OCB2d 21, at 10 (BCB 2011); *NYSNA*, 69 OCB 21, at 6 (BCB 2002).
27. NYCCBL § 12-309(a)(3) grants the Board the power "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure[.]" *ADW/DWA*, 4 OCB2d 21 (2011); *Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995).
28. *Matter of City of Johnstown (Johnstown Police Benevolent Assn)* 99 N.Y.2d 273, 278, 755 N.Y.S.2d 49 (2002).
29. 5 OCB2d 24 (BCB 2012). *See also DC 37, AFSCME, AFL-CIO*, 5 OCB2d 23 (BCB 2012).
30. 8 N.Y.3d 465, 835 N.Y.S.2d 538 (2007).
31. *Id.* at 472.
32. Civil Service Law §§65(1), (2).
33. *See also Matter of United Fed'n of Teachers, Local 2, AFT, AFL-CIO v. Board of Educ. of the City Sch. Dist. of the City of New York*, 1 N.Y.3d 72, 80, 769 N.Y.S.2d 451 (2003); *Matter of Blackburne (Governor's Off. of Empl. Relations)*, 87 N.Y.2d 660, 665, 642 N.Y.S.2d 160 (1996).
34. *County of Chautauqua v. Civil Service Employees Association, Local 1000, County of Chautauqua Unit 6300, Chautauqua County Local 807,* 8 N.Y.3d 513, 838 N.Y.S.2d 1 (2007).
35. *Supra*, at 521.
36. Civil Service Law §80(6) grants displacement rights to those employees in the same layoff unit. The Court stated that an arbitrator could take into consideration this statute when ordering any relief.
37. 20 N.Y.3d 651, 965 N.Y.S.2d. 746 (2013).
38. *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011); *NYSNA* 2 OCB2d 6 (BCB 2009).
39. *Local 371, SSEU*, 65 OCB 39, at 8 (BCB 2000); *see also DC 37, Local 1549,* 61 OCB 50, at 7 (BCB 1998).
40. *COBA* 35 OCB 7 (BCB 1985). *See also NYSNA*, 43 OCB 65 (1989).
41. *Local 621, SEIU*, 4 OCB2d 36 (BCB 2011); *Local 3, IBEW*, 45 OCB 49, at 11 (BCB 1990) (citations omitted); *see also PBA*, 3 OCB2d 1, at 11 (BCB 2010).
42. *UFOA*, 15 OCB 2, at 7 (BCB 1975); *see also ADW/DWA,* 4 OCB2d 21, at 10; *Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995).
43. *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted).
44. *See CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002).
45. *DC 37*, 49 OCB 9, at 8 (BCB 1992). *See CEU*, 5 OCB2d 10, at 10 (BCB 2012) (citations omitted); *Local 371, SSEU*, 31 OCB 28 (BCB 1983); *L. 30 IUOE*, 49 OCB 2 (BCB 1992).
46. *NYC Dist. Council of Carpenters*, 3 OCB2d 9 (BCB 2010).
47. 77 OCB 14 (BCB 2006).
48. *See SSEU, L. 371*, 61 OCB 7, at 6-7 (BCB 1998); *cf. DC37, L. 1549*, 43 OCB 67, at 8-10 (BCB 1989).
49. *Supra.*
50. *SSEU, Local 371*, *supra*. *See also In re Roberts*, 3 Misc. 3d 549 (Sup. Ct. N.Y. Co. Jan. 29, 2003) (layoff manual is not regulation); *see also OSA*, 1 OCB2d 42 (2008) (arbitrability of Public Service Bulletin cannot be determined in a categorical manner).
51. 6 OCB2d 9 (BCB 2013).
52. *UPOA*, 49 OCB 10 (BCB 1992).
53. 6 OCB2d 7 (BCB 2013). *DC 37, Local 1549,* 6 OCB2d 4 (BCB 2013).
54. *Cf. Local 3, IBEW*, 41 OCB 11 (BCB 1988).
55. *DC 37, L. 768*, 4 OCB2d 45, at 13 (2011) (quoting *Local 375, DC 37*, 51 OCB 12, at 13).
56. *DC 37, L. 1505*, 7 OCB2d 7 (BCB 2014).
57. 5 OCB2d 25 (BCB 2012).
58. *Local 333,UMD, ILA,* 6 OCB2d 22 (BCB 2013).
59. 6 OCB2d 22 (BCB 2013).
60. *SEIU, NYC L. 246*, 77 OCB 9 (BCB 2006) (lack of driver's license); *SSEU, L.371 (Bakesh)*, 77 OCB 5 (BCB 2006), *SSEU, L. 371 (Aseervathan)*; 77 OCB 4 (BCB 2006) (residency qualification).
61. The Board has also held that an employee's agreement to serve a probationary period in a last chance agreement precluded the grievance from moving to arbitration. *See DC 37, Local 1549*, 77 OCB 13 (BCB 2006).
62. 49 OCB 24 (BCB (1992). *See also NYSNA*, 67 OCB 42, at 5 (BCB 2001).
63. *Id*. at 61. *See also Captains Endowment Association*, 3 OCB2d 3 (BCB 2010) (salary scale does not include longevity payments).
64. 5 OCB2d 32 (BCB 2012).
65. *Uniformed Firefighters Ass'n, Local 94*, 23 OCB 10 (BCB 1979).
66. S*ee also Detective Endowment Ass'n*, 63 OCB 10 (BCB 1999), at 7 (express language of procedure stating the Health Services Division determinations are "final" precludes arbitration of decisions on line-of-duty injury designations); *Communications Workers of America, Local 1180*, 65 OCB 20 (BCB 2000), at 5.

67. 41 OCB 47 (BCB 1988) at 5 and 16.

68. *District Council 37, Local 2507*, 69 OCB 41 (BCB 2002); *Social Serv. Employees Union, Local 371*, 67 OCB 22 (BCB 2001); *District Council 37, Local 1549, AFSCME*, 61 OCB 33 (BCB 1998).

69. *District Council 37, Local 2507*, 69 OCB 41 (BCB 2002); *City Employees Union, Local 237, Int'l Bhd. of Teamsters*, 61 OCB 43 (BCB 1998).

70. *United Marine Division, L. 333*, 75 OCB 12 (BCB 2005).

71. *Id.* at 2-3.

72. *Id*. at 8. *See DC 37, L. 983*, 75 OCB 11 (BCB 2005) (waiver of rights precluded arbitration). *See also SSEU, Local 371*, 67 BCB 22 (BCB 2001); *DC 37, L. 1070*, 61 BCB 51 (BCB 1998).

73. Section 12-307(b) states:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

74. 43 OCB 72 (BCB 1989). *See also United Marine Division, L. 333*, 43 BCB 35 (BCB 1989), and cases cited therein.

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New York City Human Rights Law Case Developments: Not All "Gloom and Doom" for Employers

By Howard M. Wexler and Joshua D. Seidman

Attempting to navigate the nuances of the New York City Human Rights Law (NYCHRL)[1] and overcome the legislation's seemingly widespread pro-employee stance, particularly due to the Local Civil Rights Restoration Act of 2005 ("the Restoration Act")[2] and the 2009 decision in *Williams v. New York City Housing Authority*,[3] has left many New York City employers feeling like the ancient Greek character Sisyphus did when his efforts to push a boulder to the top of hill were met with irremediable disappointment.[4] However, while the scope of the NYCHRL is broad, it is not so expansive as to prohibit courts from carving out certain areas for employers to seek refuge. This article examines a number of recent court decisions analyzing the NYCHRL, the limitations many of these decisions place on the law's scope, and how employers can take advantage of these decisions when confronted with NYCHRL allegations.

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Stray Remarks Are Still Not Enough

In March 2014, the First Department issued a decision in *Godbolt v. Verizon New York Inc.* affirming the lower court's grant of the summary judgment in favor of the former employer and simultaneously establishing that evidence of a few stray, allegedly discriminatory remarks is insufficient to prove employment discrimination under the NYCHRL.[5] *Godbolt* involved a claim of discrimination on the basis of the plaintiff's race and past criminal convictions in violation of the NYCHRL.[6] Specifically, the plaintiff "relies on one remark made in an email exchange that took place weeks after the decision to terminate him was made and that concerned the resolution of his union's grievance following the termination" as the basis of his NYCHRL discrimination cause of action.[7]

The court, however, found this argument unpersuasive, "[e]ven under the mixed-motive analysis applicable to City Human Rights Law claims."[8] The court points out that the controversial remark in no way indicates that the former employer considered the plaintiff's status in the applicable protected classes as a basis for the plaintiff's termination, and instead gives credence to the former employer's explanation for why the plaintiff was let go—he falsified information on his employment application.[9] Since any nexus between the controversial remark and the decision to terminate the plaintiff was nonexistent, the *Godbolt* court "decline[d] to hold, as urged by plaintiff and amici, that the stray remarks doctrine may not be relied on in determining claims brought pursuant to the City Human Rights Law, even as [the court] recognize[d] the law's uniquely broad and remedial purposes."[10]

Another recent decision, *McCormick v. International Ctr. For the Disabled*, also stands for the proposition that employers can assert the "stray remarks" defense to overcome a NYCHRL discrimination claim.[11] In *McCormick*, the plaintiff, a 61-year-old student studying for her Ph.D. in clinical psychology, claims that she experienced age discrimination in her internship based on three comments made by her supervisor.[12] The plaintiff specifically asserts that "her supervisor [ ] stated that the therapists at [defendants' facility] preferred not to work with older students, and suggested that she might rather spend time with her grandchildren or work part time."[13] The court assessed the impact of these alleged statements and concluded that "[s]tray remarks such as these, even if made by a decision maker, do not, without more, constitute evidence of discrimination," especially where "[o]nly one of the alleged remarks actually mentions age, and none can be considered anything more than petty and trivial reference."[14]

NYCHRL, Like Title VII, Is Not a General Civility Code

Besides highlighting the usefulness of the "stray remark" defense, *McCormick* further assists employers faced with NYCHRL employment discrimination claims because in *McCormick* the court also held that "despite the broader application of the NYCHRL, it is well recognized that the law does not 'operate as a general civility code.'"[15] Although the plaintiff "may have been unhappy with her [ ] supervisor's management style" because she was allegedly "chastised for errors directly related to the quality of her work,"[16] the court tightened the reins on the NYCHRL and did not allow the plaintiff to use her unhappy feelings and displeasure with her work environment as the sole foundation for employment discrimination under the NYCHRL.

In *Cahill v. State of NY Stony Brook Univ. Hosp.*, the court granted the Hospital's motion to dismiss one of its former nurse's allegations of hostile work environment on the basis of his age, sex and disability because "[t]he acts pled by the plaintiff…which he alleges constitute a basis for a finding of a hostile work environment fail to meet" the necessary elements under the NYCHRL.[17] The plaintiff in *Cahill* worked as a nurse in the defendant Hospital for a number of years before suffering an injury that caused him permanent blindness in his right eye and forced him to take a leave of absence from work.[18] The plaintiff ultimately returned to the hospital; however, he was not assigned to the same position that he was in prior to his injury, and he was required to undergo several examinations, evaluations, and counseling sessions due to poor work performance that eventually resulted in the plaintiff getting suspended without pay.[19] While the plaintiff's injury certainly evokes a level of sympathy, the court declined to extend the NYCHRL's coverage to cases such as this, where the plaintiff's allegations do not satisfy the standard for proving a hostile work environment. The *Cahill* court explains that under the NYCHRL:

> The standard for a hostile work environment claim is a demanding one.… Allegations that [the plaintiff] was not allowed to return to work in his former position, requiring to attend a re-orientation class, assigning him preceptors and questioning him about job performance are clearly insufficient to meet such a burden.[20]

Likewise, in *Torres v. Louzoun Enterprises, Inc.* the Second Department affirmed the lower court's decision to grant the former employer's motion to dismiss the plaintiff's NYCHRL hostile work environment claim.[21] Once again the plaintiff's failure to properly plead facts that satisfy the basic elements of a hostile work environment claim was enough for the court to dismiss her case. In particular, the court elucidates that "the facts in support of [the plaintiff's] allegations of a hostile work environment fell short of [alleging] that the workplace [was] permeated with discriminatory intimidation, ridicule, and insult…that [was] sufficiently severe or pervasive to alter the conditions of the [plaintiff's] employment and create an abusive working environment," thereby warranting dismissal.[22]

Motions for Summary Judgment—Pretext Persists

A series of decisions, each issued in the second half of 2013, remind us that despite the broader reach of the NYCHRL, employers will succeed on summary if the plaintiff responds to the employer's showing of a legitimate nondiscriminatory reason with nothing more than bald assertions and insufficient evidence of pretext.

The first of these decisions, *Brightman v. Prison Health Serv., Inc.*, was issued in July 2013 and saw the Second Department affirm the lower court's granting of summary judgment in a NYCHRL retaliation claim.[23] The court explained that since the former employer successfully "present[ed] nonretaliatory reasons for the challenged actions," "the plaintiff may not stand silent," but instead must show some impermissible pretext by the employer.[24] Here, the court found that "[t]he plaintiff's unsupported assertion that the [ ] defendants' nonretaliatory reasons for the challenged actions were pretextual was insufficient to raise a triable issue of fact in opposition to the defendants' prima facie showing"[25] and thus did not hesitate to uphold summary judgment against the plaintiff.[26]

Several months later, the New York Supreme Court built off of the *Brightman* and *LaBua* cases and further found that employers can obtain summary judgment as to a NYCHRL discrimination or retaliation claim if all the plaintiff does to counter the employer's legitimate nondiscriminatory reason is argue that the employer's reasoning is wrong or improper.[27] In *Massol* the plaintiff asserts an age discrimination claim for improper termination under the NYCHRL.[28] The court points out that the defendants satisfied their burden of showing a legitimate nondiscriminatory reason for their decision to terminate the plaintiff's employment, namely that the plaintiff, without authorization, improperly "arrang[ed] for employees to have their timecards punched reflecting more work hours than they actually worked."[29] In assessing the defendants' evidence, the court explains "[i]t does not matter whether the reasons for the employer's decision are good reasons or bad reasons and that [w]hat matters is that the [employer's] stated reason for terminating plaintiff was nondiscriminatory."[30] Since the plaintiff did not "present evidence that [the defendants'] reason was a pretext for discrimination" the court saw fit to grant the employer's motion for summary judgment and dismiss the NYCHRL discrimination claim.[31]

Even Under the NYCHRL, an Employer Need Only Provide a Reasonable Accommodation, Not the Employee's Desired Accommodation

A March 2014 decision out of the First Department recently confirmed that the well-established principle that "'an employer is not obligated to provide the disabled employee with [an] accommodation that the employee requests or prefers,'" but rather must simply provide the employee with a reasonable accommodation still holds true under the NYCHRL.[32] In *Silver*, the court affirmed the lower court's grant of summary judgment as to the plaintiff's complaint because the "[d]efendant established that the denial of plaintiff's request to be reassigned to a certain work location did not constitute a refusal to make a reasonable accommodation for plaintiff's disability"

because no such position was "available at the location plaintiff desired."[33]

Extraterritoriality

Given its broader reach, it is no wonder why employees would like to fall within the confines of the NYCHRL rather than simply relying upon federal and New York state law. However, several recent decisions have stymied the attempts of employees to seek refuge in the NYCHRL despite their lack of contacts with New York City. For instance, in *Robles v. Cox & Co.* the Eastern District of New York was presented with a case where the plaintiff argued that her claim of age discrimination should be the analyzed under the NYCHRL.[34] In particular, the plaintiff claims that although she worked in the defendant's warehouse in Plainview, Long Island—outside of New York City—at the time of her termination, "the relevant discriminatory conduct is not just the discriminatory termination that occurred in Plainview, but a continuing violation of her rights through a pattern of unspecified discriminatory acts, most of which occurred [when she worked] in New York City."[35] The court responds to the plaintiff's argument by first noting that the plaintiff's general claims of discrimination are insufficient to bridge her current action with the NYCHRL.[36] Additionally, the fact that the plaintiff's residence was in New York City "is irrelevant to the impact analysis, which confines the protections of the NYCHRL to those who are meant to be protected—those who work in the city."[37] Finally, the court explains that in this case:

> the Plaintiff was terminated while an employee of the Defendant in Plainview. Thus, regardless of the Plaintiff's residency or whether the decision to terminate the Plaintiff was made in New York City, the NYCHRL does not apply because the impact of the termination was felt at the Plaintiff's workplace in Plainview, outside the boundaries of New York City. Accordingly, the Court finds that the NYCHRL does not apply to the Plaintiff's age discrimination claim and grants the Defendant's motion to dismiss this cause of action.[38]

Collateral Estoppel and Retaliation Claims Under the NYCHRL

Another area where the NYCHRL's scope is limited can be seen in cases involving the doctrine of collateral estoppel as it relates to retaliation claims raised under federal, state and city laws, some of which are initially ruled on in a New York federal court, and the remainder of which are subsequently asserted in a New York state court case.

This situation presented itself in the February 2014 *Simmons-Grant v. Quinn Emanuel Urquhart & Sullivan, LLP* decision.[39] The plaintiff, a staff attorney for a law firm, initially filed claims of race discrimination and retaliation under the NYCHRL and the corresponding federal and state laws in New York federal court on the grounds that her employer should have immediately reassigned her to another project when she informed the employer about a dispute she was having with a colleague on a particular project because such reassignment was feasible and easy to accomplish.[40] The federal judge dismissed the plaintiff's federal claims and declined to exercise supplemental jurisdiction over the plaintiff's state and city claims. The plaintiff then refiled her remaining claims in New York state court.[41]

The state court ultimately found that since "the failure to immediately transfer plaintiff is the sole action or failure to act that comprises the entirety of plaintiff's City HRL retaliation claim in this action, that retaliation claim is herewith dismissed."[42] The court notes that the "feasibility of immediate reassignment" issue was central to the federal litigation and the plaintiff did "not argue that she lacked a full and fair opportunity to litigate th[is] issue."[43] In addition, the court explains that "the feasibility-of-immediate-reassignment issue, a strictly factual question not involving application of law to facts or the expression of an ultimate legal conclusion, does not implicate any of the several ways in which City HRL claims—including retaliation claims—raise issues not identical to their federal and state counterparts."[44] Finally, since the "plaintiff has not identified any evidence on the relevant issue that the court in the previous litigation overlooked," the court concluded that "the frequent risk that evidence winds up being undervalued for City HRL purposes because it has been filtered through a Title VII lens is not present here" and thus the NYCHRL should be dismissed.[45]

In sum, employers presented with federal, state and NYCHRL claims of discrimination or retaliation based on identical grounds can utilize the doctrine of collateral estoppel as a means of ousting the NYCHRL claim if the plaintiff's federal claim was already dismissed in a sister federal court.

