SUMMARY OF 2013 LABOR AND EMPLOYMENT DECISIONS FROM THE COURT OF APPEALS

By: Philip L. Maier is the Deputy Director and General Counsel of the New York City Office of Collective Bargaining. Kasey Baker is a Trial Examiner at the Office of Collective Bargaining and assisted in the preparation of this article.

The Court of Appeals issued decisions during this past year concerning a variety of topics of interest to both labor and employment law practitioners. A summary of these decisions is set forth below.

New York State and New York City Human Rights law- disability discrimination

A distinction between the State and City human rights law (HRL) disability provisions is highlighted in ***Romanello v. Intesa Sanpaolo, S.p.A.,*** 22 N.Y.3d 881 (2013). In that case, Romanello filed a complaint alleging that he was discriminated against on the basis of a disability when he was terminated from employment. The termination occurred after he had advised his employer, in response to its inquiry, that he had an uncertain prognosis and his return to work date at that time could not be determined. Under the New York State HRL, the plaintiff has the burden to demonstrate that the essential elements of the job could be performed with a reasonable accommodation. In affirming the dismissal of the State claim, the Court stated that, in effect, since Romanello had requested an indefinite leave of absence, and such an absence is not a reasonable accommodation under the State law, it was appropriate to dismiss his complaint for failure to state a cause of action. In contrast to the State HRL, however, the New York City HRL does not define disability to include reasonable accommodation, but defines it only in terms of impairments. The Court pointed out that the City HRL affords broader protections than the State

HRL. Thus, under the City HRL, an employer has the burden to plead and prove that a plaintiff could not perform the essential elements of his job with a reasonable accommodation. Since the employer failed to meet this burden, the City law cause of action was reinstated. *See also* ***Sandiford v. City of N.Y. Dept. of Educ.***, 22 N.Y.3d 914 (2013) (the Court affirmed the denial of a motion for summary judgment seeking to dismiss a complaint based upon violation of the State and City HRLs. The Court stated that there were triable issues of fact as to whether the purported reason for plaintiff's termination was pretextual and whether the action was retaliatory.)

Collateral Estoppel and Administrative Agency Determinations

Two decisions issued by the Court demonstrate the significant effect an administrative agency determination in a labor and employment law context may have on seemingly unrelated fields, and the circumstances under which a decision in any forum will be accorded preclusive effect. In ***Auqui v. Seven Thirty One Ltd. Partnership,*** 22 N.Y.3d 246 (2013), the Court of Appeals held that a determination made by an Administrative Law Judge (ALJ) and adopted by the Workers Compensation Board should not be accorded preclusive effect in a personal injury action.[1] The plaintiff was a food service deliveryman who was injured when a sheet of plywood hit him while he was making a delivery. The Court stated that administrative agency decisions are entitled to collateral estoppel effect when the issue sought to be precluded is identical to and was necessarily decided by the administrative tribunal, and when there was a full and fair opportunity to litigate the issue. Here, the Court found that the issue of the extent of total damages in a third-party negligence action was not identical to the narrower issues decided by the Board regarding the duration of plaintiff's injury or his need for further medical care. Given the different natures of the proceedings, collateral estoppel should not apply in this situation. The

[1] This case was decided upon reargument, and vacated the Court's earlier decision in *Auqui v. Seven Thirty One Ltd. Partnership,* 20 N.Y.3d 1035 (2013).

Court stated, however, that this decision should not be read to impair the general rule that administrative agency decisions are entitled to collateral estoppel effect when, unlike here, there is identity of issue between the two proceedings.

