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

By Evan J. White

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

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

Weight Discrimination

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

* * *

National Labor Relations Board Authority Under Two-Member Board

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

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

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

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

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

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

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

* * *

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

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

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

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

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

Endnotes

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

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

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

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

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

By Philip L. Maier

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

GOOD FAITH BARGAINING

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

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

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

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

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

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

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

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

INTERFERENCE AND DISCRIMINATION

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

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

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

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

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

REPRESENTATION

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

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

PRACTICE AND PROCEDURE

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

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

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

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

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

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

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

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

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

DUTY OF FAIR REPRESENTATION

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

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

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

January 2010 through August 2010

By Steven C. DeCosta

I. Overview

A. Statutory Framework

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. UPDATE OF 2010 BOARD DECISIONS

Board of Collective Bargaining

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

PBA, 3 OCB2d 1 (BCB 2010)

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

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

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

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

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

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

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

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

***DC 37*, 3 OCB2d 5 (BCB 2010)**

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

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

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

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

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

***ADW/DWA*, 3 OCB2d 8 (BCB 2010)**

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

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

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

***PBA*, 3 OCB2d 10 (BCB 2010)**

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

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

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

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

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

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

UFA, 3 OCB2d 13 (BCB 2010)

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

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

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

Banerjee, 3 OCB2d 15 (BCB 2010)

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

UFA, 3 OCB2d 16 (BCB 2010)

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

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

***Smith*, 3 OCB2d 17 (BCB 2010)**

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

***PBA*, 3 OCB2d 18 (BCB 2010)**

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

***Morris*, 3 OCB2d 19 (BCB 2010)**

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

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

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

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

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

***Mora-McLaughlin*, 3 OCB2d 24 (BCB 2010)**

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

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

***Morales*, 3 OCB2d 25 (BCB 2010)**

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

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

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

***Kaplin*, 3 OCB2d 28 (BCB 2010)**

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

***LEEBA*, 3 OCB2d 29 (BCB 2010)**

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

***Proctor*, 3 OCB2d 30 (BCB 2010)**

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

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

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

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

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

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

UFA, 3 OCB2d 38 (BCB 2010)

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

Board of Certification

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

DC 37, 3 OCB2d 21 (BOC 2010)

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

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

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

OSA, 3 OCB2d 33 (BOC 2010)

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

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

By Seth H. Greenberg

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

Arbitration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Campaign Finance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ERISA

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

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

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

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

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

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

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

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

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

Authority of NLRB to Issue Decisions[20]

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

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

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

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

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

Discrimination Charges

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

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

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

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

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

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

> practice thus defined can be the basis for a disparate-impact claim at all.
>
> We conclude that it can.[26]

* * * * *

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

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

Privacy Rights

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

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

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

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

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

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

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

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

Other Cases of Interest: Attorneys' Fees and More

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

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

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

Looking Ahead to the 2010-11 Term

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

Endnotes

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

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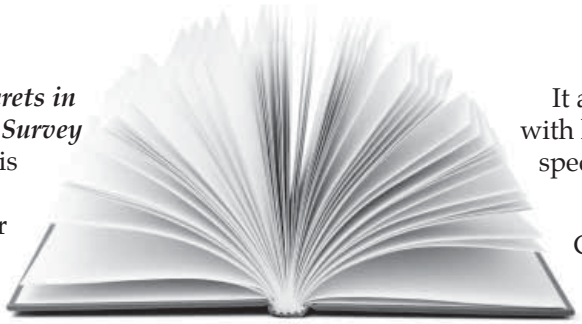
Book Reviews



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

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

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

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

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

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

* * *

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

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

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

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You are encouraged to participate in the programs and on the Committees of the Section.
Feel free to contact any of the Committee Chairs for additional information.

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