Conclusion

As the above-referenced decisions highlight, simply because an employee has brought a claim under the NYCHRL does not mean that all is lost for employers. Courts have continued to apply certain "tried and true" defenses to claims of discrimination and retaliation—even taking into account the "remedial" purposes of the NYCHRL—which should cause employers doing business within the five boroughs some relief.

Endnotes

1. N.Y.C. Admin. Code §§ 8-101 *et seq.*, as amended.
2. N.Y.C. Local Law No. 85 (Oct. 3, 2005). Specifically Section 1 of the Restoration Act states that "through passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes…viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."
3. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 66, 872 N.Y.S.2d 27 (1st Dep't 2009) (holding that in light of the Restoration Act the NYCHRL "now explicitly requires an independent liberal analysis in all circumstances, even where state and federal civil rights law have comparable language").
4. Eric Dietrich & Valerie Gray Hardcastle, Sisyphus's Boulder: Consciousness and the Limits of the Knowable 5 (2005) ("At the very end of his long effort measured by skyless space and time without depth, the purpose is achieved. Then Sisyphus watches the stone rush down in a few moments toward that lower world whence he will have to push it up again toward the summit. He goes back down to the plan.").
5. *Godbolt v. Verizon New York Inc.*, 2014 N.Y. Slip Op. 01561, at *2 (1st Dep't Mar. 11, 2014), *leave to appeal denied*, 24 N.Y.3d 901 (2014).
6. *Id.* at *1.
7. *Id.* at *2. The stray remark was made by "one of defendant's employees responsible for making the decision to terminate plaintiff" and the substance of the remark involved the employee "declin[ing] to reconsider the penalty [imposed on the plaintiff] because of the nature of plaintiff's convictions and his concern about the liability that defendant would assume if plaintiff committed a similar crime while on company time." *Id.*
8. *Id.*
9. *See Godbolt*, at *1.
10. *Id.*
11. *McCormick v. International Ctr. For the Disabled*, 2013 NY Slip Op. 31063(U) (N.Y. Sup. Ct. May 10, 2013).
12. *Id.* at *2, 11-12.
13. *Id.* at *11-12.
14. *Id.* at *12 (quoting *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 125, 946 N.Y.S.2d 27 (lst Dep't 2012)).
15. *McCormick*, at *12 (citing *Williams*, 61 A.D.3d at 79).
16. *Id.*
17. *Cahill v. State of NY Stony Brook Univ. Hosp.*, 2013 NY Slip Op. 31178(U) (N.Y. Sup. Ct. May 30, 2013).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Torres v. Louzoun Enterprises, Inc.*, 105 A.D.3d 945, 963 N.Y.S.2d 682 (2013), *appeal dismissed*, 22 N.Y.3d 895, 997 N.E.2d 485 (2013), *reconsideration denied*, 22 N.Y.3d 1054, 981 N.Y.S.2d 360 (2014) and *leave to appeal dismissed in part, denied in part*, 22 N.Y.3d 1054, 981 N.Y.S.2d 360 (2014).
22. *Id.* (internal citation omitted).
23. *Brightman v. Prison Health Serv., Inc.*, 2013 NY Slip Op. 05510, at *2-3 (2d Dep't July 31, 2013).
24. *Id.* at *2.
25. *Id.*
26. *See also LaBua v. Parsons Brinckerhoff*, 2013 NY Slip Op. 32610(U), N.Y. Sup. Ct. Oct. 21, 2013) (granting the defendant's motion for summary judgment as to the plaintiff's retaliation claim because the "defendants have presented prima facie evidence that plaintiff was terminated for legitimate, nondiscriminatory reasons, i.e. her failure to complete work in a timely manner and her uncooperative behavior towards her colleagues and upper management, which plaintiff has failed to rebut with evidence that defendants' claims were false, contrived or pretextual in nature.").
27. *Massol v. Congregation Rodeph Sholem*, 2013 NY Slip Op. 33396(U) (N.Y. Sup. Ct. Dec. 6, 2013).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Silver v. City of New York Dept. of Homeless Servs.*, 2014 N.Y. Slip Op. 01550, at *1 (1st Dep't Mar. 11, 2014).
33. *Id.* at *1.
34. *Robles v. Cox & Co.*, 841 F. Supp. 2d 615 (E.D.N.Y. 2012).
35. *Id.* at 623.
36. *Id.*
37. *Id.* at 623-24 (internal citations and quotations omitted).
38. *Id.* at 625; *see also Welch v. United Parcel Serv., Inc.*, 871 F. Supp. 2d 164, 180 (E.D.N.Y. 2012) (granting the defendants' motion for summary judgment as to the plaintiff's NYCHRL retaliation claim because "[a]lthough the decision to reassign the Plaintiff was communicated to him at a meeting that was held within the boundaries of New York City, [the Plaintiff] felt the impact of this retaliation through the actual reassignment to Nassau County").
39. *Simmons-Grant v. Quinn Emanuel Urquhart & Sullivan, LLP*, 2014 Slip Op. 01407 (1st Dep't Feb. 27, 2014).
40. *Id.* at *2-3.
41. *Id.* at *2.
42. *Id.* at *4.
43. *Id.* at *4-5.
44. *Id.* at *5. *But see Cajamarca v. Regal Entertainment Group*, 2013 NY Slip Op. 32615(U) (N.Y. Sup. Ct. Oct. 17, 2013) ("[D]efendants are not precluded on this motion from addressing the issue of [the alleged supervisor's] employment status or from submitting additional evidence" because "[t]he issue of whether [the alleged supervisor] was plaintiff's supervisor was not finally decided against any party in the federal action, the issue was not essential to the federal court's determination, and the federal court did not base its grant of defendant's motion on this ground.").
45. *Simmons-Grant*, at *5.

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Nassar: A Shift in the Supreme Court's View of Retaliation Claims?

By Sandra J. Mullings

In the last few years, the Supreme Court has issued several significant decisions about crucial issues regarding retaliation claims under the antidiscrimination statutes.[1] Most of these decisions were surprisingly plaintiff-favorable and underscored the importance of the anti-retaliation provisions in combatting employment discrimination. That trend appears to have come to a halt with the Court's 2013 decision in *University of Texas Southwestern Medical Center v. Nassar*.[2] The decision is noteworthy because of the expressed concern about both the increase in retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) over the last fifteen years and the potential future increase in "frivolous" claims that might withstand summary judgment if the Court were to reach a different result.[3]

Nassar

In *Nassar*, the Court addressed the standard of proof in so-called "mixed-motive" retaliation claims under Title VII of the Civil Rights Act of 1964.[4] In a mixed-motive case, there is evidence that the employer was motivated to take the challenged adverse action by both permissible and impermissible factors. The Court held that a plaintiff must prove that the impermissible factor, i.e., retaliation for protected activity, was the "but-for" cause of the employer's action, not merely a "motivating factor." The Court arrived at its conclusions using a similar analysis it had applied in determining that but-for causation was required in claims under the Age Discrimination in Employment Act (ADEA)[5] in *Gross v. FBL Financial Services, Inc.*[6] That analysis was based on the history of mixed motive claims, described briefly here.

The Supreme Court first addressed the question of mixed motive claims under the antidiscrimination statutes more than two decades ago in *Price Waterhouse v. Hopkins*,[7] in which, as explained in the *Nassar* decision, six Justices agreed that the plaintiff could prevail on her claim of gender discrimination if she could show that gender "was a 'motivating' or 'substantial' factor in the employer's decision."[8] The Court also held that if the plaintiff could show that the prohibited characteristic was a motivating or substantial factor, the burden would shift to the employer, "which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus."[9] The Civil Rights Act of 1991 (the "1991 Act")[10] made a number of changes to the antidiscrimination statutes, including two relevant to mixed motive claims under Title VII. The Act added 42 U.S.C. § 2000e-2(m) to Title VII, and adopted the *Price Waterhouse* causation standard by providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." However, the Act also added 42 U.S.C. § 2000e-5(g)(2), which makes clear that an employer's proof that "it would have taken the same action in the absence of the impermissible motivating factor" does not relieve the employer of liability under Title VII, but does limit the plaintiff's relief to declaratory and injunctive relief and attorneys' fees and costs, and prohibits awarding other Title VII remedies, such as damages and reinstatement.

*"Most of [the Supreme Court] decisions [in the last few years] were surprisingly plaintiff-favorable and underscored the importance of the anti-retaliation provisions in combatting employment discrimination. That trend appears to have come to a halt with the Court's 2013 decision in…*Nassar."

In *Gross*, the Court held that a mixed motive jury instruction would never be proper in an ADEA case because a plaintiff is required to "prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."[11] The Court reasoned that the 1991 Act, which amended Title VII in regard to mixed-motive claims, did not similarly amend the ADEA, so the "motivating factor" standard set forth in the 1991 Act did not apply. The majority rejected the contention that ADEA mixed-motive claims should therefore be governed by the Court's pre-1991 Act analysis in *Price Waterhouse*. The opinion noted that it was not clear that the Court would have used the same approach were it considering mixed-motive cases in the first instance and that the *Price Waterhouse* burden-shifting framework had proven "difficult to apply."[12] Instead, the Court looked to the dictionary for the meaning of "because of" in the statute's prohibition of discrimination because of a person's age, finding the phrase to mean "by reason of" or "on account of."[13] Accordingly, the Court concluded, a plaintiff suing under the ADEA must prove that age was the "but-for" cause of the action and the burden of persuasion never shifted "to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[14]

The Court applied similar reasoning in *Nassar*. The opinion first drew a distinction between "status-based discrimination," i.e., discrimination based on race, color, religion, sex or national origin, and discrimination constituting employer retaliation.[15] Status-based mixed-motive claims could be proved with something less than but-for causation given *Price Waterhouse* and the 1991 Act.[16] Looking at basic tort law principles of causation, the dictionary definition of "because of" and the failure of the 1991 Act to expressly mention retaliation claims, the Court concluded that a plaintiff alleging retaliation under Title VII was required to prove but-for causation. As in *Gross*, the Court again rejected the argument that the Court's pre-1991 Act *Price Waterhouse* analysis should apply. The Court asserted that the *Price Waterhouse* framework had been "displaced" by the 1991 Act provisions and that, in any event, applying that standard would be inconsistent with the *Gross* reading of "because of."[17]

In deciding *Nassar*, the Court was not resolving a post-*Gross* Circuit split on the application of *Gross* to Title VII mixed-motive retaliation claims[18] and, indeed, no lower court cases were cited or discussed. However, as the petitioner pointed out, there was disagreement about the reach of *Gross* to antidiscrimination claims generally, and as to the continued viability of the *Price Waterhouse* analysis.[19] Viewed in that light, it may be that *Nassar* was simply the vehicle that allowed the Court to make a definitive ruling about mixed-motive analysis. Read with *Gross*, the decision leaves little room to argue for the application of a mixed motive standard for any of the various antidiscrimination provisions that contain "because" language. These include the retaliation provision of the ADEA[20] and the substantive and retaliation provision of the Americans with Disabilities Act (ADA).[21] If putting the mixed-motive issue to rest was the Court's aim, the fact that *Nassar* was a retaliation case may have been irrelevant.

However, the Court seemed to take pains to note that "the proper interpretation and implementation [of Title VII's retaliation provision] and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems."[22] In particular, the Court noted that the number of retaliation claims filed with the EEOC had doubled between 1997 and 2012.[23] The Court also stated that adopting a motivating factor standard could lead to an increase in frivolous retaliation claims.[24] A lessened causation standard, the Court cautioned, "would make it far more difficult to dismiss dubious claims at the summary judgment stage" and would thus impose financial and reputational costs on an employer that had not discriminated.[25] The Court described a scenario in which an employee who knows she is about to be the subject of an adverse employment action makes a knowingly unfounded charge of discrimination and then makes a charge of retaliation when the adverse action occurs.[26] That hypothetical seems to assume a high level of prescience and a rather sophisticated knowledge of antidiscrimination law, as well as a willingness to litigate on the part of the hypothetical employee. The Court also seems to disregard its earlier acknowledgment of the extent to which fear of retaliation inhibits reporting of discrimination as well as the good faith belief standard that will generally be imposed in determining whether a plaintiff has engaged in protected activity. Whatever the likelihood of the Court's parade of horribles, the view expressed by these observations is strikingly at odds with the Court's previous expressions about the importance of and impediments to retaliation claims.

The Earlier Retaliation Decisions

Three major Title VII retaliation decisions preceded *Nassar*. Each can be said to differ from *Nassar* for its plaintiff-friendly holding, for the expressed concern about the importance of retaliation claims in promoting the underlying aims of the antidiscrimination statutes and for the failure to draw bright lines, which failure could be expected to increase the incidence of claims filed.

Burlington Northern

The question of what constitutes an adverse action sufficient for a retaliation claim was presented in *Burlington Northern & Santa Fe Ry. Co. v. White*.[27] The Court was confronted with at least four different standards developed in the lower courts, ranging from the most restrictive standard, requiring an "'ultimate employment decision,'" such as "'hiring, granting leave, discharging, promoting and compensating'"[28] to one requiring only "'adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'"[29] Ultimately, the Court chose an expansive standard, holding that acts constituting retaliation include those "that would have been materially adverse to a reasonable employee or job applicant," and are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[30] The Court also held that actions covered by the anti-retaliation provision of Title VII are not limited to employment-related actions.[31] In reaching its conclusions, the Court observed that interpreting the statute to provide broad protection against retaliation was necessary to accomplish the statute's primary objective of preventing employment discrimination on the basis of prohibited characteristics.[32]

Although *Burlington* purports to offer an objective standard, the Court stated that the standard was phrased in general terms because the "significance of any given act of retaliation will often depend upon the particular circumstances. Context matters."[33] The Court noted, for instance, that job changes, such as schedule changes, may have different effects on different workers (e.g., a young mother with school age children). Thus the action is to be judged from "the perspective of a reasonable person

in the plaintiff's position,"[34] a standard that suggests the importance of a fact sensitive case-by-case determination.

Crawford

Prior to *Crawford v. Metro. Gov't. of Nashville and Davidson County, Tenn.*,[35] Most retaliation claims involving participation in an employer's internal investigation had been analyzed under the "participation" clause of the anti-retaliation statutes. Such claims were usually denied on the reasoning that the participation clause refers to proceedings under the statute, and that internal investigations preceding the filing of charges, which starts the process under the statute, were not such proceedings.[36] Because the Supreme Court found that Crawford's conduct amounted to opposition under the opposition clause, it declined to reach the participation clause question and that issue remains open.

The Court expressly rejected the Sixth Circuit's view that the opposition clause requires "'active, consistent'" activities, noting that even inaction could constitute opposition. The Court described as "freakish" a rule that would protect an employee who, on her own initiative, reported illegal conduct, but would not protect an employee, such as Crawford, who reported the same conduct in response to an employer's questions.[37] In determining that employees in Crawford's position were protected against retaliation, the Court specifically noted that "'[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'"[38]

Thompson

Perhaps the most surprising decision was that in *Thompson v. North American Stainless, LP*,[39] in which the Court held that Title VII permitted a pure third party retaliation claim, i.e., a claim by an individual who did not himself engage in protected activity, but alleged that he suffered adverse action as retaliation for the protected activity of someone else. The first surprise was that the Court granted *certiorari*, given that there was no Circuit split[40] and that the United States had submitted a brief arguing that although the decision was incorrect, a grant of *certiorari* was not warranted.[41]

The second surprise was the analysis applied. Prior to the Court's decision in *Thompson*, the debate had been between the "plain language" of the anti-retaliation provisions versus the "plain purpose" of the antidiscrimination statutes. That is, the anti-retaliation provisions generally forbid discrimination against an employee or applicant "*because he has* opposed any practice made unlawful by this subchapter or *because he has* made a charge, testified, assisted or participated in an investigation, proceeding, or hearing under this subchapter" (emphasis added),[42] suggesting that the person retaliated against must be the person who engaged in the protected activity and that only that person has a claim. The argument on the other side was that it was necessary to go beyond the plain language of the anti-retaliation provision because allowing third party retaliation would allow an employer to accomplish indirectly what it could not do directly, and thus would be in conflict with the protective purpose of the statute, generally, and of the anti-retaliation provision in particular.[43]

The Supreme Court's opinion in *Thompson* ignores the "plain language versus plain purpose" debate and, indeed, does not cite a single lower court case dealing with third party retaliation, other than passing references to the decisions below in *Thompson*. Instead, the Court adopted an analysis, first fully developed in dissents to the Sixth Circuit's *en banc* decision,[44] and used by Thompson to frame the questions in the petition for *certiorari*. In the Court's words, the questions presented were "First, did NAS's firing of Thompson constitute unlawful retaliation? And second, if it did, does Title VII grant Thompson a cause of action?"[45] With the questions thus framed, the Court easily concluded that firing Thompson, who had not engaged in protected activity, was prohibited retaliation *against his fiancée,* who had filed a claim of gender discrimination, under the *Burlington* test. The Court found it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[46]

The Court looked to § 706 (f)(1) of Title VII, which allows a civil action to be brought "by the person claiming to be aggrieved"[47] and to its interpretation of the term a person "adversely affected or aggrieved" under the Administrative Procedure Act, and concluded that a person aggrieved under Title VII is one who is "within the zone of interests" protected under Title VII.[48] Since the purpose of Title VII is "to protect employees from their employers' unlawful actions" and Thompson was an employee and was not simply "an accidental victim" of the alleged retaliation, the Court concluded that Thompson was within the zone of interests protected under Title VII, and thus was aggrieved and had standing to sue.[49]

As the Court acknowledged, the opinion makes no effort to define the type of relationship that would support a claim of third party retaliation, despite the argument that an employer would be at risk "any time it fires any employee who happens to have a connection to a different employee."[50] *Thompson* also does not identify the type of action against a third party that would be sufficiently adverse. Thus the opinion left open significant questions to be answered in future cases.