In ***Matter of Howard v. Stature Elec., Inc.,*** 20 N.Y.3d 522 (2013), the Court declined to give preclusive effect to a plea entered pursuant to *North Carolina v. Alford,* 400 U.S. 25 (1970*),* in a criminal case, because the plea could not be found to have necessarily involved the same issues. Howard pled guilty to insurance fraud in the fourth degree in satisfaction of all the charges against him. In accordance with his *Alford* plea, he did not acknowledge guilt but stated that he entered the plea to avoid the risks of trial. The plea was accepted without any allocution of the underlying facts of the offense. The Court stated that *Alford* pleas are rare and should be used sparingly but, in any event, are no different in effect from any other plea. Accordingly, the Court considered whether the plea was entitled to preclusive effect in the subsequent workers compensation proceeding by determining whether the identical facts were necessarily decided, and whether the party had the opportunity to contest those facts. Since there was no reference to the facts in the plea colloquy, there was no basis to find that the plea precluded relitigation of the issue in the workers compensation proceeding.

Public Sector

Discipline -

Searches and GPS devices

One of the most anticipated decisions of the term was ***Matter of Cunningham v. New York State Dept. of Labor,*** 21 N.Y.3d 515 (2013). The Court in that case held that a warrant was not required when the State of New York attached a GPS device to an employee's car, but that on the facts of the case the search was unreasonable. Cunningham was investigated for

falsification of time records and unauthorized absences from work. Part of the investigation included attaching a GPS device to his personal vehicle which recorded his movements for a month, including evenings, weekends, and when he was on vacation. Eleven specifications were brought against Cunningham in the disciplinary proceeding seeking his termination, four of which were based upon evidence obtained from the GPS device.

The Court found that while this was a "search" within the meaning of Article 1, §12 of the New York Constitution and the Fourth Amendment of the United States Constitution, a warrant was not required because the search came within the workplace exception to the warrant requirement as proscribed by *O'Connor v. Ortega*, 480 U.S. 709 (1987) and *Matter of Caruso*, 72 N.Y.2d 432 (1988). The Court rejected the contention that the workplace exception should be confined to the workplace itself, at least to the extent that it would require an employer to get a search warrant to determine the location of an employee's car used while working for the employer. The Court stated that people have a greater expectation of privacy in the location of their bodies than their cars, and the privacy interests in this matter are no greater than those in *O'Connor*. The Court concluded that when an employee chooses to use his car during the business day, GPS tracking of the car may be considered a workplace search.

The Court, however, found that the search was unconstitutional since it was not reasonable. A search is reasonable when the measures taken are "reasonably related to the objectives of the search and are not excessively intrusive" given the nature of the misconduct. A search needs to be justifiable at its inception, which it was in this matter. It was not, however, reasonable in scope. The State had no legitimate concern with off-duty hours, yet tracked the petitioner continuously for a month. Due to the extraordinary tracking capacity of GPS devices, all such evidence, whether permissibly obtained or not, is excluded from evidence. The rule that

only impermissibly obtained evidence is suppressed is therefore inapplicable when GPS devices are used. Consequently, the Court found that the four specifications which were based on the GPS evidence must be dismissed.

The concurrence stated that a search warrant is needed for the State to place a GPS device on a personal, private car to investigate workplace misconduct. The privacy concerns recognized in *People v. Weave,* 12 N.Y. 3d 433 (2009), and *United States* v. *Jones*, 132 S.Ct. 945 (2012*),* apply equally in this matter and the majority impermissibly extends *O'Connor* beyond the boundaries of the workplace.

Teacherdiscipline Terminating the employment of a tenured teacher for failure to comply with residency requirements is not required to be done pursuant to an Education Law section 3020-a hearing. In ***Matter of Beck-Nichols v. Bianco***, 20 N.Y.3d 540 (2013), the Court considered three separate matters in which school district employees, two of whom were tenured, were terminated from employment due to their failure to comply with residency requirements. The residency policy made clear that employees were expected to be domiciled in Niagara Falls within a year of appointment and to remain there. The Court stated that residency policies serve legitimate governmental purposes, and define eligibility for employment. As a result, the two tenured employees, Adrian and Luchey were not entitled to hearings pursuant to provisions of the Education Law (§§ 2509 (2), 3020, and 3020-a) dealing with teacher discipline. Due process only mandated notice and an opportunity to respond. The Court rejected Beck-Nichols' contention that the standard of review of the Board's decision should be whether it was supported by clear and convincing evidence. The proper standard was whether the decision was arbitrary and capricious, and whether it was made without foundation in fact. Accordingly, the Court found that the school district's decisions to terminate the employees were lawful.

Corporal punishment and Education Law 3028

Employees of the NYC Department of Education who are sued for using corporal punishment are entitled to a defense provided by the City even though the conduct violated a City regulation. In ***Matter of Sagal-Cotler v. Board of Educ. of the City Sch. Dist. of the City of N.Y.,*** 20 N.Y.3d 671 (2013), the petitioners did not dispute that they were found to have violated a rule prohibiting corporal punishment. The Court held that Education Law § 3028, which states that a school district employee shall be provided a defense for actions performed "while in the discharge of his duties within the scope of his employment," entitled the employees to a defense. The Court stated that General Municipal Law 50-k did not affect the rights under Education Law 3028. It rejected the contention that the actions in issue were not "within the scope of employment," since it has construed that phrase, and the phrase "discharge of duties," as interchangeable under its precedents.

Health Insurance

In a significant decision confirming the health insurance rights of retirees, the Court in ***Kolbe v. Tibbetts***, 22 N.Y.3d 344 (2013), held that collective bargaining agreements ("CBA's") can establish a vested right to the same health insurance coverage under which an employee retires, and that the Insurance Moratorium Law does not provide a basis for abrogating a retiree's vested contractual rights. The Court's initial inquiry focused upon whether the parties intended that the CBA give rise to a vested right. The plain language of the provision "unambiguously established" that the plaintiffs had a vested right to the same coverage in retirement as they had when they retired. That Court concluded that in construing the language of the CBA, it showed a mandatory obligation on the part of the District to retain such coverage. The Court, however, stated that the parties both advanced plausible interpretations of the contested language. An issue

of fact remained as to the scope of the coverage, necessitating that the matter be remanded for hearing. The Court rejected the District's contention that the 2009 Moratorium Law allowed the District to modify retiree coverage because a corresponding change was made in the subsequent CBA. The Court stated that this Law only applied to prevent districts from reducing retiree health insurance benefits that were voluntarily conferred. It was not meant to apply to rights in a CBA.

Deference to arbitration awards

Demonstrating the deference paid to arbitration awards, the Court in ***Matter of Shenendehowa Cent. Sch. Dist. Bd. of Educ. (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO, Local 864)***, 20 N.Y.3d 1026 (2013), affirmed an Appellate Division decision that confirmed an arbitrator's award reinstating to work, with conditions, a school bus driver who had been terminated due to testing positive for marijuana. The Court restated that the bases for vacating an arbitration award-- that it was irrational, exceeded the arbitrator's power, or violated public policy-- were limited, and that these criteria were not met. The Court concluded by stating that the fact that reasonable minds may differ on what the proper penalty should be is not a basis upon which to vacate an award. (*But see* ***Matter of Principe v. New York City Dept. of Educ.,*** 20 N.Y.3d 963 (2012) (Appellate Division decision affirmed, over a dissent, that penalty of termination of a teacher was excessive.)

Triborough Law and Retirement benefits –Tier V

In two decisions, the Court examined the effect that legislation creating a new tier of retirement benefits has on collective bargaining agreements providing for non-contributory retirement plans. In ***Matter of City of Yonkers v. Yonkers Firefighters, Local 628, IAFF, AFL-CIO,*** 20 N.Y.3d 651 (2013), the Court addressed the issue of whether an expired collective

bargaining agreement whose terms continued pursuant to the Triborough amendment was "in effect" for purposes of Article 22, Section 8 of the Retirement and Social Security Law. After the term of the agreement had ended, a new tier of pension benefits-- tier V-- was adopted requiring firefighters and police to make contributions to their pensions. The new legislation provided for an exception, in that employees could elect coverage under a different retirement plan provided for in a collective bargaining agreement as long as the agreement was "in effect." While the terms of the agreement would normally continue under the Triborough law, the Court held that the portion of the agreement requiring non-contributory plans was rendered unlawful by operation of tier V. The Court did not find that the legislative intent supported an interpretation that the "in effect" language included agreements that continued under the Triborough law, but that it referred to the date in the agreement. The dissent concluded that under Triborough, the agreement remained in effect, and the statutory exception in tier V was applicable.