Will *Nassar* Stem the Tide?

Nassar, then, stands out as being the first decision of the Roberts Court and the first since 2005 to explicitly consider the effect of the Court's decisions on increases in retaliation claims. Indeed, earlier cases considered the impediments posed by the fear of retaliation and the

importance of the availability of the retaliation provisions to the enforcement of the statute.

Are the Court's fears of the effects of its decisions justified? It is true that the number of retaliation claims filed with the EEOC under Title VII essentially doubled between FY 1997 (16,394) and FY 2012 (31, 208) as did the retaliation claims under all statutes (18,198 versus 37,836).[51] Similarly, the percentage of retaliation claims under Title VII compared to the total Title VII claims increased from FY 1997 (20.3%) to FY 2012 (31.4%).[52] The percentage of retaliation claims under all antidiscrimination statutes also increased from 1997 (22.6%) to 2012 (38.1%).[53] Those statistics, however, may be misleading in attempting to gauge the effects of Supreme Court decisions on the filing of retaliation claims. The first caveat is one provided with the statistics, i.e., that "individuals often file charges claiming multiple types of discrimination."[54] In the absence of evidence that there are large numbers of employees filing retaliation claims divorced from claims of underlying discrimination, it is difficult to separate out an increase in claims of status discrimination from an increase in claims of retaliation. Second, the upward trend of retaliation claims has been an ongoing trend that predates the more recent favorable decisions. For instance, prior to *Burlington*, the percentage of retaliation claims under Title VII and under all statutes increased from 14.5% and 15.3%, respectively, in FY 1992,[55] to 25.8% and 29.5%, respectively, in FY 2005.[56] It is true that there were significant increases in the percentage of retaliation claims for all statutes post-*Burlington* in FY 2006.[57] However, the increase in the percentage of retaliation claims under Title VII has not been as significant.[58] In addition, the largest increase in absolute number of total claims, from 82,792 to 95,402, which is mirrored in increases in retaliation claims, occurred from FY 2007 to FY 2008[59] and may well be largely attributable to the extensive layoffs that occurred because of the fiscal crisis.

Another possible gauge of the effects of the Court's decisions may be how the cases translate into the case law in the lower courts. One way of measuring that is by Shepard's citations. As of the date of this writing, *Burlington* has been cited in more than 5,600 cases, *Crawford* in more than 350, and *Thompson* in more than 190. Courts have applied the *Thompson* decision to various relationships, including familial relationships such as parents and children[60] but also to dating relationships[61] and best friends.[62] Adverse actions against third parties that have been deemed actionable include not only termination[63] and failure to hire[64] but also reduction and changing of the third party's job duties[65] and denial of a transfer and suspension.[66]

If *Nassar* was intended to stem the tide of retaliation claims and if the fear of the proliferation of those claims was well founded, the question arises as to whether that attempt will be successful. In the six months after its publication, *Nassar* was cited in more than 240 cases, more than 40 of those in the Second Circuit. However, looking at some of those cases within the Second Circuit, it is not clear the extent to which the heightened standard leads to a different outcome in particular cases. For instance, in a few cases, summary judgment was denied because the plaintiff had sufficient evidence from which a jury could conclude that the employer's proffered reason was pretextual.[67] In others, summary judgment has been denied on grounds other than causation, for instance, because the plaintiff could not show a materially adverse action.[68] Interestingly, in a few cases the court has considered the evidence under both standards and concluded that the result would be the same.[69]

Cases that were already "in the system" when *Nassar* was decided will not give a full picture of how the decision will affect the number of retaliation claims that will be filed in the future. Some time will be required for the opinion to percolate further into the decisions and, ultimately, to affect how attorneys for potential plaintiffs assess the likelihood of success and, therefore, what claims will be filed.

Endnotes

1. In addition to the cases discussed in this article, the Court has held that antidiscrimination statutes encompass anti-retaliation claims, even where the statute in question does not expressly provide for such a claim. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (federal sector provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 633a(a)); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (42 U.S.C. § 1981); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (Title IX of the Education Amendments of 1972). The Court also ruled that the anti-retaliation provision of the Fair Labor Standards Act, prohibiting discrimination because an employee "has filed any complaint," covers making an oral complaint. *Kasten v. Saint-Gobain Performance Plastics, Inc.*,__ U.S. __, 131 S. Ct. 1325 (2011).
2. __ U.S. __, 133 S. Ct. 2517 (2013).
3. *Id*. at 2531-32.
4. 42 U.S.C. §§ 2000e *et seq*.
5. 29 U.S.C. §§ 621 *et seq*.
6. 557 U.S. 167 (2009).
7. 490 U.S. 228 (1989).
8. *Nassar*, 133 S. Ct. at 2526.
9. *Id*.
10. Pub. L. 102-166, 105 Stat. 1075 (1991).
11. *Gross*, 557 U.S. at 180.
12. *Id*. at 178-79.
13. *Id*. at 175-76.
14. *Id*. at 480.
15. *Nassar*, 133 S. Ct. at 2522.
16. *Id*. at 2522-23.
17. *Id*. at 2534.
18. *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 11-13.

19. *See* Reply Brief of Petitioner on Petition for a Writ of Certiorari at 4-7.
20. 29 U.S.C. § 623(d).
21. 42 U.S.C. §§ 12112 (a) and 12203 (a). However, there may still be a question of the standards applicable to interference claims under the ADA (29 U.S.C. § 12203) and interference and failure to restore claims under the Family and Medical Leave Act (29 U.S.C. §§ 2615 (a)(1) and 2614 (a)(1)) due to differences in language.
22. *Nassar*, 133 S.Ct. at 2531.
23. *Id.*
24. *Id*.
25. *Id*.
26. *Id*. at 2532.
27. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).
28. *Id.* at 60, citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) and *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).
29. *Burlington*, 548 U.S. at 61, citing *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000).
30. *Burlington*, 548 U.S. at 57.
31. *Id.* at 57.
32. *Id*. at 67.
33. *Id.* at 69.
34. *Id.* at 69-70.
35. 555 U.S. 271 (2009).
36. *See, e.g., EEOC v. Total System Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000) (the participation clause in Title VII covers participation in "an investigation…under this subchapter").
37. *Crawford*, 555 U.S. at 851.
38. *Id*. at 852, *citing* Deborah Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005).
39. 131 S. Ct. 863 (2011).
40. All four Courts of Appeal that had considered the issue had rejected pure third party retaliation claims. *Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2009) (*en banc*) (Title VII); *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3rd Cir. 2002) (ADEA and ADA); *Smith v. Riceland Food, Inc.*, 151 F.3d 813 (8th Cir. 1998) (Title VII); and *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996) (ADEA).
41. Brief of United States as Amicus Curiae on Petition for Writ of Certiorari, available at http://www.justice.gov/crt/about/app/briefs/thompsonbr_sct.pdf.
42. 42 U.S.C. § 2000e-3(a).
43. *See, e.g., EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1210 (E.D. Cal. 1998).
44. *Thompson v. North American Stainless, LP*, 567 F.3d 804 at 825-27 (6th Cir. 2009) (Moore, J., dissenting) and 827-29 (White, J., dissenting).
45. *Thompson*, 131 S. Ct. 863, 867.
46. *Id.* at 868.
47. 42 U.S.C. § 2000e-5(f)(1).
48. *Thompson*, 131 S. Ct. at 870.
49. *Id.*
50. *Id*. at 868.
51. EEOC Charge Statistics FY 1997 Through FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
52. *Id.*
53. *Id*.
54. *Id*.
55. EEOC Charge Statistics FY 1992 Through FY 1996, http://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm.
56. EEOC Charge Statistics FY 1997 Through FY 2012.
57. The percentage of retaliation claims increased from 29.8% in 2006 to 32.3% in 2007 and ultimately to 38.1% in 2012. *Id.*
58. The percentage of retaliation claims under Title VII increased from 25.8% in 2006 to 28.3% in 2007, and 31% in 2009, and has remained at a similar level through 2012. *Id*.
59. *Id*.
60. *E.E.O.C. v. Walmart Associates, Inc.*, 07-CV-0300 (D. N. Mex. Oct. 26, 2011); *Zamora v. City of Houston*, Civ. Act. No. 4:07-4510, 2011 U.S. Dist. LEXIS 138830 (S.D. Tex. Dec. 2, 2011).
61. *Harrington v. Career Training Institute Orlando, Inc.*, 8:11-cv-1817, 2011 U.S. Dist. LEXIS 107723 (M.D. Fla. Sept. 21, 2011).
62. *Ali v. District of Columbia Gov't*, 810 F. Supp. 2d 78 (D.D.C. 2011).
63. *Dembin v. LVI Services, Inc.*, 822 F. Supp. 2d 436 (S.D.N.Y. 2011).
64. *E.E.O.C. v. Walmart, supra*.
65. *Harrington, supra*.
66. *Zamora, supra*.
67. *Ellis v. Century 21 Department Stores*, 11-CV-2440, 2013 U.S. Dist. LEXIS 140241 (E.D.N.Y. Sept. 28, 2013); *Kovaco v. Rockbestos-Surprenant Cable Corp.*, 3:11-cv-00377-WWE, 2013 U.S. Dist. LEXIS 137353 (D. Conn. Sept. 25, 2013).
68. *Geller v. North Shore Long Island Jewish Health Sys.*, 10-CV-0170, 2013 U.S. Dist. LEXIS 135865 (E.D.N.Y. Sept. 23, 2013).
69. In two cases, the court assumed that the standard under the New York City Human Rights Law would still remain the lessened "motivating factor" standard, but found that even under that standard, the plaintiff could not prevail. *Russo v. New York Presbyterian Hosp.*, 09-CV-5334, 2013 U.S. Dist. LEXIS 13576 (E.D.N.Y. Sept. 23, 2013); *Urquhart v. Metropolitan Transportation Authority*, 07 Civ. 3561 (S.D.N.Y. Sept. 25, 2013). In *Litchhult v. USTRIVE, Inc.*, 10-CV-3311, 2013 U.S. Dist. LEXIS 98619 (E.D.N.Y. July 10, 2013), because *Nassar* had not been decided at the time of briefing, the court acknowledged both standards but concluded that the plaintiff's claim would not survive even under the lower standard of causation.

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California Labor Code § 2855 and Sports: Can Federal Labor Preemption Uphold the Enforceability of NHL Contracts for California Teams?

By Grant Goeckner-Zoeller

In 1978, twenty-one-year-old rookie Dale McCourt finished his first National Hockey League (NHL) season as the leading scorer of the Detroit Red Wings.[1] That summer, the Red Wings made a big splash signing all-star goaltender Rogie Vachon away from the Los Angeles Kings.[2] Under the 1970s version of NHL free agency, however, the Kings were entitled to an "equalization payment" for the loss of Vachon's services.[3] A neutral arbiter awarded McCourt's contract to the Kings.[4] Rather than accept his fate, McCourt sued, alleging that the equalization payment restricted trade in violation of federal antitrust laws.[5] After receiving an injunction preventing his assignment from the district court, the Sixth Circuit Court of Appeals rejected McCourt's claim. The court found that the equalization payment was exempt from antitrust scrutiny as part of a good-faith, arm's-length collective bargaining agreement.[6]

The equalization payment involved in *McCourt* was part of a long history of restrictive player rights clauses used by professional sports leagues. By requiring a prospective team to pay not only the player's salary but also a penalty to the player's former team, the equalization payment suppressed a player's value on the open market.[7] On the other hand, by giving a player's existing team a competitive advantage for that player's services, the equalization payment fosters team continuity, which is an advantage for fans and fellow teammates.[8] Despite McCourt's loss in court, the NHL's rules governing players' rights have become much less restrictive in the intervening thirty-five years.

Following two contentious lockouts and the cancellation of the 2004-05 season, the NHL financial landscape has drastically changed over the past ten years. In 2004-05, the NHL insisted on pro-owner cost assurances including a hard salary cap and limited rookie salaries.[9] In return, the NHLPA fought for liberalization of free agency for veteran players.[10] Prior to 2004, players could not reach unrestricted free agency until the age of thirty-one.[11] Under the new rules, players could generally reach unrestricted free agency by twenty-seven, with some players qualifying as early as age twenty-five.[12]

As might be expected, the limitation on teams' ability to compete for players by raising salaries resulted in increased competition on contract length.[13] When the owners locked out the players again in 2012-13, they sought to set a maximum contract length.[14] Ultimately, the sides agreed on a seven-year contract limit, with the exception that teams are allowed to resign their own free agents for an eighth year.[15] Under a similar system, the NBA frequently sees "sign-and-trade" deals, where a player will resign with his current team for the extended term and be traded immediately to another team under a previously negotiated deal.[16] The ability of teams to offer their players an additional year of contract security, just like the equalization payment from *McCourt*, likely suppresses player salaries by making it harder for new teams to compete for their services.[17]

The eight-year maximum contract length may affect NHL negotiations in another way: by acting as a magnet attracting contracts up to the eight-year limit.[18] In this vein, shortly after the new contract length limit began, the Anaheim Ducks signed their two star players, Ryan Getzlaf and Corey Perry, to lucrative eight-year deals.[19] These contracts raise an interesting issue of California state law. California Labor Code section 2855 places a seven-year limit on personal services contracts.[20] Section 2855 has been applied regularly in the entertainment industry, but it has never been applied to an employee working under a collective bargaining agreement.[21]

The combination of three factors suggest that the application of section 2855 to unionized employees may be decided in the NHL. First, NHL players are signing longer contracts in the salary cap era. Second, NHL players are reaching free agency at a younger age. Third, league revenues continue to rise steadily, suggesting that under the salary cap system, player salaries are also likely to continue to rise.[22] These factors make it more likely that a player will enter the eighth year of his contract and find his salary is lower than his fair market value. With three teams in California, the application of section 2855 to NHL contracts would be significant problem for the NHL.

This article will evaluate the potential result if an NHL player chose to challenge his contract in a declaratory judgment action in a California state court. Part I will briefly describe the history of the reserve clause in sports and the NHL's current free agency system. Part II will consider the prima facie application of section 2855 to NHL players as a matter of California state law. Finally, Part III will consider the application of federal preemption doctrine to section 2855 as a defense to a potential player challenge. Ultimately, this article argues that section 2855 applies to all California NHL players who have been under contract or restrictive rights clauses for seven

full seasons. Further, the current reach of federal labor preemption doctrine would only affect a small number of these players.

Part I

A. The Beginnings of Player Restraint: The Reserve Clause

All modern player restraint mechanisms in the major American sports developed from the original reserve clause in bcaseball.[23] The reserve clause began in 1879 as a secret agreement between the eight owners of the National League permitting each exclusive negotiation rights to five of their current players.[24] Prior to this agreement, players changed teams frequently, sometimes in the middle of the season.[25] The primary purpose of this agreement was to control costs by restricting salary competition for star players.[26] Eventually, this secret agreement spread to the American Association and expanded to cover a team's full complement of players.[27] By 1890, the owners had negotiated with the National Brotherhood of Professional Players to include the reserve clause in the national player agreement.[28]

By 1914, the reserve clause had grown more comprehensive.[29] Each team listed a number of players to whom they were given exclusive rights and with whom other teams were prohibited from tampering.[30] The national player agreement also included a team option to renew the player's contract for an additional year, with the team having final authority to set the player's salary for that option year.[31] In addition, the implementation of an amateur draft allowed teams to acquire exclusive rights to a player prior to his signing a contract of any kind.[32]

Despite periodic challenge, the reserve clause in baseball survived, largely in this form, for ninety-six years.[33] Despite a growth of antitrust challenges to restrictive practices in sports during the 1960s, Major League Baseball was insulated by an exemption from federal antitrust laws.[34] Yet, the Court strictly limited this rule to baseball,[35] setting the stage for the erosion of the reserve clause era in the other major sports leagues.[36] The National Football League (NFL) adopted a reserve clause similar to that in baseball in 1921.[37] The precursors to the National Hockey League (NHL) and the National Basketball Association (NBA) adopted similar practices in the 1920s and 1930s, before formal adoption with the creation of the modern-day leagues.[38] As adopted into the standard players' contract in 1952, the NHL's unique development system made its reserve system even more restrictive on player movement than other leagues.[39] Rather than drafting college players like the NFL and NBA, the NHL sponsored amateur and junior hockey programs, giving NHL teams the exclusive rights to promising local teenagers.[40]

In the 1960s, the NHL, NBA, and NFL all faced new leagues looking to compete for their players.[41] This new competition ignited a flurry of antitrust litigation implicating the reserve clause.[42] New leagues created competitors willing to support a players' challenge to the existing reserve system.[43] The standard provision allowing a team option to extend a player's contract for one year was a common target of antitrust challenge. The early decisions, however, were often inconsistent.[44]

This string of inconsistent individual player challenges ended with *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*[45] Because of the NHL's control over player development leagues, the NHL system was particularly susceptible to antitrust challenge. College players who had avoided NHL developmental leagues were an insufficient source of players for the upstart World Hockey Association (WHA).[46] During the WHA's first season, over 200 of its 345 players were subject to reserve clauses from their prior year's contract.[47] Following a number of successful individual challenges,[48] the WHA sought an injunction to prevent enforcement of these reserve clauses league-wide.[49] The court found that the NHL's reserve clause and minor league affiliation agreements violated section 2 of the Sherman Act prohibiting monopolization.[50] The court granted the WHL's injunction preventing the NHL from "prosecuting, commencing, or threatening to commence" any suit to enforce the reserve clause.[51]

While *Philadelphia Hockey* did not erase the reserve clause from NHL contracts, it did temporarily prevent the clause's enforcement against players leaving for the WHL. While the one-year option remained in force within the NHL, the availability of the WHL drastically changed the bargaining power of players negotiating their salary for that option season. Sensing the turning tide, the NHL removed the perpetual team option from the standard players' contract in 1974, becoming the first major sports league to accept player free agency.[52] Shortly thereafter, football, basketball and baseball players made similar successful challenges, opening the door to the beginning of the free agency era.[53]

B. The NHL's Current Player Restraint System

The NHL's modern player restraint system is substantially less restrictive than the old reserve system. From a bird's eye view, a player is first subject to restriction through the NHL's annual amateur draft. Once signed to a contract, a player will go through three phrases with different levels of contractual freedom. Each player's first contract, called an entry-level contract, is strictly limited in length and salary. The second phase is restricted free agency, where the player has a limited ability to negotiate with other teams. The final phase, unrestricted free agency, allows a player to negotiate with any team without restriction. The analysis of section 2855 will require a brief explanation of each of these phases.