In ***Matter of City of Oswego (Oswego City Firefighters Assn., Local 2707),*** 21 N.Y.3d 880 (2013), based upon its decision in *City of Yonkers* issued the same day, the Court vacated an arbitration award finding that the City violated the parties' collective bargaining agreement by requiring employees to contribute to their pension. Since, in accordance with *City of Yonkers*, a non-contributory pension for new hires was a benefit which was no longer permitted by law, the arbitration award finding a violation of the parties' agreement was vacated. The dissent argued, as it did in *City of Yonkers*, that the contract clause was still in effect and the statute requiring contribution was not applicable, and also that there was no public policy justification to support vacating the award.

General Municipal Law 207-a

When no notice or opportunity to respond to allegations was afforded to a public employee in the context of the denial of supplemental disability benefits, the Court found that the municipality lacked a rational basis for its denial. In ***Ward v. City of Long Beach,*** 20 N.Y.3d 1042 (2013), the Court affirmed an Appellate Division decision finding that the City had acted arbitrarily in denying Ward's application for supplemental disability pension benefits under Gen. Mun. Law § 207-a. The denial was made by the Fire Commissioner and upheld by the City's Corporation Counsel. The denial was based upon Ward's estranged wife's statements made in the midst of a divorce and the Corporation Counsel's own observations. Ward was given no notice of the allegations or an opportunity to respond to them, as a hearing was not held. The Court found that the determination lacked a rational basis and was therefore arbitrary and capricious. Consequently, the municipality was ordered to grant the petitioner the subject benefits.

Taylor Law and past practices

In a case which demonstrates both the potential overlap and the differences between an arbitrator's authority and PERB's jurisdiction, the Court in ***Matter of Chenango Forks Cent. Sch. Dist. v. New York State Pub. Empl. Relations Bd.,*** 21 N.Y.3d 255 (2013), confirmed a PERB decision finding that the school district violated the Taylor Law when it unilaterally terminated its past practice of reimbursing employees for the expenditures of Medicare Part B payments. The Board found that a past practice was present since the practice had continued for a period of time that could give rise to the reasonable expectation that it would continue. The Court stated that the Board appropriately did not defer to an arbitrator's decision which found that there was no contractual right to the payments, since past practices, in the absence of a "maintenance of benefits" clause, do not constitute contract rights. To the extent that the

arbitrator purported to make findings regarding a past practice under the Taylor Law, such findings were both outside the scope of his authority and repugnant to the Law, as the arbitrator did not appropriately apply the test used by PERB to determine whether a past practice exists. The Court also rejected the contention that the reimbursement constitutes an unconstitutional gift of funds. School districts may only give funds pursuant to a contract, local law, statute or resolution. Since this was granted pursuant to the terms of the Taylor Law as a term and condition of employment, there was no prohibition.

Labor Law provisions

Labor Law 220

Both labor and management are directly affected by a determination of whether a project is covered by the prevailing wage law of Labor Law § 220 and Article 1, sec. 17 of the NY State Constitution.[2] The Court issued two decisions this past year which addressed both prongs of the test set forth in *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (1983), *aff'd for reasons stated below*, 63 N.Y.2d 810 (1984), used to answer this question. In *Erie County*, the Courtset forth a two-part test to determine whether a project is bound by this constitutional imperative, stating that in order to find the prevailing wage law applicable: (1) the public agency must be a party to a contract involving the employment of the workers, and (2) the contract must concern a public work project.

[2] Article 1, sec. 17 of the NY State Constitution states, in pertinent part:

> No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he or she be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.

N.Y. CONST. art I, § 17

In ***Matter of M.G.M Insulation, Inc. v. Gardner,*** 20 N.Y.3d 469 (2013), the Department of Labor had issued a determination that the Bath Volunteer Fire Department's (BVFD) project to build a firehouse was a public project within the meaning of the Labor Law. The Appellate Division confirmed a hearing officer's determination that the BVFD was a covered entity under the Labor Law since it was the functional equivalent of a municipal corporation. The Court stated, however, that the first prong of the test – whether the contract is with a public agency – was not satisfied because the BVFD was not one of the specifically named entities (state, public benefit corporation, municipal corporation, or commission appointed by law) which qualifies as a public entity under the Labor Law. The conclusion that this prong was satisfied because the BVFD was the functional equivalent of a public agency was set aside because the "functional equivalent" test had been previously rejected by the Court. The Court further stated that the service agreements between the Fire Department and the Village were contracts for emergency services pursuant to Village Law § 4-412 (9) and not contracts for public work. Thus, this agreement was not a contract for public work within the meaning of the prevailing wage law.

The Court expanded upon the *Erie County* test in ***De La Cruz v. Caddell Dry Dock and Repair Co., Inc.,*** 21 N.Y.3d 530 (2013) The specific holding of that case was that a municipal vessel is a public work within the meaning of Labor Law 220 and Article 1, sec. 17 of the NY State Constitution. As a result, if the vessel's primary objective is to benefit the general public, workers involved in its construction, maintenance, or repair must be paid prevailing wages. The precise issue which the Court needed to address was whether the "public work" must be a structure attached to land. The Court found that the statute and constitutional provisions support the view that a public work could be a vessel, since a structure covered by the statute could be either "situated, erected or used." A review of dictionary definitions of the term "public works"

made clear to the Court that being attached to land is not an essential element of the definition of a public work. The Court therefore concluded that a three-prong test should be applied to determine whether a project is subject to the prevailing wage requirements and stated that: 1) a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, 2) the contract concerns a project that primarily involves construction-like labor and is paid for with public funds, and 3) the primary object of the work product must for the use of or benefit for the general public.

Labor Law 196-d

A challenge to the legality of the tip sharing policy at Starbucks gave rise to another decision interpreting a provision of the Labor Law, in this instance, section 196-d.[3] In ***Barenboim v. Starbucks Corp.*, 21 N.Y.3d 460, (2013),** the Court answered reformulated questions certified to it by the Second Circuit concerning the interpretation of Labor Law § 196-d, which addresses the permissible sharing of tips between employees and agents of an employer. The employee hierarchy at Starbucks is as follows: baristas, who serve patrons, are supervised to an extent by shift supervisors, who also serve patrons; both titles are hourly employees. Assistant store managers have greater managerial and supervisory authority, but also perform customer-related services. As the name implies, they assist the store managers, who are responsible for the

[3] This section states, in pertinent part:

> No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel.

N.Y. Labor Law § 196-d

overall operation of the store. Both of these latter titles are salaried employees. The tips are divided at the end of each week in proportion to the hours worked. Shift supervisors were included in the tip sharing policy, giving rise to one suit (Barenboim), while the exclusion of assistant store managers from tip sharing was the impetus for the second (Winans). Section 196-d, as relevant here, precludes an "employer or his agent" from accepting directly or indirectly any part of a gratuity received by or meant for an employee. It also states that a waiter may share tips with a busboy or similar employee. The Department of Labor appeared as amicus in the case, and the Court examined its Hospitality Industry Wage Order ("Wage Order") which clarified and unified DOL's previous tip-splitting policies. The Wage Order states that tip sharing shall be based upon duties and not titles, and is limited to those employees who assist patrons at a level that is a principal and regular part of their duties. DOL has reasonably maintained, the Court stated, the view that employees who have limited supervisory responsibility and provide direct service to patrons may remain tip eligible. With regard to the assistant store managers, the Court stated that there comes a point when managerial authority becomes so substantial that an employee can no longer be characterized as an employee similar to wait staff within the meaning of Labor Law 196-d. That level of authority occurs when there exists meaningful or significant control over subordinates. This may include authority to discipline or evaluate, involvement in the hiring or firing of employees, or creating work schedules. Meaningful authority, not final authority, as argued by Winans, was the standard adopted by the Court. The Court further stated, in answer to the Second Circuit, that Labor Law 196-d does not require the inclusion in a tip pool of all employees not statutorily barred from participation. The Court did not address what the limits of the exclusion might be. Judge Smith, dissenting in part, did not find the statue applicable. Judge Rivera, concurring in part and

dissenting in part, agreed that an employee who exercises meaningful authority or control is ineligible to receive tips, and would decline to answer the question as to whether an employer may exclude an otherwise eligible employee from tip sharing.