The NHL entry draft occurs every year in June and consists of seven rounds in which each team may select one eligible player.[54] Eligible players are generally junior or college players between the ages of eighteen and twenty who have not been selected in a previous draft.[55] Drafted players are placed on a team's reserve list where the team has exclusive negotiation rights with that player for one to five years, depending on a variety of factors.[56] Beginning with the 1995 collective bargaining agreement, entry-level contracts have had very specific limits on their term and compensation.[57] This rule represents a policy agreement between the NHL and NHLPA that the majority of compensation should go to proven veteran players, rather than to prospects based on potential. Despite some problems with excessive bonuses during the 1995 CBA, the current entry-level contracts have been very successful at controlling rookie player costs.[58] Entry-level contracts are limited to a salary and signing bonus equal to roughly one million dollars plus limited performance bonuses.[59] For an idea of the true maximum salary under an entry-level contract, Sidney Crosby was the NHL leading scorer and Most Valuable Player in his second season of 2006-07.[60] He received $3,700,000 for each of the three years of his entry-level contract, and received a considerable raise to an average of $8,700,000 dollars per year on his next contract.[61]

After a player's entry-level contract expires, they become a free agent. There are generally two types of free agents: unrestricted free agents and restricted free agents.[62] All players with seven NHL seasons or who are twenty-seven years old when their contract expires qualify for unrestricted free agency.[63] Unrestricted free agents are free to sign with any team, without restriction, and their former team retains no right to compensation.[64] All players who are neither subject to entry-level contract restrictions, nor qualify for unrestricted free agency, are restricted free agents.[65]

If a restricted free agent's former team makes a minimum contract offer, called a qualifying offer, the team retains the right to "first refusal or draft pick compensation."[66] Restricted free agents are still free to negotiate with any team, but if they agree to a contract with a new club, the potential contract is submitted to the player's former team.[67] The former team has seven days to either: (1) accept the offer itself, thereby creating a binding contract with the player on those same terms, or (2) instead accept a package of draft picks from the new team, thereby finalizing the contract between the player and the new team.[68] The number and quality of draft picks acquired depends not on individual negotiation, but on a specific chart in the collective bargaining agreement depending on the salary of the new contract.[69]

Restricted free agency is very limiting on player movement. The right to match any offer means that a player is completely subject to the business decision of his former team.[70] Even the form of free agency in *McCourt*, which required the Red Wings to forfeit their top scorer as compensation, did not give the Kings the right to keep free agent Rogie Vachon.[71] For a free agent who cares less about absolute salary and more about moving to a new team, this rule is exceptionally restrictive.[72] Since the 2004-05 lockout, seven of the eight offer sheets signed by restricted free agents have been matched by the player's former team.[73] It seems that current star players are too valuable for teams to lose through restricted free agency, even for the promise of future draft picks. Yet, the willingness of teams to match an offer is likely further suppressing competition for restrictive free agents. Most teams assume the player's former team will match their offer, making the negotiation period a waste of time.[74] The process is also fraught with the possibility of collusion between general managers to disincentivize salary escalation.[75]

The NHL's current free agency system provides for very restrictive rules on young player's contract rights. However, the availability of unrestricted free agency as early as age twenty-five is a dramatic move toward increased player salary and player movement since the *McCourt* decision.

Part II

California Labor Code section 2855 (a) provides:

> [A] contract to render personal service… may not be enforced against the employee beyond seven years from the commencement of service under it… [but i]f the employee voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.[76]

In 1872, the California Legislature passed the original form of this law as Civil Code section 1980, then limiting personal services contracts to two years.[77] Working conditions in California following the civil war were harsh and oppressive.[78] The two-year limitation developed from concerns about involuntary servitude resulting from unconscionable and unending employment agreements.[79] The adoption of section 1980 reflected a legislative public policy decision that concern for public health and welfare overrode the freedom of contract.[80] The term allowed in section 1980 extended to five years in 1919 and seven years in 1931, before becoming section 2855 of California's first Labor Code in 1937.[81]

In 1944, section 2855 became a powerful tool for actors to fight the oppressive studio system in Hollywood.[82]

In the seminal case of *De Haviland v. Warner Brothers Pictures, Inc.*, actress Olivia De Havilland[83] challenged her contract with the Warner Brothers studio (Warner).[84] De Havilland signed a one-year contract with Warner in 1936.[85] De Havilland's contract contained two clauses then standard to the movie industry, an option clause and a suspension clause. The option clause gave Warner the right to extend De Havilland's contract for an additional six years in one year increments.[86] The suspension clause allowed Warner to suspend De Havilland if she should "fail, refuse, or neglect to perform her services to the full limit of her ability and as instructed by the producer."[87] During the time of her suspension, De Havilland would not be paid, and her contract would be extended for the term of the suspension.[88] These clauses together gave the studio complete control over De Havilland's career until she agreed to perform seven years' worth of movies that they chose for her.[89]

While De Havilland's contract could be considered pro-studio, it was not illegal on its face. In fact, De Havilland's contract was approved by the California Superior Court because she was a minor when she entered into it.[90] Even under the suspension clause, Warner could not arbitrarily extend De Havilland's contract beyond seven years; only she could invoke the suspension clause by refusing to work.[91] Ultimately, De Havilland began refusing roles she felt were beneath her after her starring role in *Gone With the Wind*.[92] Warner suspended her for a total of twenty-five weeks over the course of the contract.[93] Seven calendar years after she began service under the contract, De Havilland sued to invalidate the remaining twenty-five extension weeks as a violation of section 2855.[94]

The California Appellate Court agreed with De Havilland, offering a very pro-employee interpretation of section 2855 that remains the definitive interpretation of the statute today.[95] The first major issue was whether section 2855 limited the term of actual service or a term of simple calendar years.[96] Warner argued for the actual service interpretation from the ambiguous wording of the 1931 amendment of the original section 1980.[97] However, the court denied this argument. The original section 1980 was clearly measured in calendar years.[98] To accept Warner's interpretation would have required adding the clause "actual service" to "beyond seven years from the commencement of service under it."[99] The court noted the legislature failed to add the clause "actual service," and refused to infer a major policy change into the statute without a more clear statement from the legislature.[100]

The second issue was whether section 2855's protections could be waived by the employee. Warner argued that De Havilland's contract only extended beyond seven years because she refused to work, asserting that she should be estopped from now challenging the suspension clause that she herself invoked.[101] The court also rejected this contention, finding section 2855's employee protections could not be waived by private agreement.[102] California law prevents individuals from waiving the protections of laws passed for the public benefit.[103] The court found section 2855's one-sided protection of employees to be strong evidence of its public policy purpose.[104] The welfare of workers on personal services contracts, on which the country depends, is of great interest to the community.[105] As an employee becomes more skilled and experienced, he should have the ability to "employ his abilities to the best advantage and for the highest obtainable compensation."[106] Moreover, the court noted that a contrary rule would be unworkable.[107] Any employee who signs a contract for longer than seven years could be said to have waived the right to leave the contract after seven years.[108] The court concluded, "[i]t could scarcely have been the intentions of the Legislature to protect employees from the consequences of their improvident contracts and still leave them free to throw away the benefits conferred upon them."[109]

Following the *De Haviland* decision, the growth of the entertainment unions[110] and an antitrust suit against the studios, the old studio system broke up and stars began signing lucrative movie deals.[111] Because stars could become free agents after they became famous, actors began negotiating for percentages of movie profits and salaries soared.[112]

Recently, the focus of section 2855 has shifted to the music industry. Today's record companies resemble the old movie studios in many ways, with only a few powerful record companies and the use of long restrictive contracts.[113] Recording artists began challenging industry standard contracts that required the production of a number of records that could never be completed in seven years.[114] As an early response to these suits, record labels offered to renegotiate contracts in exchange for larger cash advances rather than risk losing an act outright.[115] In addition, labels would structure these renegotiations to give the impression, questionable in reality, that the new contract restarted the seven-year clock or was governed by New York law despite being signed in California.[116]

In 1985, the Recording Industry Association of America began lobbying the California legislature for an amendment covering record contracts.[117] The RIAA claimed that the record company's investment in an artist could not reasonably be expected to pay off until the fourth record.[118] If artists could break a contract after seven years without delivering the promised number of records, the music industry's financial model would become unsound.[119] In response to the RIAA's complaints, the California legislature passed section 2855 (b), limiting the applicability of the seven-year limit to musicians.[120] Section 2855 (b) continues to be a volatile subject, with musicians attempting both to challenge the statute in court and petition the legislature for relief.[121]

Largely ignored in the controversy over section 2855 (b) is the potential application of section 2855 (a) to professional sports. The NHL player rights system also shares many of the attributes of the old movie studio system. Young players become property of teams at a very young age through the use of the amateur player draft. Drafted players are not only limited in bargaining power as young unproven players, but they also can only negotiate with one team and only up to predetermined entry-level salary limits. The restricted free agent system is similar to the option clause in *De Haviland*, where a player cannot change teams unless his former team agrees not to match his contract offer. The prima facie application of section 2855 to NHL players under California law will be considered further in this section. The distinction between the studio system and the NHL free agent system, namely the preemptive power of federal labor statutes, will be discussed further in Part III.

The application of section 2855 to eight-year NHL contracts is uncomplicated. The NHL standard players' contract is a personal services contract under California law.[122] There is nothing about the sports context that precludes application of the seven-year limit.[123] An eight-year contract violates the seven-year limit of section 2855 on its face. That said, an NHL contract that purports to extend beyond seven years would nonetheless be enforceable through the seventh year.[124] Thus, when challenging an eight-year contracts, section 2855 applies but would only be available to invalidate the final season.[125]

The application of section 2855 becomes more ambiguous when applied to players who have never experienced unrestricted free agency. These players fall into two categories, though they are similar in many respects: (1) players who have resigned multiple contracts while never reaching any type of free agency, and (2) players who have been under contract or limited by restricted free agency for at least seven years. For example, Drew Doughty typifies the second group of players. Doughty was drafted by the Los Angeles Kings second overall in the 2008 amateur draft and began playing with the Kings immediately.[126] Doughty was named to the NHL All-Rookie team his first season and was a finalist for the league's best defenseman award in his second season.[127] Following the end of his third season, Doughty and the Kings could not reach a deal. The Kings wanted to pay Doughty like a young player with no other options; Doughty wanted to be paid like a star player.[128] After missing much of training camp, Doughty signed an eight-year, fifty-six million dollar contract.[129]

The question is, when Doughty completes the fourth season of his new contract in June 2015, could he challenge his contract under section 2855? On one hand, Doughty has never been completely free from his contractual relationship with the Kings. In *De Haviland*, the court suggested section 2855 requires an employee to be free to seek his "best advantage and [] highest obtainable compensation.[130] On the other hand, an unforgiving standard might prevent an employee and employer entering into a mutually advantageous extension because the employer could not guarantee the employee would choose to perform after seven years. When a performer intends to renegotiate his contract to reflect his market value, often the only give-back the performer has is more service time.[131] For example, a long term deal might have been in both Doughty's and the Kings' best interests, because the Kings were willing to pay a premium to sign a star to a long term deal. If the Kings thought that Doughty could leave after four years and upset their team balance, they might have offered less money for those four years.

The proper treatment of midterm contract extension under section 2855 is unsettled. In *Manchester v. Arista Records, Inc.*, Melissa Manchester sued to terminate her record contract in 1980.[132] Manchester signed her first contract in 1973 and her second contract in 1976.[133] She argued that the two contracts should be treated as a single employment for the purpose of section 2855.[134] The court rejected this argument, finding it too restrictive on the employment relationship.[135] A per-se rule treating any contract extension under the same seven-year limit would prevent the employer and employee from entering a new beneficial agreement until all obligations of the first agreement were completed.[136] Instead, the court applied an individual analysis, based on an examination of the policy behind section 2855.[137]

If a contract extension was intended to circumvent section 2855, it would be treated as one contract with the original.[138] If, instead, the new contract was a new bargain, completed toward the end of the first contract, it would be treated a new contract under section 2855.[139] The court found Manchester's second contract was a new bargain because it contained a number of different conditions, it was supported by different consideration, and it was signed after partial performance of the original contract.

A second interpretation of the midterm extension comes from *De La Hoya v. Top Rank, Inc.*[140] Boxer Oscar De La Hoya signed an initial five-year contract in 1992, which was extended by a variety of additional contracts until at least 2003.[141] These extensions were periodically signed to coincide with separate contracts between Top Rank and pay-per-view television provider HBO.[142] De La Hoya also received improved terms over the life of the contractual relationship.[143] Thus, the extensions signed by De La Hoya were signed after partial performance, for improved compensation, and signed in order to facilitate a related contract that benefited both De La Hoya and Top Rank. Under *Manchester*, these extensions would likely have been independent contracts, making section 2855 inapplicable.

Instead, the court adopted a per-se rule where all contracts between the same parties are treated as one contract for the purpose of section 2855.[144] The seven-year limit does not restart until "the employee is free from any existing contract, able to consider competitive offers and able to negotiate for his true value in the marketplace."[145] While the court noted that De La Hoya and Top Rank treated their contract as one continuous eight-year relationship, it relied more heavily on legislative history since *Manchester*.[146] At the same time that the California legislature added section 2855 (b), it considered adding a section 2855 (c) applying to mid-contract extensions.[147] The proposal would have treated a superseding agreement, entered into by the same parties during an original contract, as a new contract for the purpose of section 2855 (a).[148] The court focused on two aspects of the legislative hearings: (1) the legislators clearly believed the *De Haviland* standard prohibited more than seven years of continual service without a break, and (2) the legislature did not amend the statute to change that rule.[149]

Examining these two decisions, the absolute rule of *De La Hoya* is more consistent with section 2855 policy as described in *De Haviland*. One of the aims of the seven-year limit is to impair an employee's ability to enter permanent and secure employment relationships.[150] Under this standard, employees have a right to unrestricted free agency in the employment market at least once every seven years. Inherent in this right is the understanding that superseding contracts signed while an employee is still bound to the employer are signed under some duress.[151] The employer has a power advantage in the employment relationship that infects the midterm negotiation because the employee is not free to seek other employment. Moreover, *De Haviland* broadly interprets the non-waivable feature of section 2855. When the *Manchester* court treated the 1976 agreement as a new contract, it functionally allowed Manchester to waive her right to be a free agent within seven years of the original 1973 agreement. The *Manchester* court is certainly right that forcing an employer to wait until a complete break in service before negotiating a new contract with an employee is a substantial restriction on the right to contract.

Yet, that restriction was inherent in *De Haviland* and should only be amended, if at all, by the legislature. Applying *De La Hoya* to the two sets of NHL players under consideration, it is likely that both of their contracts would be subject to section 2855. For players who have resigned with the same team without ever becoming a restricted free agent, their contracts would all be treated as a continual employment for section 2855. These players are in the same situation as De La Hoya, but with the added restriction that they often could not have become unrestricted free agents had they allowed their original contract to expire, making their midterm extension especially coercive.

For players like Drew Doughty, who became a restricted free agent before resigning with the same team, the result is less clear. The analysis depends on an evaluation of the restraint created by NHL restricted free agency. In one respect, players are free to negotiate with other teams to determine their fair market value. On the other hand, players are not truly in the market because competing teams know that the player will either be reclaimed by his former team, or force the new team to pay an additional price in future draft picks. A free agent subject to some draft pick equalization may be sufficiently free to restart the seven years under *De Haviland,* especially with concerns about the function of a professional sports league. However, the ability of a player's former team to match any free agent offer from a competing team creates such a chilling effect that NHL restricted free agency can not satisfy *De La Hoya*.[152]

While the law is still unsettled, the *De La Hoya* interpretation of midterm contracts extensions better effectuates the policy behind section 2855, as announced in *De Haviland*. Applying this interpretation, NHL players who have been under contract with California teams for seven years without a period of unrestricted free agency meet the prima facie case to have their contracts invalidated under section 2855. The next Part considers the application of federal labor preemption to this analysis.

Part III

The most likely defense for the three California teams to section 2855 actions is the governance of the employment relationship by federal labor law. Section 2855's seven-year limit has never been applied to a unionized employee. Yet, section 2855 cannot be inapplicable just because the employee joined a labor union, because section 2855 is a non-waivable right.[153] The Supremacy Clause of the U.S. Constitution allows Congress to preempt state law.[154] In this area, there are two federal statutes that could potentially be used to preempt state employment protections.

A. National Labor Relations Act

The National Labor Relations Act (NLRA) is silent on preemption, but the Supreme Court broadly interpreted NLRA preemption to cover two areas.[155] In *San Diego Building Trades Council v. Garmon*, a California court enjoined a union from peacefully picketing a business urging its employees to unionize.[156] The California courts accepted jurisdiction after the National Labor Relations Board (NLRB) refused.[157] The Supreme Court reversed, holding that the breadth of regulatory power entrusted to the NLRB by Congress must be left to the NLRB, even if the Board does not pursue charges.[158] The resulting *Garmon* preemption doctrine applies to state laws regulating conduct that is arguably protected or prohibited by the NLRA.[159] *Garmon* preemption applies regardless of the

content of the state law, meaning that no policy conflict is required, just a conflict in the coverage of the laws.[160]

In order for section 2855 to be *Garmon* preempted, it must regulate conduct arguably protected or prohibited by the NLRA. The strongest argument for *Garmon* preemption is that section 2855 interferes with the mandatory subjects of bargaining that define the employment relationship.[161] The NLRA obligates both the union and the employer to negotiate in good faith over these mandatory subjects: "wages, hours, and other terms and conditions of employment."[162] The concept of mandatory subjects is important because they are the only subjects over which either side may insist; insisting in the labor context means to cause a work stoppage.[163] At first glance, the eight-year maximum contract rule appears to be a mandatory subject, particularly given the relationship between contract length and salary under the NHL salary cap.[164] This argument is reinforced by the NHL's insistence on a contract term limit during the 2012-13 lockout, with NHL deputy commissioner Bill Daly calling it "the hill we will die on" in negotiations.[165] If maximum contract length is a mandatory subject of bargaining between the NHL and the NHLPA, then the section 2855 limit regulates conduct that is arguably protected by the NLRA.

This argument, however, extends *Garmon* preemption too far. The original *Garmon* court recognized that even with a broad preemption doctrine, there would be areas of peripheral concern to the NLRA that would be left to local regulation.[166] The purpose of the NLRA is to protect certain rights of employees and to encourage good-faith bargaining between employers and employees.[167] While section 2855 may restrict the content of certain negotiations, it does not conflict with any of the employee rights established by or unfair labor practices prohibited by the NLRA.[168] The Supreme Court has approved of state regulation affecting mandatory subjects of bargaining more directly than section 2855. For example, the Court upheld a Maine statute requiring a one-time severance payment in the event of a plant closing.[169] Under this line of cases, section 2855 is a minimum employment standard available to all employees regardless of union status. To the extent California means to enforce minimum standards for all employees, it raises no issue under *Garmon*.[170]

The second type of NLRA preemption was established in *International Association of Machinists v. Wisconsin Employment Relations Commission*.[171] Following the expiration of the collective bargaining unit, the union engaged in a collective refusal to work overtime.[172] The employer filed complaints both with the NLRB and with the Wisconsin Employment Relations Commission.[173] After the NLRB refused jurisdiction, the Wisconsin Commission concluded that the concerted action did not violate the NLRA, and thus, state law was not preempted.[174] The Commission proceeded to enjoin the collective action under state law.[175] The Supreme Court reversed, holding that state regulation of self-help remedies left available by Congress would frustrate the policy of the NLRA.[176] The resulting *Machinists'* preemption doctrine prohibits states from regulating in the zone of activity that Congress meant to be left to the free play of economic forces.[177]

The prime example of *Machinists* preemption involves the state regulation of economic weapons such as replacement workers and work slowdowns.[178] Thus, the argument that section 2855 is *Machinists* preempted would rely on the effect of section 2855 on the bargaining power between the parties. In one respect, the right to contractual freedom is an economic weapon that players can use against owners to receive higher contracts. On a broader level, the imposition of the seven-year limit to NHL restricted free agency would be a major blow to the NHL. NHL teams rely on restricted free agency to maintain team continuity and suppress player salaries. Thus, section 2855 disrupts the "intentional balance" struck by Congress in the NLRA system to allow unions and employers to advance their respective interests.[179]

This argument is unpersuasive for much the same reason as the *Garmon* argument. As a practical matter, it would seem odd if a California statute that predated the NHL CBA was now preempted for upsetting the NHL bargaining relationship. In addition, the seven-year limit seems to affect the bargaining relationship between the players and the teams, rather than between the teams and the union. Individual negotiation between employers and employees is not part of the classic negotiation model, and the employer and union must first agree to allow individual contracts. Interrupting this non-standard aspect of bargaining seems insufficient to cause preemption.[180] While it is true that a seven-year limit would be difficult on the structure of restricted free agency, the NHL would still be free to respond to this shift of bargaining power by using its own economic weapons to find another acceptable balance.[181]

On a more doctrinal level, the Court has been reluctant to infer Congressional intent to preempt state law, particularly under *Machinists* preemption for indirect intrusions into the collective bargaining relationship.[182] *Machinists* preemption does not apply to local establishment of substantive employment terms,[183] nor does it preempt minimum state labor standard.[184] Since section 2855 applies to all employees, it seems to fit both exemptions. For example, in *Contract Services Network v. Aubry*, an employer challenged California Labor Code section 3700 requiring that employers contribute to state workers' compensation and unemployment funds.[185] The employer claimed that the required payment interposed the state into the bargaining relationship and shifted the intended Congressional balance toward the union.[186] The Ninth Circuit disagreed, holding that local minimum employee standards are consistent with Congressional intent regardless of incidental effect on the bargaining relationship.[187]

B. Section 301 of the Labor Management Relations Act

In 1944, as part of the Labor Management Relations Act, Congress passed section 301 creating federal jurisdiction over claims for the breach of a collective bargaining agreement.[188] While on its face section 301 is simply a jurisdictional statute, the Supreme Court found that section 301 authorized the federal courts to create a uniform common law of CBA interpretation.[189] Though section 301 does not have an explicit preemption clause, the Court interpreted Congress's goal of establishing uniform federal labor doctrine required the preemption of state contract law.[190] The breadth of section 301's preemptive force has grown from breach of CBA claims to encompass some state law claims that are "inextricably intertwined" with the CBA.[191] Section 301 has two roles that are relevant to evaluate section 2855: (1) preemption of state law claims, and (2) enforcement of arbitration agreements in CBAs.[192]

In *Allis-Chalmers Corp. v. Lueck*, the Supreme Court established the modern reach of section 301 preemption doctrine.[193] Lueck was a unionized employee who sued his employer for bad-faith administration of a disability plan under Wisconsin state tort law.[194] The Wisconsin Supreme Court held that Lueck's claim was not preempted, because under Wisconsin law, the tort of bad-faith is distinct from a breach of contract claim, even if the tort duty arose from the contract.[195] The Supreme Court reversed, holding that section 301 preempts state law causes of action that require interpretation of the CBA.[196] In this case, the meaning of good-faith depended on that term's meaning in the labor contract.[197]

While the preemptive rule of *Lueck* is broader than appears on the face of section 301, the Court carefully limited the doctrine in an important way. Section 301 does not allow parties to a private agreement to "contract for what is illegal under state law."[198] Section 301 preemption does not apply to non-waiveable state law rights that exist independently from a collective bargaining agreement.[199] Moreover, because section 301 preemption does not concern the substance of state laws, the fact that a CBA provides a remedy for conduct that also violates state law does not result in preemption[200] For example, in *Saucedo v. Felbro, Inc.*, Saucedo sued his employer for disability discrimination under California state law following his termination.[201] The court found that the state statute was not preempted by section 301 because it provided a non-negotiable, independent state-law right.[202] This state right was enforceable despite the availability of recourse for disability discrimination under the CBA.[203]

Under this standard, it would be difficult to argue that section 301 preempts section 2855 for players who have been under contract for seven years. Section 2855 does not depend on the CBA, nor does it require any interpretation of it. All that is necessary is the existence of an employment relationship, a fact that is clear on the face of the standard players' contract.[204] In this way, a player's claim would be almost exactly like that in *Saucedo*: an employee suing under a non-waivable independent California statute requiring proof of an employment relationship for a period of time.[205]

This issue changes substantially when considering the third category of players, those who have become restricted free agents during the course of their seven-year employment. The argument that these players were subject to section 2855's seven-year limit depended on the limiting nature of restrictive free agency. The NHL's restricted free agency system is contained in the standard players' contract only by reference.[206] In this case, the analysis resembles the case of *Lueck* much more closely. The player would be required to show that the status 'restricted free agent' is substantially similar to a full employment relationship to satisfy the requirements of section 2855. For this reason, that player's claim would require interpretation of the CBA and would likely be preempted by section 301.

The second way section 301 is relevant to the application of 2855 is the strong federal policy of enforcing arbitration agreements when interpreting CBAs.[207] The broad scope of section 301 preemption reflects the favored role of arbitration in our "system of industrial self-government."[208] However, claims that are not preempted may nevertheless be subject to arbitration if the parties "clearly and unmistakably agree."[209] Federal policy dictates that ambiguous arbitration agreements are to be resolved in favor of coverage.[210] While arbitrators are bound by federal and state law, an arbitrator would not have the same deference to California law and policy that would be found in a California court.[211] Federal law prohibits courts from reviewing arbitration awards either for errors of law or interpretations that draw their essence from the CBA.[212] Thus, it is possible that California's section 2855 policy could be subverted, even if not preempted, were it subject to arbitration under the NHL CBA. Moreover, if a player's section 2855 claim is subject to arbitration, the player would lose the ability to force resolution of his claim if the players' association did not want the issue decided for tactical reasons.[213]

The NHL CBA contains two clauses that might potentially bind a player's section 2855 claims to arbitration. First, in Article 17 on grievance and arbitration procedures: "A 'Grievance' is any dispute involving the interpretation or application of, or compliance with, any provision of this Agreement, including any SPC. All Grievances will be resolved exclusively in accordance with the [Arbitration] procedure set forth in this Article."[214] Second, in the standard players' contract, set forth in Exhibit 1 of the CBA: "The Club and the Player further agree that in case of dispute between them, except as to the compensation to be paid to the Player on a new SPC, the dispute shall be

referred [to Arbitration]."[215] On one hand, a section 2855 claim is a "dispute" between the player and his team regarding the applicability of the player's contract. On this reading, the claim would be subject to arbitration.

However, this reading of the term dispute is unpersuasive, even in light of the federal policy favoring arbitration. The existence of a binding arbitration clause regarding CBA disputes does not foreclose state court adjudication of non-waivable state rights.[216] Moreover, California may not refuse to enforce section 2855 simply because the NHL CBA contains an arbitration clause; it can do so only if the parties clearly and unmistakably agreed to arbitrate that specific claim.[217] The fact that these general CBA terms do not implicate state law rights is best shown by comparison. In *Coleman v. Southern Wine and Spirit of California, Inc.*, the parties' arbitration agreement provided:

> It is the desire of both parties to this Agreement that disputes and grievances arising hereunder involving interpretation or application of the terms of this Agreement, *including any statutory or common law claims of sex, race, age, disability or other prohibited discrimination*, shall be settled amicably or if necessary, by final and binding arbitration as set forth herein.[218]

The court in *Coleman* correctly found that this language satisfied the "clearly and unmistakably agree" standard set out by the Supreme Court for the inclusion of non-preempted employee claims in the arbitration agreement.[219] By comparison, the NHL CBA language is noticeably void of any reference to state or federal employee rights. For this reason, the NHL CBA's arbitration language will be insufficient to divest California courts of jurisdiction to adjudicate claims under section 2855.

Conclusion

The objective of this article was to evaluate the possible claims of certain NHL players in California state court for a declaratory judgment to invalidate their contracts. For that purpose, there were three distinct groups of relevant players. The first group has completed seven years of an eight-year contract for the same team. The second group has played for the same employer for seven years under multiple overlapping contracts. The third group has played for the same team under multiple contracts with an intervening break of restricted free agency. After analyzing the claims of these players and the possible preemption of state law under both the NLRA and section 301 of the Labor Management Relations Act, this article has concluded that all three groups of players have cognizable claims under California law, but the third group's section 2855 claims would most likely be preempted by section 301.

In conclusion, there are a number of brief issues that remain to be considered in this area. First, there are complications relating to choice of law and venue that were beyond the scope of this article.

Despite the fact that the NHL CBA and standard players contract contain no choice of law provision,[220] the signing of a contract outside of California or the trading of a player either to or from one of the California teams creates an extra step of analysis.[221]

Second, as a practical concern, a claim of this type would be difficult to bring during the NHL off-season. While it appears that the teams' federal preemption defense is largely non-meritorious, it is not a settled area of law. It is very unlikely that a player could get relief of this kind without a full hearing of the issues. It is also unlikely that a player would be willing or able to challenge this contract prospectively while playing in the NHL. It would likely be necessary that a player sit out a season or two in order to pursue this claim, a resolution that is unlikely though not impossible.[222]

Finally, the NHL CBA contains a no tampering provision, preventing teams from negotiating with players under a CBA-approved players' contract.[223] If a player successfully invalidated his contract under state law, but the owners all agreed not to negotiate with that player, a very interesting situation would result. On one hand, the owners appear to be violating federal antitrust laws by engaging in a group boycott. On the other hand, the owners may be within the non-statutory labor exemption. On this theory, the owners would be exempt from antitrust law because they would be enforcing the no tampering provision that was arm's-length negotiated into the CBA. This example would challenge the contours of the antitrust labor exemption in sports, but the players seem to have the stronger argument. To satisfy the exemption, the owners would be required to show why a contract that comports with the rules of the CBA, but is invalidated by California law, still satisfies the language of the no-tampering provision.

Endnotes

1. McCourt v. Cal. Sports, Inc, 600 F.2d 1193, 1195-96 (6th Cir 1979).
2. *Id.* at 1196.
3. *Id.*
4. *Id.* at 1196, 1205.
5. *Id.* at 1196.
6. *Id.* at 1203. Prior to appeal to the Supreme Court, the parties settled and McCourt remained with the Red Wings. Bill Dow, *Remembering Former Detroit Red Wing Dale McCourt*, Detroit Athletic Blog (Dec 4, 2009), http://blog.detroitathletic.com/2009/12/04/remembering-former-detroit-red-wing-dale-mccourt/.
7. McCourt v. Cal. Sports, Inc., 460 F. Supp. 904, 907 (E.D. Mich. 1978) ("Bylaw 9A cannot be justified by any legitimate business purpose to achieve the NHL's announced goal of maintaining competitive balance. It inhibits and deters teams from signing free agents,

decreases a player's bargaining power in negotiations, denies players the right to sell their services in a free and open market, and it depresses salaries more than if competitive bidding were allowed.").

8. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir 1976) (citing the NFL's three justifications for the Rozelle Rule, similar in most respects to the NHL's equalization payment: (1) the Rozelle Rule prevents star players from flocking to cities with natural advantages such as larger economic bases, winning teams, warmer climates, and greater media opportunities, thereby adversely affecting the league's competitive balance, (2) the Rozelle Rule is necessary to protect the clubs' investment in scouting expenses and player developments costs, and (3) that elimination of the Rozelle Rule would lead to increased player movement and a concomitant reduction in player continuity; and that the quality of play in the NFL would thus suffer, leading to reduced spectator interest, and financial detriment both to the clubs and the players.").

9. *See* Paul D. Staudohar, *The Hockey Lockout of 2004-05*, Monthly Lab. Rev. 27 (Dec. 2005). The salary cap was tied to a set percentage of league revenue that would be allotted to the players. *Id.* The new agreement created low maximum salaries for entry level contracts, generally covering a player's first three seasons in the league. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, July 22, 2005, at 23-24.

10. Staudohar, *supra* note 9, at 27.

11. *Id.* at 24. Unrestricted free agency means just that, his ability to move to a new team is unrestricted. This is contrasted with restricted free agency, where a player can move to a new team, but his former team likely gets some form of compensation in return or the right to match the terms of the new contract.

12. *Id.* at 27, 29.

13. *See* Russell McKenzie, *NHL: How Long-Term Contracts are Killing Teams*, Bleacher Report (Oct. 27, 2010), http://bleacherreport.com/articles/503288-money-money-money-how-long-term-contracts-are-killing-nhl-teams 14 Kevin Allen, *NHL Contract Rules Could Lead to More Sign-and-Trades*, USA Today (Dec. 20, 2012), http://www.usatoday.com/story/sports/nhl/columnist/allen/2012/12/20/nhl-contract-rules-proposal-column/1782011/.

15. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 285. *See e.g.*, *Raptors Sign-and-Trade Chris Bosh to Heat*, Inside Hoops (July 9, 2010), http://www.insidehoops.com/blog/?p=6189.

16. If the NHL moves to a "sign-and-trade" system, the effect will likely be more restrictive on player salaries than the NBA system. The NBA collective bargaining agreement has a maximum player salary depending on the number of years that player has been in the league. But with so few players needed to have a successful team, maximum contracts are relatively common in the NBA. *See, e.g.*, the maximum contract signed by the Washington Wizard's John Wall, who is a good, but not exceptional player. Wall has never played in the NBA All-Star game. Kurt Helin, *It's Official, John Wall Signs $80 Million Max Deal with Wizards*, NBCSports.com (July 31, 2013), http://probasketballtalk.nbcsports.com/2013/07/31/its-official-john-wall-signs-80-million-max-deal-with-wizards/; *John Wall Player Profile*, NBA.Com (last visited Dec. 1, 2010), http://www.nba.com/playerfile/john_wall/bio/. Thus, star players involved in sign-and-trades in the NBA are not losing money by the transaction, because they will likely earn a maximum contract wherever they play. By contrast, the NHL maximum salary precludes any player from making more than twenty percent of the salary cap in the year his contract begins. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 282. Yet, because more NHL players are required for a successful team, there are currently zero players making the NHL maximum salary. The NHL's highest paid player is Shea Weber, who signed a fourteen-year, $110 million dollar deal in 2012. Josh Cooper, *Shea Weber's Final Contract Lacks No-Trade Clause*, USA Today (Sept. 5, 2012), http://usatoday30.usatoday.com/sports/hockey/nhl/predators/story/2012-09-05/shea-weber- final-contract/57610386/1. Weber could not earn more than twenty percent of the $70,200,000 salary cap, or $14,040,000 in any one season. Adam Gretz, NHL, NHLPA Announce Salary Cap Range for 2012- 13 Season, CBSSports.com (June 28, 2012), http://www.cbssports.com/nhl/eye-on- hockey/19437730/nhl-nhlpa-announce-salary-cap-range-for-2012-13-season. While Weber's $14,000,000 salary for the 2013-14 season is close to the maximum allowable salary, that number is deceiving. Weber's contract averages only $7,857,143 over the life of his fourteen-year deal. Thus, under a true maximum fourteen-year contract, Weber could have earned nearly twice as much as the deal he signed (14 years x 14 million = 196 million). This dynamic suggests that the new NHL contract length structure will restrain competition for free agents more than it does in the NBA.

17. *See* Allen, *infra* note 74 (quoting former NHL general manager Craig Button: "You are going to exactly what you see in the NBA. You will sign your player for the longer deal and you will trade for assets…[b]ut what the players really lose here is the ability to go out and really have people compete for their services. This would be a big loss for players."

18. *See* Pierre LeBrun, *Could Travis Zajac's Deal Set a Trend?*, ESPN.com (Jan. 16, 2013), http://espn.go.com/blog/nhl/post/_/id/21391/could-travis-zajacs-deal-set-a-trend.