Wicks Law

In ***Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith,*** 21 N.Y.3d 309 (2013), the Court held that when the Legislature has enacted a law of statewide impact on a matter of substantial State concern, but treated certain areas differently, the Home Rule section of the State Constitution does not require an inquiry into the reasonableness of the distinctions.[4] Accordingly, amendments to the Wicks Law,[5] which raised the threshold of contracts to different levels in different counties, were upheld. The Court, however, modified causes of action challenging apprenticeship requirements as applied to out-of-state contractors.

The Court stated that it is undisputed that bidding on public construction contracts is a matter of substantial state concern. The Court distinguished this case from *City of New York v.*

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[4] This section states:

> (b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . .
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> (2) Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.

N.Y. CONST. art IX, § 2 (b) (2)

[5] The Wicks Law requires public entities seeking bids on construction contracts to obtain "separate specifications" for certain work to be performed. According to the Court, it has long been controversial and is alleged to be cumbersome and increase the costs of construction contracts.

Patrolmen's Benevolent Assn. of City of New York, 89 N.Y.2d 380, (1996), on the grounds that the Legislature in that case injected itself into a purely local matter without a Home Rule message. In contrast, the subject matter here involved a matter of statewide concern. The Court reinstated causes of action alleging that apprenticeship provisions favored in-state over out-of-state contractors in violation of the Federal Constitution. A provision was not open to out-of-state contractors and therefore allegedly excludes them from certain contracts. The Court stated that it was not able to determine whether the apprenticeship programs were exclusionary in violation of the Privileges and Immunities, or Dormant Commerce Clauses of the US Constitution.

Workers' Compensation

Death benefits are payable to an employee when a work-related injury contributed to the employee's death, without apportioning the award between injuries which are work-related and those that are not work-related. In ***Matter of Hroncich v. Con Edison***, 21 N.Y.3d 636 (2013), the decedent was classified as permanently partially disabled due to asbestos-related diseases sustained during the course of his employment. Subsequently he was diagnosed with thyroid cancer, a disease unrelated to his employment. The expert evidence adduced during the workers compensation proceeding showed that he would have died as a result of the cancer, but that the asbestos condition hastened his demise. The issue of causation was not preserved for appeal. The Court concluded that the statutory scheme, and case law interpreting it, did not require that death benefits be apportioned and it was up to the legislature to amend the statute to achieve that result.

In ***Matter of Beth V. v. New York State Off. of Children & Family Servs.,*** 22 N.Y.3d 80 (2013), the Court held that the proceeds received in a workers' compensation proceeding are a credit against the settlement proceeds from a civil rights action brought against an employer and co-employees for injuries arising from the same incident. Section 29(1) of the Workers' Compensation Law provides that an employee injured "by the negligence or wrong of another not in the same employ" may bring a suit against "such other." Section 29(4) gives a person or entity liable for the payment of benefits a credit or offset against proceeds of a suit brought under section 29(1). In this matter, the plaintiff instituted a third party action against her employer and co-employees after being sexually assaulted and beaten, resulting in physical and mental injuries. She asserted deprivations of constitutional rights resulting from this incident. The Court stated that Section 29(4) applies, and an employee's settlement proceeds in an action against co-employees may be subject to a recoupment by the workers' compensation carrier. The character and nature of the compensation benefits sought is the important factor in determining whether a setoff is permissible. The settlement agreement shows that the proceeds compensating her for the injuries she suffered were also the injuries which were the subject of the workers' compensation proceedings.