19. *Ducks Extend Corey Perry 8 Years*, ESPN.com (Mar. 19, 2013), http://espn.go.com/los- angeles/nhl/story/_/id/9068984/anaheim-ducks-sign-corey-perry-eight-year-extension 20 Cal. Lab. Code § 2855(a) (2009).

21. *See, e.g.*, De Haviland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225 (1944); Foxx v. Williams, 244 Cal. App. 2d 223 (1966). Section 2855 was used in the individual sports context by Oscar De La Hoya to invalidate his contract with promoter Top Rank. De La Hoya v. Top Rank, Inc., 2001 U.S. Dist. LEXIS 25816.

22. *See* James Mirtle, *Rogers Mega TV Deal to Boost NHL Salary Cap*, Globe and Mail (Nov. 27, 2013), http://www.theglobeandmail.com/sports/hockey/globe-on-hockey/mirtle-how-the-nhls-salary-cap-will-jump-10- million-in-two-years/article15627506/.

23. Paul C. Weiler et al., Sports and the Law 128 (Thomson Reuters 4th ed. 2011).

24. Subcommittee on the Study of Monopoly Power of the Committee of the Judiciary, 82d Congress, 2d Session, Report on Organized Baseball (Washington D.C., 1952) (Celler Report) at 111, *available at* http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=62:1952-celler-hearings-report- to-the-committee-of-the-whole&catid=37:1900-1960&Itemid=47.

25. Weiler, *supra* note 23, at 128.

26. Celler Report, *supra* note 24, at 111.

27. *Id.*

28. *Id.* at 112.

29. Weiler, *supra* note 23, at 128 (describing the reserve clause in the contract of Chicago White Sox first baseman Hal Chase, *see* Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6 (1914)).

30. *Id.*

31. *Id.*

32. *Id.* For more information on the antitrust implications of the modern amateur draft, see Smith v. Pro Football, Inc., 593 F.2d 1173 (DC Cir 1978) (holding the amateur draft to be an illegal restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1). The analysis of *Smith* has been largely supplanted by the inclusion of the amateur draft and draft eligibility requirements in sports league collective bargaining agreements. *See* Clarett v. Na. Football League, 369 F.3d 124 (2d Cir 2004); NHL Players' Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir 2005).

33. *See e.g.*, Celler Report, *supra* note 24, at 112 ("Adverse court decisions which denied specific performance of the uniform players contract led to frequent changes in the wording designed to give the reserve clause the indicia of an option to renew. The basic principle of the reserve clause, however, remains the same."); *Chase*, 149 N.Y.S. 6 (1914) (refusing to issue injunction sought by American League team to prevent Chase from signing with the rival Federal League); Flood v. Kuhn, 407 U.S. 258 (1972) (following longstanding precedent finding that the baseball reserve system is exempt from antitrust challenge).

34. Weiler, *supra* note 23, at 135. In *Federal Baseball Club, Inc v. National League of Professional Baseball Clubs*, the Supreme Court unanimously held that baseball exhibitions were a purely state matter, despite the need for the interstate travel of visiting teams, meaning that they were not within the reach of the Sherman Act. 259 U.S. 200 (1922). While the Supreme Court's general interpretation of Congress' Commerce Power has expanded significantly since that time (*e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)), the Court has continued to respect the *Federal Baseball* rule. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); *Flood*, 407 U.S. 258 (1972).

35. *See Flood*, 407 U.S. at 284 (specifically limiting the *Federal Baseball* rule to baseball and stating that "[i]f there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.").

36. *See* Lionel S. Sobel, *The Emancipation of Professional Athletes*, 3 W. St. U. L. Rev. 185 (1976). Chris Willis, The Man Who Built the National Football League 136-37 (Rowman & Littlefield 2010). James Quirk & Rodney D. Fort, Pay Dirt: The Business of Professional Team Sports 187 (Princeton University Press 1997).

39. Phila. World Hockey Club v. Phila. Hockey Club, 351 F. Supp. 462, 475 (E.D. Pa. 1972).

40. *See id*. *See also* Scott Surgent, The Complete Historical and Statistical Reference to the World Hockey Association 1972-1979 3 (2004).

41. The expansion hockey league was the World Hockey Association (WHA). The WHA began playing in 1972 and dissolved in 1979 when several WHA teams were accepted into the NHL. *See generally* Surgent, *supra* note 40; *World Hockey Association History and Statistics*, HockeyDB.com, http://www.hockeydb.com/ihdb/stats/leagues/270.html. The NFL was challenged by the American Football League from 1960 until the leagues merged in 1969. B. Duane Cross, *The AFL: A Football Legacy*, CNNSL.com (Jan 22, 2001), http://sportsillustrated.cnn.com/football/news/2001/01/22/afl_history_2/. The NBA competed with the American Basketball Association between 1967-76 when the NBA absorbed four teams from the crumbling ABA. Terry Pluto, Loose Balls: The Short, Wild Life of the American Basketball Association (Simon & Schuster 2007).

42. *See e.g.*, Phila. World Hockey Club v. Phila. Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972) (enjoining the enforcement of the reserve clauses against players moving to the World Hockey Association).

43. For example, in Lemat Corp. v. Barry, when the Oakland Oaks of the upstart American Basketball Association lured player William Barry away from the San Francisco Warriors of the National Basketball Association, they agreed to indemnify him for any losses resulting from his move and subsequent litigation. 275 Cal. App. 2d 671, 242 (1969).

44. *Compare* Dallas Cowboys Football Club, Inc v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961) (finding that James Harris's contract had not expired after he chose not to play for the Dallas Cowboys during his option year before signing with the rival Dallas Texans, essentially making the team's option perpetual) *with Barry*, 275 Cal. App. 2d 671 (1969) (finding Richard Barry's contract concluded after he refused to resign with the San Francisco Warriors and sat out a season, making him free to begin playing with the rival Oakland Oaks), 45 351 F. Supp. 462 (E.D. Penn. 1972).

46. *Sobel*, *supra* note 36, at 194.

47. *Id*.

48. *Id.* at 195 (citing Boston Professional Hockey Association v. Cheevers, 348 F. Supp. 261 (D. Mass 1972); Nassau Sports v. Hampson, 355 F. Supp. 733 (D. Miss. 1972)).

49. *Sobel*, *supra* note 36, at 196.

50. *Philadelphia Hockey*, 351 F. Supp. at 517-18.

51. *Id.* at 519.

52. *Sobel*, *supra* note 36, at 186, 197 (citing National Hockey League Standard Players Contract (1974 Form) cl. 17; National Hockey League By-law § 9A).

53. *See e.g.*, Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976) (holding antitrust labor exemption to be inapplicable where provision does not result from bona-fide arm's-length bargaining); Major League Baseball Players Ass'n v. Twenty Six Major League Baseball Clubs, Grievance No. 88-1 (1990) (Nicolau, Arb.) (finding that MLB owners colluded to suppress free agency between 1985–87); *In re* Arbitration of Messersmith, Grievance No. 75-27, Decision No. 29 (1975) (finding the MLB reserve clause was not perpetual and allowing free agency in baseball); Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) (denying the NBA's motion for summary judgment on plaintiff's Federal antitrust claims).

54. There are periodically additional selections beyond the one selection each round added when a team loses the rights to a previously drafted player. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 16. Prior to the 2004-05 lockout, the draft consisted of nine rounds. Staudohar, *supra* note 9, at 27.

55. More specifically, players are eligible to be drafted unless: (1) they are on the reserve list of another club, (2) they have already been drafted twice, (3) they have already played in the NHL and become a free agent, or (4) they reach age 21 (22 for players who have not played in North America) and have not been selected in a prior draft. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 16.

56. Important factors are age of the player, whether the player is playing in a junior program, college, or Europe, and whether the team makes an initial contract offer. *See Id.* at 17-21. Players who do not sign a contract while on a reserve list, or who otherwise pass outside of draft eligibility, become unrestricted free agents and can sign with any team. *Id.* at 29-30. Some players may remain eligible to be drafted a second time. *See* discussion *supra.*

57. Staudohar, *supra* note 9, at 24.

58. *Id.* at 25. Players who sign their entry level contract between eighteen and twenty-one years old sign a three-year contract, those who sign at twenty-two or twenty-three sign a two-year contract, and those who sign at twenty-four sign a one-year deal. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 23. Players who sign their first contracts after the age of twenty-four are generally exempt from the entry level contract system, though there is an exception for foreign players, who are still subject to entry-level contract limits until age twenty-eight. *Id.*

59. *Id.* at 25, 326-31. In addition, entry-level contracts are automatically "two-way contracts," meaning the player can be sent down to the minor leagues at a reduced salary, usually less than $100,000. *Id.* at 25-26.

60. Sidney Crosby Player Notes, NHL.com (last visited Dec. 1, 2013), http://www.nhl.com/ice/player.htm? id=8471675&view=notes.

61. Sidney Crosby Contract History, Capgeek.com (last visited Dec. 1, 2013), http://capgeek.com/player/476.

62. The description that follows is a somewhat simplified version of the NHL free agency system. The information in the text will be

sufficient for the purpose of this article. More specific information will be contained in the footnotes.

63. *Id.* at 28 (describing Group 3 free agents). NHL players can also become unrestricted free agents by (1) having completed 10 professional seasons with the final season of their contract paying less than the NHL league minimum and requesting to become an unrestricted free agent, (2) by being twenty-five years old, having completed three professional seasons, and having played fewer than eighty NHL games (twenty-eight games for a goaltender), (3) by being a restricted free agent who does not receive a qualifying offer as described *infra,* (4) having their former team walk away from a salary arbitration award as described *infra,* or (5) as noted earlier through draft-related free agency. *Id.* at 28-30.

64. *Id.*

65. *Id.* at 30.

66. *Id.* at 30, 35. A qualifying offer is an offer for a contract the following season with a salary between 100-110% of the player's prior contract, depending on the salary of the prior contract. *Id.* at 30-31. If the team fails to make a qualifying offer, the player becomes an unrestricted free agent. *Id.* at 31. Note that a restricted free agent can lose the right to sign with another team if either the player or team file for salary arbitration. *Id.* at 30. For a description of the subset of restricted free agents eligible for salary arbitration, see *Id.* at 57-59. Under certain circumstances, a player can become an unrestricted free agent if a club chooses to "walk away" from the arbitrator's award. *See id.* at 69-70.

67. *Id.* at 35-36.

68. *Id.* at 35-37.

69. *Id.* at 38-39.

70. *See* Allan Muir, *Predators Complete No-Brainer by Hanging onto Weber in Nashville*, SportsIllustrated.com (July 24, 2012), http://sportsillustrated.cnn.com/2012/writers/allan_muir/07/24/shea-weber-predators/

71. *See McCourt*, 600 F.2d at 1203-04.

72. *See* Muir, *supra* note 70 (suggesting that the Nashville Predators had no choice but to match the Philadelphia Flyers offer to Shea Weber even though it was designed in financially disadvantageous terms to make it difficult for the Predators to match).

73. *See id.*; Adam Kimelman, *History of Recent Offer Sheets Presents Varied Results*, NHL.com (July 19, 2012), http://www.nhl.com/ice/news.htm?id=638232; *Avs Match Ryan O'Reilly Offer Sheet*, ESPN.com (Mar. 1, 2013), http://espn.go.com/nhl/story/_/id/9000445/.

74. Kevin Allen, *Offer Sheets Make Little Sense in Today's Salary Cap World*, USA Today (July 24, 2011), http://usatoday30.usatoday.com/sports/hockey/columnist/allen/2011-07-24-nhl-offer-sheets_n.htm ("But most general managers believe making an offer sheet is a waste of energy because they assume a rival GM just would match.").

75. Nicholas J. Cotsonika, *Collusion Question Goes Right to the Heart of NHL Lockout*, Yahoo Sports (Sept. 28, 2013), http://sports.yahoo.com/news/nhl--collusion-question-goes-right-to-the-heart-of-the-nhl-lockout.html.

76. Cal. Lab. Code § 2855(a) (2009).

77. Cal. Civ. Code § 1980 (1872). California legislators designed the law after a draft law from New York, though New York never passed this law and does not now have a similar limit on personal services contracts. Jonathan Blaufarb, Note, *The Seven-Year Itch: California Labor Code Section 2855*, 6 Hastings Comm. & Ent. L.J. 653, 656 (1984). There are currently three U.S. jurisdictions other than California with limits on the length of personal services contracts: Guam (Five years) (Comm & Bus Guam Code Ann. § 55306); North Dakota (Two years) (N.D. Cent. Code § 34-01-02); South Dakota (Two years) (S.D. Codified Laws § 60-2-6).

78. Tracy C. Gardner, Note, *Expanding the Rights of Recording Artists: An Argument to Repeal Section 2855 (b) of the California Labor Code*, 72 Brook. L. Rev. 721, 728 (2007).

79. *Id.* at 727.

80. Blaufarb, *supra* note 77, at 653.

81. *Id.* at 656.

82. Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, 116 Harv. L. Rev. 2632, 2635 (2003).

83. De Havilland's name was misspelled in the title of the reported case. In this article, the case name will be cited as reported, while other references to De Havilland's name will be spelled correctly. Blaufarb, *supra* note 77, at n. 71.

84. De Haviland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225 (1944).

85. *De Haviland*, 67 Cal. App. 2d at 228.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 229 ("[A]ccording to the contract the producer was the sole judge in such matters and she had to do as she was told.").

90. Blaufarb, *supra* note 77, at 668. *See also* Cal. Civ. Code § 36 (West 1982) ("A minor employed to render artistic or creative services may not disaffirm an otherwise valid contract on the ground that it was entered into during minority if the contract has been reviewed and approved by a county superior court.").

91. Blaufarb, *supra* note 77, at 668.

92. *Id.* at n. 74.

93. *De Haviland*, 67 Cal. App. 2d at 228-29.

94. *Id.* at 229.

95. *See* Blaufarb, *supra* note 77, at 665; *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 82, at 2634.

96. *De Haviland*, 67 Cal. App. 2d at 230.

97. *Id.* at 232 ("That the 1931 amendment of section 1980 was ineptly phrased may not be doubted.").

98. *Id.*

99. *Id.* at 231.

100. *Id.* at 232. As part of this analysis, the court also interpreted "may not" as mandatory, foreclosing the argument that California courts had discretion whether to apply section 2855 in a particular instance. *Id.*

101. *Id.* at 234.

102. *Id.* 236.

103. *Id.* at 234-35 (citing Cal. Civ. Code § 3513 ("Anyone may waive the advantage of a law intended soley for his benefit. But a law established for a public reason cannot be contravened by a private agreement.").

104. *Id.* at 235 (citing Stone v. Bancroft, 139 Cal. 78 (1903)).

105. *Id.*

106. *Id.*

107. *Id.* at 236.

108. *Id.* at 237.

109. *Id.*

110. The Screen Actors Guild union began in 1933 and signed its first contract with a studio in 1937. Gilbert Cruz, *A Brief History of the Screen Actors Guild*, Time Magazine (Dec. 18, 2008). While De Havilland was in the Guild, her contract was signed before 1937 and her union membership was not mentioned in *De Haviland*. See

Interview with Olivia de Havilland, SAGAFTRA.ORG, *available at* http://www.sagaftra.org/the-olivia-de-havilland-interview.

111. U.S. v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Gilbert Cruz, *A Brief History of the Screen Actors Guild*, TIME MAGAZINE (Dec. 18, 2008).

112. Cruz, *supra* note 110.

113. Connie Chang, *Can't Record Labels and Recording Artists All Just Get Along?: The Debate Over California Labor Code § 2855 and Its Impact on the Music Industry*, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 13, 15 (2002).

114. *See e.g.*, Foxx v. Williams, 244 Cal. App. 2d 223 (1966); Manchester v. Arista Records, Inc., 1981 U.S. Dist. LEXIS 18642; Motown Record Corp. v. Brockert, 160 Cal. App. 3d 123 (1984); Chang, *supra* note 113, at 16 ("Since no artist is able to turn out seven albums within seven years considering the restrictions put on them by the labels themselves to take two years between record releases to promote the record via tours, music videos, and television appearances, this clause is virtually impossible to fulfill within the bounds of 2855.").

115. Chang, *supra* note 113, at 18.

116. *See id*. at 18-19. *Cf.* De La Hoya v. Top Rank, Inc., 2001 U.S. Dist. LEXIS 25816 at *38.

117. *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 82, at 2636.

118. *Id.*

119. *See id. See also* Blaufarb, *supra* note 77, at 600 (suggesting that record labels require a one million dollar investment to reach the potential profit point of three to four albums). For the contrary position see Chang, *supra* note 113, at 19-20 (suggesting that recording contracts actually require artists to pay many of the costs associated with recording and promotion of records).

120. Cal. Lab. Code § 2855(b) (2009).

121. *See California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 82, at 2636-37 (describing both an attempt by Courtney Love challenging the constitutionality of 2855 (b) and lobbying attempts aimed at repealing the amendment).

122. *See* Cal. Lab. Code § 2750 ("The contract of employment is a contract by which one, who is called an employer, engages another, who is called employee, to do something for the benefit of the employer or a third person."); Foxx v. Williams, 244 Cal. App. 2d 223 (finding Foxx's contract was for personal services rather than as an independent contractor because Foxx merely performed and Williams produced and made production decisions regarding the recordings); Blaufarb, *supra* note 77, at 657 ("[personal services] will be so defined as long as the promised performance is of a personal and non-delegable character.").

123. *See* De La Hoya v. Top Rank, 2001 U.S. Dist. LEXIS 25816. Notwithstanding the discussion *infra* regarding the unionized team sports context, the point here is merely that the statute does not exclude contracts providing for athletic competitions in the way that, for example, Tennessee's Privilege Tax law specifically targets them. Tenn. Code Ann. § 67-4-1703 (2009).

124. This is the most logical reading of the statutory text, "may not be enforced against the employee beyond seven years from the commencement of service under it." Cal. Lab. Code § 2855 (a). Although, even more persuasive would be the application of the statute's second clause: "Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it." *Id.* See also Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 315 ("The Player represents and agrees that he has exceptional and unique knowledge, skill and ability as a hockey Player, the loss of which cannot be estimated with certainty and cannot be fairly or adequately compensated by damages.").

125. At this writing, there are a number of NHL contracts longer than eight years that were signed before the 2012-13 lockout and the imposition of the maximum contract length. Section 2855 is equally applicable to those contracts, though the focus of this article will be on the current CBA rules.

126. *Drew Doughty Player Profile*, ELITEPROSPECTS.COM (last visited Dec 4, 2013), http://www.eliteprospects.com/player.php?player=10430.

127. *Kings' Drew Doughty Regains Elite Status*, CBC.CA (May 24, 2012), http://www.cbc.ca/sports/hockey/nhl/kings- drew-doughty-regains-elite-status-1.1146109.

128. *Id.*

129. *Id.*

130. *De Haviland*, 67 Cal. App. 2d at 235.

131. Blaufarb, *supra* note 77, at 686.

132. 1981 U.S. Dist. LEXIS, at *5.

133. *Id.* at *1.

134. *Id.* at *18. Technically Manchester had not completed performance of either contract, but the court ruled that the first contract could not be invalidated under section 2855 because it contained a New York choice of law clause. So, Manchester could only challenge the second contract under California law. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at *19.

138. *Id.*

139. *Id.*

140. 2001 U.S. Dist. LEXIS 25816.

141. *Id.* at *34-35.

142. *Id.* at *5.

143. *Id.* at *6.

144. *Id.* at *41.

145. *Id.*

146. Id. at *36, *38-40.

147. *Id.*

148. *Id.* at 39.

149. *Id.* at 39-40.

150. Blaufarb, *supra* note 77, at 681.

151. *Id.* at 664.

152. *See* discussion *supra* notes and accompanying text.

153. *De Haviland*, 67 Cal. App. 2d at 235.

154. U.S. CONST. art VI, cl. 2.; Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429 (1998).

155. National Labor Relations Act, 29 U.S.C. §§ 151, *et seq*. (1994); Befort, *supra* note 154.

156. San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 237 (1959).

157. *Id.* at 238.

158. *Id.* at 244-45.

159. *Id.* at 244. ("When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."); Befort, *supra* note 154.

160. Befort, *supra* note 154.

161. NLRB v. Wooster Div., 356 U.S. 342, 350 (1958).

162. 29 U.S.C. § 158 (d).

163. *Id.* at 349.

164. A player's salary cap number is computed as the player's average salary over the course of the deal. Prior to the 2012-13 lockout, the NHL had several issues with teams structuring contracts to circumvent the salary cap. *See* Nat'l Hockey League v. Nat'l Hockey League Players' Ass'n, Aug 9, 2010 (Bloch, Arb.).

165. Stephen Whyno, *Contract Limit 'Hill We Will Die On' For Owners*, WashingtonTimes.com (Dec. 7, 2012), www.washingtontimes.com/blog/capitals-watch/2012/dec/7/nhl-lockout-2012-contracts-are-hill-we-will-die/.

166. *Garmon*, 359 U.S. at 243-44 ("[Federalism counsels] not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."); 167 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

168. Section 7 of the NLRA protects an employee's right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities," 29 U.S.C. 157. The unfair labor practices of both employers and labor unions are listed in 29 U.S.C § 158.

169. Befort, *supra* note 154 (citing Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987). Bargaining over the effects of a plant closing is a mandatory subject of bargaining. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981).

170. Castillo v. Toll Bros., Inc., 197 Cal. App. 4th 1172, 1207 (2011) (citing Met Life, 471 U.S. 724, 754 (1985); Southern California Edison, *supra*, 140 Cal. App. 4th 1085, 1099–1101 (2006).

171. Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm'n, 427 U.S. 132.

172. *Id.* at 134.

173. *Id.* at 135.

174. *Id.*

175. *Id.* at 135-36.

176. *Id.* at 155 (1976) ("[T]he Union's refusal to work overtime is peaceful conduct constituting activity which must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated").

177. *Id.* at 50; Befort, *supra* note 154.

178. Befort, *supra* note 154. The Supreme Court's most recent example of *Machinists* preemption involved a California law that restricted employer speech related to unionization for those employers who received public funds. Chamber of Comm. of the U.S. v. Brown, 554 U.S. 60 (2008).

179. Befort, *supra* note 154 (quoting Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 614 (1986)).

180. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 49.

181. This is what the NHL did to curb the rise in salaries in the 1990s, by locking out the players until the players accepted a salary cap. *See generally* Staudohar, *supra* note 9.

182. *See* Bldg. & Constr. Trades Council v. Assoc. Builders & Contrs., 507 U.S. 218, 224 (1993); Int'l Paper Co. v. Town of Jay, 928 F.2d 480, 484 (1st Cir. 1991); So. Cal. Edison Co. v. Public Utilities Com., 140 Cal.App.4th 1085, 1100 (2006).

183. Cal. Grocers Assn. v. City of Los Angeles, 52 Cal. 4th 177, 197 (2011) (noting that the NLRA is not a federal code of employment law).

184. Metro. Life Ins. Co. v. Mass. Travelers Ins. Co., 471 U.S. 724, 755 (1985).

185. Contract Services Network, Inc. v. Aubry, 62 F.3d 294, 298 (9th Cir. 1995).

186. *Id.* at 198.

187. *Id.*

188. 29 U.S.C. § 185 (a).

189. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

190. Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

191. Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 408 (1988).

192. Livadas v. Bradshaw, 512 U.S. 107, 122-23 (1994).

193. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

194. *Id.* at 206.

195. *Id.* at 207.

196. *Id.* at 213-14.

197. *Id.* at 218.

198. Id. at 211-12 ("Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. 6 Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.").

199. *Id.* at 211-12. The Ninth Circuit has also treated "whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA" as an additional requirement to avoid section 301 preemption. Miller v. AT & T Network Sys., 850 F.2d 543, 548 (9th Cir. 1988). Because section 2855 is sufficiently clearly stated (*De Haviland*), the added prong is unnecessary.

200. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 412-13 (1988).

201. 2007 U.S. Dist. LEXIS 90588 at *7; Cal. Gov. Code §12921.

202. *Saucedo*, 2007 U.S. Dist. LEXIS 90588 at *7.

203. *Id.* at *3. Note that federal employment disability protection was likely also available under the Americans with Disabilities Act, 42 U.S.C. § 12101. Federal employment discrimination laws also do not preempt state discrimination laws. Befort, *supra* note 154.

204. *See Livadas*, 512 U.S. at 124 ("These principles foreclose even a colorable argument that a claim under Labor Code § 203 was pre-empted here…the mere need to "look to" the collective-bargaining agreement for damages computation is no reason to hold the state-law claim defeated by § 301").

205. *See also* Williams v. NFL, 582 F.3d 863 (8th Cir. 2009) (holding that pro football players' claims under non-negotiable state employee drug testing protections were not preempted by the NFL drug testing policy contained in the CBA).

206. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 315 ("The Club and the Player severally and mutually promise and agree to be legally bound by the League Rules that affect any terms or conditions of employment of any Player and by any collective bargaining agreement that has been or may be entered into between the member Clubs of the League and the NHLPA, and by all of the terms and provisions thereof. This SPC is entered into subject to the CBA between the NHL and the NHLPA and any provisions of this SPC inconsistent with such CBA are superseded by the provisions of the CBA.").

207. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960).

208. *See Livadas*, 512 U.S. at 123 ("[Section 301 aims to prevent] parties' efforts to renege on their arbitration promises by 'relabeling' as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements."); Befort, *supra* note 154.

209. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2008) (finding a claim under the federal Age Discrimination in Employment Act subject to arbitration).

210. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

211. *See e.g.*, *Manchester*, 1981 U.S. Dist. LEXIS 18642, at *14.

212. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

213. *Pyett*, 556 U.S. at 269-70.

214. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 109.

215. *Id.* at 315.

216. *See* Miller v. AT&T Network Sys., 850 F.2d 543, 545 (9th Cir. 1988).

217. *See Livadas*, 512 U.S. at 126-28.

218. Coleman v. S. Wine & Spirit of Cal. Inc., 2011 U.S. Dist. LEXIS 84592 at *18-19 (emphasis in original).

219. *Id.* at *19.

220. *See generally* Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012. The CBA does contain an arbitration venue provision. *Id.* at 113.

221. *See, e.g.*, Radioactive, J.V. v. Manson, 153 F. Supp. 2d 462 (S.D.N.Y. 2001) (holding that New York state law applied but also abstaining under Colorado River abstention doctrine in favor of California state court action).

222. *See, e.g.*, *De Haviland*, 67 Cal. App. 2d at 985 (noting that De Havilland was still on suspension awaiting resolution of her claim before resuming her acting career); Lemat v. Barry, 275 Cal. App. 2d 671, 675 (noting that Barry sat out the 1967-68 basketball season to escape the option clause of his NBA contract).

223. Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players' Association, September 16, 2012, at 15 ("Except where otherwise permitted, no Player who is a party to an SPC with a Club shall, during the term of such SPC, enter into negotiations with another Club.").

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Ten Things Your Employment Lawyers Want to See (or Don't Want to See) When You Get an Employee Lawsuit

By Joel J. Greenwald

Employment law litigations are costly and time-consuming, however, actions can be taken to (a) prevent them and/or (b) create defenses to them. If you have an employee complaint, employment lawyers are going to want to see (or not see) the following:

1 For all cases, we want to see your employee handbook, containing a complaint procedure, and an acknowledgement form signed by the complaining employee saying they received it, knew they had to read it and abide by it. There's a defense to discrimination claims if the employee failed to utilize an existing complaint procedure. If the company first hears about the employee's issue through a court complaint, you should have the above in place.

2 For most cases, we want to see the complaining employee's hiring documentation—without comments suggesting discrimination such as "too old," "looks pregnant," "black." We do not want to see employment application questions that address protected categories. Asking for graduation years can suggest an age discrimination claim; "what language is spoken at home" could support national-origin discrimination; "are you taking medications, or do you frequently miss work due to being ill" all can support disability discrimination claims.

3 For cases claiming unpaid commissions, we want to see documents outlining how commissions are earned, how/when they are paid, what happens to unpaid commissions after an employee leaves, and any other details of commission payment as well as evidence that the complaining employee received and read the commission plan.

4 For disability leave related cases, we want to see written communication with the employee from the start of the leave seeking information from his or her doctor certifying the need for leave and its expected length, granting an amount of leave (potentially conditionally until documentation is received), and following up with the employee if/when documentation is not received.

5 For discrimination cases alleging bad actions by a manager, we want to see documentation of manager training on discrimination and harassment, along with the manager's signature on the handbook acknowledgement form. Companies may not be liable for managers who act outside the scope of their employment—but you need to be able to show that you told the manager what that scope was. Individual defendant managers who acted inappropriately can be advised to get separate counsel and distance from the company if actions appear to have been taken outside the scope of their employment.

6 For non-compete/breach of confidentiality cases where your company hired someone who worked for a competitor, we want to see that you reviewed the applicant's non-competition agreement before hiring them, were aware of any restrictions, and assigned the new employee to a position you did not believe would violate the agreement. We want to see that your confidentiality agreement advises employees not to use prior employers' confidential information.

7 For wage and hour cases, we want to see wage payment and timekeeping records, including pay stubs showing overtime wages and New York Wage Theft Prevention Act Notices.

8 For cases involving a reduction in force, we want to see documentation supporting the reason each employee was selected for layoff, along with a disparate impact analysis: did the selection method inadvertently target a protected group? For those targeted for "job elimination," we do not want to see that position filled in any short order.

9 For all terminations, we want to see documentation showing that the employee was given a real reason for the termination. While it is not necessary to give them the documentation (or even necessarily advisable), do tell your departing employees the truth. It does not have to be everything—but what is said must be accurate.

10 For any litigation where the employee's job performance will be an issue, we do not want to see performance reviews saying the employee's performance and/or production was "satisfactory" when it was far from it. Give employees honest reviews—or do not do them at all.

An ounce of prevention is truly worth a pound of cure in this arena. In consultation with your employment lawyer, you can train your managers to get it right and potentially avoid them taking improper workplace actions. You can also put in the policies and procedures you need to prevent employee lawsuits or have defenses in place should disgruntled employees try to take a stab at the company.

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This article originally appeared in the Fall 2014 issue of Inside, *published by the Corporate Counsel Section of the New York State Bar Association.*

Defense and Indemnification of Public Employees After *Lancaster*

By Jessica M. Baquet

Public employees may be exposed to liability in the performance of their duties. At common law, a public entity could not lawfully fund the defense of or indemnify its public employees in a lawsuit, even if the case arose out of the employee's official acts.[1] In the late 1970s and early 1980s, however, the state legislature enacted sections 17 and 18 of the Public Officers Law, which provide for the defense and indemnification of public employees at the state and local levels, respectively.

Both public entities and public employees have certain obligations under these statutes, which Peter Bee and James Clemons described in detail in their article "Indemnities and Immunities for Municipal Officials," published in the Winter 2014 issue of *Municipal Lawyer*.[2] In general, the public entity must fund the defense of a public employee in a lawsuit arising from his official acts and must indemnify him in the event of a settlement or adverse judgment so long as the public employee fully cooperates in his defense and fulfills the statute's procedural requirements.[3]

"What must a public employee do to fulfill his duty to cooperate? What are the public entity's obligations in the event the employee fails to cooperate? What are the consequences of a public entity's failure to withdraw an employee's defense after he refuses to cooperate?"

This article focuses on the obligation of public employees to fully cooperate in their defense. Until recently, several important questions regarding the cooperation requirement remained largely unanswered: What must a public employee do to fulfill his duty to cooperate? What are the public entity's obligations in the event the employee fails to cooperate? What are the consequences of a public entity's failure to withdraw an employee's defense after he refuses to cooperate? In *Lancaster v. Inc. Village of Freeport*,[4] the Court of Appeals shed light on these issues for the first time.

The *Lancaster* Decision

Lancaster concerned the Village of Freeport's ("Village") withdrawal of its defense of various public employees in two federal lawsuits brought against them and the Village by two private plaintiffs. These suits alleged, among other things, that the public employees had committed RICO violations and fraud. The plaintiffs demanded $8,500,000 in damages plus treble damages and attorney's fees.

The Village and the public employees were represented by separate counsel in the federal lawsuits. The Village, by its attorney, negotiated a settlement that provided for the discontinuance of the cases against it and the public employees. Although the Village was required to make a payment to the private plaintiffs as part of the settlement, the employees were not required to pay plaintiffs or to admit any wrongdoing. The plaintiffs required only that the public employees agree to refrain from criticizing the settlement.

The employees refused to agree to the foregoing terms, and, as a result, the settlement foundered with respect to the claims against them. Thereafter, the Village's Board of Trustees voted to withdraw the public employees' defense based on their failure to fulfill their duty to cooperate under Public Officers Law § 18 and Freeport Village Code § 130-6.[5]

The public employees then brought Article 78 proceedings against the Village seeking the reinstatement of their defense. The Supreme Court dismissed the proceedings, finding that the employees, had, in fact, failed to cooperate.[6] The Second Department and the Court of Appeals subsequently affirmed.[7] *Lancaster* is one of only a handful of decisions to consider whether a public employee breached the duty to cooperate under the Public Officers Law and marks the first time that the Court of Appeals has weighed in on the issue.

The *Lancaster* decision expounded upon the duty to cooperate in two important respects. First, the Court found that the failure of a public employee to accept a reasonable settlement offer constitutes a breach of the duty to cooperate.[8] Second, the Court held that a public entity's duty to defend its employees is akin to an insurer's obligation to defend its insured. As such, like an insurer, a public entity is only justified in withdrawing an employee's defense for non-cooperation where: (1) the entity acted diligently in seeking to bring about the public employee's cooperation; (2) the efforts employed by the entity were reasonably calculated to obtain the employee's cooperation; and (3) the attitude of the employee, after cooperation was sought, was one of willful and avowed obstruction.[9]

The *Lancaster* decision has significant implications for public employees and public entities alike: public employees must be aware of what they must do to fulfill

their duty to cooperate, while public entities must understand the circumstances under which they are obligated to withdraw an employee's defense for non-cooperation and the potential consequences of a failure to do so. In this regard cases construing an insured's breach of the duty to cooperate with his insurer will prove instructive.

Obligations of the Public Employee

In the insurance context, courts have noted that the duty to cooperate is premised upon the fact that an insurer cannot properly defend a lawsuit without the participation of its insured. Courts have thus held that the duty to cooperate requires an insured to provide truthful disclosure of information demanded by the insurer, to aid in securing witnesses, to forward papers related to the lawsuit to counsel, to testify at depositions and at trial and to otherwise provide all reasonable assistance necessary to enable counsel to defend the lawsuit.[10] Courts will likely find that public employees are subject to the same obligations.

Lancaster sets out another critically important element of the cooperation requirement: the duty to accept a reasonable offer of settlement. There, the Court of Appeals found that, in the face of the multi-million dollar exposure associated with continuing to litigate, the public employees' refusal to settle the lawsuits in exchange for nothing more than their agreement to refrain from criticizing the settlement was unreasonable. The Court did not, however, articulate a test to be applied in determining whether an employee's refusal to settle was unreasonable in other situations.

Insurance cases do not provide much additional insight on this point. In the most relevant case, *Cowan v. Ernest Cordelia, P.C.*, an insured refused to settle a lawsuit because the plaintiff would not agree to keep the settlement absolutely confidential.[11] The insured's purported justification for insisting on confidentiality was that, if the fact that the case settled became known, it might create the perception that he had done something wrong. He was particularly concerned about this because he was an attorney and had previously testified before the Character and Fitness Committee that he had not committed the acts that gave rise to the lawsuit. The Court found that the objections to the settlement were "phantom" and "illusory" insofar as there is no legal basis upon which a settlement that does not include an admission of wrongdoing could support a claim that the insured lied about his innocence in another proceeding. As such, the Court found that the insured failed to cooperate by "thwart[ing] the ultimate settlement of [the] lawsuit."[12]

The principle to be gleaned from *Lancaster* and *Cowan* is that the reasonableness of an employee's refusal to settle likely hinges on a balancing of: (1) the financial burden to be incurred by the public entity if litigation continues; against (2) the degree to which the employee will be injured or prejudiced by the settlement terms. While the financial exposure to the public entity may be more easily determined, the extent of injury to the employee is harder to quantify. The injury may not be monetary in nature, but might instead take the form of the relinquishment of a right or potential exposure to civil or criminal liability. If the employee can articulate a real and substantial harm that will inure to him under the settlement, it is unlikely that his refusal to settle will be considered unreasonable. The employees and insured in *Lancaster* and *Cowan* simply failed to meet that burden.

Obligations of the Public Entity

Faced with a public employee's failure to cooperate, a public entity is not simply free to withdraw the employee's defense. Instead, there are several standards that must be met, and steps the entity must take in order to ensure that the withdrawal is proper.

First, cases in both the insurance and public employment contexts make it clear that a public employee's lack of cooperation must be both material and substantial in order to warrant the withdrawal of his defense.[13] The burden of proving materiality is on the public entity and it has been described as a "heavy one."[14] Before *Lancaster*, the Third Department considered two cases concerning the withdrawal of a public employee's defense. In *Garcia v. Abrams*, the court found that the employee had not committed a material breach of the duty to cooperate when he testified inaccurately about a prior arrest at his deposition because: (1) he quickly corrected the inaccuracy; (2) the inaccurate information was likely inadmissible; and (3) even if the testimony were admitted at trial, the defense would have an opportunity to explain the reason for the misstatement.[15] In *N.Y.S. Inspection, Security and Law Enforcement Employees, District Council 82 v. Abrams*, the court held that an employee's failure to attend a deposition on a single occasion, where he otherwise completed all necessary paperwork and subsequently attended a rescheduled deposition, was not a material breach of the duty to cooperate.[16]

When, then, is a failure to cooperate material and substantial? With respect to the failure to attend depositions or to provide requested information, several courts have held, in the insurance context, that the insurer is required to demonstrate an "unreasonable and willful pattern" of such conduct.[17] In contrast, a single instance of the insured knowingly providing false information has been held sufficient to constitute non-cooperation.[18] With the foregoing in mind, public entities should be guided by the principle that, where an employee has prevented counsel from effectively defending the claims against him, he has committed a material breach of the duty to cooperate.

If the employee has committed a material and substantial breach, the employer must then fulfill its obligations under *Lancaster* before withdrawing the employee's defense. Specifically, the entity must act diligently in seeking to bring about the public employee's cooperation and it must employ efforts that are reasonably calculated to obtain the employee's cooperation. The employer is required to attempt to convince the employee to cooperate and must continue to do so until it is clear that "further reasonable attempts…will be futile."[19] The Court of Appeals has held, in the insurance context, that further attempts may clearly be futile where an insured openly disavows its duty to cooperate, while a "longer period of analysis may be warranted" where an insured "has punctuated periods of noncompliance with sporadic cooperation or promises to cooperate."[20] In sum, unless a public employee overtly declares that he will not cooperate, as the employees in *Lancaster* did, the public entity must make multiple attempts to procure cooperation over an extended period of time before it can legitimately withdraw the employee's defense.

Finally, the public entity must be able to demonstrate that the public employee's conduct was willful and avowed after the entity attempted to procure his cooperation. Simply put, the public entity must be able to show that the employee's continued failure to cooperate was deliberate rather than inadvertent.[21]

If all of the foregoing requirements are satisfied, the public entity must withdraw the employee's defense. The entity's failure to do so carries with it serious implications, as the unlawful expenditure of funds on an employee's defense may violate the Gift and Loan Clause of the New York Constitution. That clause provides that a public entity "shall [not] give or loan any money or property to or in aid of any individual or private corporation or association, or private undertaking…."[22] The magnitude of such a violation is severe; public officials can be held personally liable for such unlawful expenditures under General Municipal Law § 51.[23] Therefore, it is of critical importance that public entities keep abreast of their employees' cooperation, or lack thereof, in the defense of a lawsuit and that they document evidence of non-cooperation as well as their attempts to convince the employee to cooperate.

Conclusion

Lancaster has brought clarity to the obligations of public entities and public employees under the Public Officers Law. While there is room for further judicial clarification of the broad concepts of reasonableness of a settlement, materiality of an employee's breach, and futility of further attempts by the public entity to procure an employee's cooperation, public entities can now tailor their policies and procedures to ensure, in large part, that the requirements of Public Officers Law sections 17 or 18 are satisfied.

Endnotes

1. *See generally* James D. Cole, *Defense and Indemnification of Local Officials: Constitutional and Other Concerns*, 58 Alb. L. Rev. 789 (1995).
2. Peter A. Bee & James A. Clemons, *Indemnities and Immunities for Municipal Officials*, 28 Mun. Lawyer 10 (2014).
3. N.Y. Pub. Officers Law §17(4) (2013) (requiring public employee to deliver initiatory papers to attorney general within five days of being served therewith and providing that delivery of those papers shall be deemed a request that state fund his defense); N.Y. Pub. Officers Law §18(5) (2013) (requiring public employee to deliver initiatory papers to chief legal officer of public entity within ten days of being served therewith along with written request that public entity fund his defense).
4. 22 N.Y.3d 30, 978 N.Y.S.2d 191 (2013).
5. This section of the Village Code adopts the provisions of Public Officers Law § 18.
6. *Lancaster v. Inc. Vill. of Freeport*, 2010 N.Y. Slip Op. 32341(U) (Sup. Ct., Nassau Co. 2010).
7. *Lancaster v. Inc. Vill. of Freeport*, 92 A.D.3d 885, 939 N.Y.S.2d 122 (2d Dep't 2012), *aff'd*, 22 N.Y.3d 30, 978 N.Y.S.2d 191 (2013).
8. 22 N.Y.3d at 34.
9. *Id.* at 39.
10. *See generally* 70A NY Jur. *Insurance* § 2121.
11. *Cowan v. Ernest Cordelia, P.C.*, 2001 U.S. Dist. LEXIS 185, 98 Civ. 5548 (S.D.N.Y. 2001).
12. *Id.* at *15.
13. *Garcia v. Abrams*, 98 A.D.2d 871, 872, 471 N.Y.S.2d 161, 163 (3d Dep't 1983); *State v. Aetna Casualty & Surety Co.*, 43 A.D.2d 988, 988, 352 N.Y.S.2d 65, 65 (3d Dep't 1974).
14. *City of New York v. Cont'l Casualty Co.*, 27 A.D.3d 28, 31-32, 805 N.Y.S.2d 391, 393-94 (1st Dep't 2005).
15. 98 A.D.2d at 872, 471 N.Y.S.2d at 163.
16. 135 A.D.2d 304, 525 N.Y.S.2d 402 (3d Dep't 1988).
17. *See, e.g.*, *N.Y. Cent. Mut. Fire Ins. Co. v. Rafailov*, 41 A.D.3d 603, 603, 840 N.Y.S.2d 358, 358 (2d Dep't 2007); *Anthony Sicari, Inc. v. Fireman's Ins. Co.*, 200 A.D.2d 542, 542, 606 N.Y.S.2d 695, 695 (1st Dep't 1994).
18. *See, e.g.*, *United States Fidelity & Guaranty Co. v. Von Bargen*, 7 A.D.2d 872, 872, 182 N.Y.S.2d 121, 121 (2d Dep't 1959).
19. *Continental Cas. Co. v. Stradford*, 11 N.Y.3d 443, 450, 871 N.Y.S.2d 607, 611 (2008).
20. *Id.*
21. *Matter of Liberty Mut. Ins. Co. v. Roland-Staine*, 21 A.D.3d 771, 773, 802 N.Y.S.2d 6, 9 (1st Dep't 2005).
22. N.Y. Const. art. VIII § 1; *see also* Cole, *supra* n. 1.
23. N.Y. Gen. Mun. Law § 51 (2014); *see also* Jessie Beller, *Assistant Counsel of New York City Conflicts of Interest Board, Use of Municipal Resources for Personal Purposes*, 23 Mun. Lawyer 17 (Spring 2009).

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This article originally appeared in the Spring 2014 issue of the Municipal Lawyer, *published by the Municipal Law Section of the New York State Bar Association.*

Misclassification and the "Fluctuating Work Week": A Potential Schism in Wage and Hour Litigation

By Paul F. Millus and Kieran X. Bastible

At its core, the concept behind the Fair Labor Standards Act (FLSA) is simple and straightforward. If an employee is not exempt under the FLSA, that employee is entitled to be paid time and one half for every hour worked each week the employee works over 40 hours—whether the employee works 45 hours one week and 35 hours the next. That the employee receives a salary in no way, in and of itself, exempts the employee from this protection under the FLSA. Yet, despite what should be a simple analysis, 7,764 FLSA cases were filed in federal court in 2013 according to the Federal Judicial Center—a ten percent increase from 2012.[1] In the ten previous years the number of collective actions under the FLSA filed in federal court increased nearly 500%.[2] There is no question that litigation in this area of the law is ever expanding, requiring employers to know their obligations and employees to know their rights.

Misclassification

One of the primary issues engendering a significant amount of litigation is due to an employer's misclassification of workers. Misclassification generally occurs in two ways. First, the employer mistakenly classifies the employee as exempt under the law because the employer believes that the employee falls under the executive, administrative, professional, or outside sales employees' exemptions.[3] These are broad categories and each case is fact specific. In addition to these categories, the U.S. Department of Labor lists thirty-six other exempt classifications of employees by job title on its website. The next major area where classification comes into play is where the employer contends that the "employee" is actually an independent contractor, which is fertile ground for future writing.

Lady Gaga and the "Fluctuating Work Week"

If the employer has misclassified an employee, what is the employer's recourse when the litigation begins? There are very few options for the employer to minimize the poor decision that resulted in the misclassification in the first instance. However, there is a little known but potentially game changing concept in the law known as the "fluctuating work week" (FWW), which could have a great impact on wage and hour litigation in the future. The FWW has its roots in 1968, when the U.S. Department of Labor (DOL) issued a bulletin interpreting this section of the FLSA to address the payment of overtime to salaried employees "who do not customarily work a regular schedule of hours."[4] The bulletin was issued in connection with two Supreme Court cases decided the same day that had addressed payment of overtime to employees who had fluctuating hours from week-to-week, and who wished to receive a predictable, flat rate of pay: *Overnight Motor Transp. Co. v. Missel*, and *Walling v. A.H. Belo Corp*.[5] The relevant portions of the DOL FWW bulletin provide that an employee employed on a salary basis may have hours of work that fluctuate from week to week. The salary may be paid to the employee pursuant to an *understanding* with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Payment for overtime hours at one-half an employee's regular hourly rate satisfies the overtime pay requirement because such hours have already been compensated at the straight-time rate, under the salary arrangement. The FWW method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the lawful minimum hourly wage.[6]

Thus, five factors must be present before an employer may use the FWW method to pay a non-exempt employee: (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed weekly salary which remains the same regardless of the number of hours the employee works during the week; (3) the fixed amount is sufficient to provide compensation at a regular rate not less than the legal minimum wage; (4) the employer and the employee have a clear mutual understanding that the employer will pay the employee a fixed salary regardless of the number of hours worked; and (5) the employee receives a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week.[7] As noted, the reasoning underlying the half pay rate is that the employee is already being compensated for all base hourly pay including the hours worked over 40 hours per week.[8]

In 2013, a Federal District Judge in the case of *O'Neill v. Mermaid Touring, Inc. and Stephanie Germanotta a/k/a Lady Gaga*[9] revisited the concept of FWW, and issued a decision denying Ms. Gaga's motion for summary judgment in a wage and hour case. Lady Gaga sought to have the FWW method employed, which would have significantly limited the measure of damages sought by the plaintiff. Of note, there was no evidence of a prior agreement between plaintiff and Lady Gaga that plaintiff would be paid a fixed salary regardless of the hours worked *and* would receive a one-half overtime premium because Lady Gaga never classified plaintiff as a exempt employee under the FLSA. Indeed, because Lady Gaga

admittedly misclassified plaintiff, there never would have been any talk of overtime because Lady Gaga believed the plaintiff was being paid all that she was entitled to irrespective of the hours she worked. In denying summary judgment, the court noted that neither the Second Circuit nor any court in the S.D.N.Y. had opined on whether the DOL's FWW bulletin and methodology may be applied retroactively to determine the measure of overtime damages for employees who have been misclassified as exempt, while other federal courts have divided on the issue.[10]

The court concluded that Ms. Gaga did not establish the factual predicate for application of the FWW methodology, agreeing with those circuit and district court decisions finding that the DOL FWW bulletin is not remedial in nature, and thus not applicable to calculation of overtime damages where an employee has been misclassified. However, the court further noted that several courts have applied the FWW methodology—not as a result of the DOL FWW bulletin—but instead as a natural outgrowth of the Supreme Court's decisions in *Missel and Walling*.[11] In that regard, the court, while still denying summary judgment, would have permitted the jury to make a factual finding as to whether the plaintiff's employment involved fluctuating hours or instead was "24/7" (as plaintiff maintained)—if the matter went to trial.[12] If the jury were to find the plaintiff worked fluctuating hours, the Court left open the question as to whether a half pay multiplier, based on *Missel* and *Walling*, was appropriate.

Thus, it is important to understand *Missel* and *Walling* if employers seek to viably claim that they need not pay time and one half overtime. Conversely, these decisions are just as important to employees who may find their FLSA damage claims severely compromised. If the point of the FLSA is to compensate non-exempt employees for work performed over 40 hours per week *on a week to week basis*, the argument that, irrespective of the fact they worked in excess of 40 hours for weeks at a time, they are limited to a half hour rate premium for overtime, could potentially change the way plaintiffs and defendants approach wage and hour litigation.

In *Missel*, the Court found there was an employment contract for a weekly wage with variable or fluctuating hours but failed to state an hourly wage and there was no explicit provision for overtime.[13] The Court rejected the employer's contention that the contract should not be construed as paying the employee only his "regular rate," regardless of hours worked. While the Court noted that the wages actually paid the employee were large enough to cover both base pay and fifty percent overtime pay so as to not run afoul of the minimum wage provisions of the FLSA, the contract had no limit on the maximum number of hours the employee could work for his "regular rate," nor any provision for the payment of additional compensation should the regular rate, divided by the hours actually worked, fall below the minimum wage. Thus, the *Missel* Court found the employment contract in non-compliance with the FLSA.[14]

In *Walling*, the Court upheld an arrangement between the employer and the employee whereby the employee was advised that he would be receiving a certain hourly rate paid and a guaranteed minimum payment per week to compensate the employee for overtime at a one and one half rate for each hour over a 44-hour workweek in effect at the time.[15] Distinguishing *Walling* from *Missel*, the Court cited the parties' agreement that the employee would receive a basic hourly rate of pay and not less than time and one half of overtime and found it carried out the intention of Congress. In both decisions, the result turned on the existence or absence of an explicit agreement between the parties and what was determined to be the "regular rate of pay" for overtime calculation purposes. While *Missel* did not explicitly provide for a half pay premium, the court in Lady Gaga's case found that the *Walling* decision "provides figures that permit the reader to confirm that there was such an agreement and the Court intended to approve a half pay multiplier."[16]

The Fourth, Seventh, First and Fifth Circuits have applied the FWW to misclassified employees.[17] Others in the Fourth and Seventh Circuits have applied the FWW methodology based on the decision in *Missel*.[18] In the Lady Gaga case, the issue that would have been presented to the jury was whether the plaintiff's hours did indeed fluctuate. If so, as noted, the Court indicated it might revisit the issue of whether *Missel* and *Walling* applied and thus whether the FWW half pay multiplier was the appropriate measure of damages.

There are many questions which can be drawn by the district court analysis in the Lady Gaga case. If it were demonstrated that the plaintiff's hours did fluctuate would she then be relegated to a claim seeking one half hour of overtime per overtime hour as opposed to time and one half? In a broader sense, could this be so when the employer paid a weekly salary with no agreement on the part of the employer as to whether that salary included an overtime premium? Also, it is clear that the provisions of the FLSA cannot be waived,[19] so does that mean that an employer, provided it could demonstrate some measure of fluctuating hours, be able to *post facto* defend an action and significantly lessen the claim of a salaried employee by raising the FWW defense in response to the complaint? What if employers believe they can save on overtime costs by working salaried employees very heavily during busy weeks and sending them home on less busy weeks if that works out economically to their benefit? Considering the dearth of case law in this circuit and others the answers to these questions are elusive. All of this could be avoided if the employer and the employee have an agreement when they begin their association as to how the employee is to be paid, and whether that pay cover hours in excess of 40 hours per week

Endnotes

1. Federal Judicial Caseload Statistics for the period ending September 30, 2013.
2. Federal Judicial Caseload Statistics for the period ending March 30, 2013.
3. 29 C.F.R. Part 541.
4. 29 C.F.R. § 778.114(c).
5. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942); *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942).
6. 29 C.F.R. § 778.114.
7. 29 C.F.R. § 778.114(a).
8. 29 C.F.R. § 778.114(b).
9. *O'Neill v. Mermaid Touring Inc.*, No. 11 Civ. 9128 (S.D.N.Y. Sept. 10, 2013).
10. *O'Neill* at *10.
11. *O'Neill* at *13.
12. *Id.*
13. *Missel*, 316 U.S. at 581.
14. *Id.* at 581.
15. *Walling*, 316 U.S. at 635.
16. *O'Neill v. Mermaid Touring Inc. *13, citing Walling*, 316 U.S. at 634.
17. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 357 (4th Cir. 2011); *Urnikis–Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 681 (7th Cir. 2010); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230–31 (10th Cir. 2008), *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 39 (1st Cir. 1999); and *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988).
18. *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351 (4th Cir. 2011); *Urnikis–Negro v. Am. Family Prop. Servs.*, 616 F.3d 665 (7th Cir. 2010).
19. *See*, *e.g.*, *Lynn's Food Stores v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982) (internal citations omitted).

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Labor and Employment Law Journal

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ISSN 2155-9791 (print) ISSN 2155-9805 (online)

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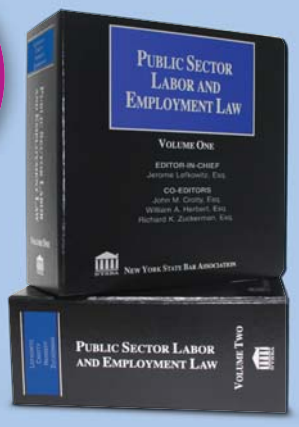

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