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ARE COLLEGE ATHLETES EMPLOYEES?

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I admit it; I am an unabashed MSU football and basketball fan. I endure the elements every fall, and cast about for tickets every winter, to watch the Spartans and to enjoy the college sports spectacle. For me and for millions of Americans, these are simple pleasures in a complicated world. At the same time, though, I am a labor lawyer and therefore naturally apply my years of labor law thinking to many aspects of life. I am also a university professor, concerned about the academy and the future of higher education. Given all this, it is not surprising that this confluence of experiences might cause me to wonder about NCAA athletics, universities, athletes and employment.

A few years ago, while watching the NCAA "March Madness" basketball tournament, I began to wonder why the NCAA was devoting so much effort and money to proselytize that athletes at their institutions were "student-athletes." You know the ads — the ones that depict an athlete who says she put everything into her sport, and in the process, learned vital "life lessons." Why, I wondered, would the NCAA repeat this, over and over again? If nothing else, they were devoting a great deal of money to support this idea. And then it occurred to my wife and to me that perhaps the NCAA was protesting too much and that, in fact, some of these athletes might not be "student-athletes" at all. They might be employees.

We began to look into the question and soon learned that the NCAA actually invented the term "student-athlete" in direct response to a 1953 Colorado Supreme Court decision that an injured football player was an employee and was, therefore, entitled to workers' compensation for his football injuries. As former NCAA Commissioner Walter Byers would later write.

> [T]he threat was the dreaded notion that NCAA athletes could be identified as *employees* by the state industrial commissions and the courts.
>
> [To address the threat, w]e crafted the term *student-athlete,* and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes.[1]

From here, it was no leap for us to conclude that of course the NCAA would be alarmed at such a determination. The NCAA member institutions, after all, have agreed among themselves to limit these athletes' compensation to the level of tuition, room, board and books. This mechanism, in turn, has enabled them to reap great, indeed astonishing, pecuniary (and other) benefits for themselves from the athletes' talents, time and energy — that it, their labor — while severely curtailing the costs associated with such labor. By creating and maintaining the idea of the student-athlete and that major college sports are amateur, we realized, the NCAA and its member institutions, like no other association of institutions or businesses in this country, have been able to obtain the benefits of one type of labor — in this case labor that is central to the athletic enterprise — without paying a competitive wage for it.

I was certainly aware that college sports have become a highly commercial enterprise and an important part of the sports entertainment industry. I knew, for example, that CBS had recently paid the NCAA $6 billion for the rights to televise the annual March Madness basketball tournament for eleven years, and I was painfully aware of John L. Smith's six-year, $9.6 million contract as MSU football coach. I later learned that at least thirty-five college football coaches are paid more than $1 million annually, and that more than ten Division I universities pay their football and men's basketball coaches, combined, $3 million per year. Indeed, I learned that some college coaches now make more than their professional counterparts and are commonly the highest paid public employees in their states. College sports, it turns out, is a $60 billion a year industry.

If the NCAA message is propaganda, as it appeared, then I wondered, what actually is an "employee"? While this is certainly a central question to labor and employment lawyers, I frankly had never considered it in this context. As labor lawyers well know, the common law, "right of control" standard, also adopted by the NLRB, is the template against which to measure whether any individual is an employee. This standard considers the degree to which the employer controls the lives of the putative employees, including the manner in which they carry out their work. In this vein, the NLRB has written that "an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."[2] At times, the Board's reasoning in this area has also been influenced by consideration of the "economic realities" of the relationship, that is, the degree to which the putative employees are economically dependent upon an employer.

I was also aware that the NLRB had visited, and recently revisited, the issue of whether graduate student assistants are employees under the Act, and it occurred to me that since both graduate assistants and athletes are also students, the Board's reasoning in this area might shed light upon my theory. In its 2000 *New York University (NYU)* decision[3], the Board had held that graduate and research assistants were employees because they performed services under the direction and control of the university and were compensated for those services. In 2004, however, the Board reversed *NYU* in *Brown University.*[4] In *Brown,* the Board returned to its 1974 *Stanford University*[5] holding that graduate student assistants were not employees because they "perform[ed] services at a university in connection with their studies [and had] . . . a predominantly academic, rather the economic, relationship with their school."[6] The Board in *Brown* grounded its decision on precisely that same footing, namely that "graduate student assistants . . . are primarily students and have a primarily educational, not economic, relationship with their university."[7]

To test our developing thesis that college football and basketball players in major NCAA programs might be employees, not "student-athletes," we undertook to investigate the reality of major

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STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly journal published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section or the State Bar. We encourage Section members and others interested in labor and employment law to submit articles, letters and other material for possible publication.

Stuart M. Israel, ***Editor***
John G. Adam, ***Associate Editor***

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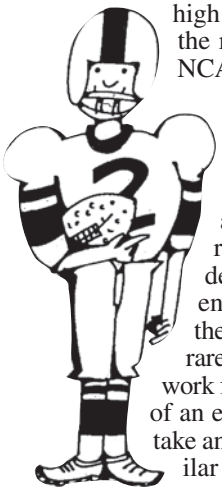
college football and men's basketball players' lives. From that data, we could learn whether in fact these student athletes serve under the control of their coaches and athletic departments and whether they are economically dependent upon their universities. Most importantly, these data would show whether the athletes are "primarily students" with a "primarily educational, not economic, relationship with their university," or, instead, employees despite also being enrolled as students.

We looked into this question by surveying literature on the subject as well as by interviewing several current and former NCAA football and men's basketball players. Their stories bore remarkable similarity. In short, we learned, that not only are their football and basketball duties closely monitored, virtually every detail of their lives is carefully controlled by coaches and athletic staff, not only during the season, but year around. During the season, a conservative estimate of a football player's time commitment to football is at least fifty hours per week. At the same time, they are required by NCAA rules to take twelve credit hours each term. They are, however, told not to enroll in classes that conflict with practice, thereby essentially eliminating afternoon classes. In the off-season, their lives remain under the close direction and control of their coaches. Indeed, even in the summer they are required to remain on campus during the week, and may leave only with the advance permission of the coach. In addition, the depictions of their dependence upon their universities were also surprisingly similar and poignant. Many football and men's basketball players come from families with very limited economic resources. Moreover, NCAA rules forbid them from accepting cash or other gifts from non-family members, and even gifts from family and guardians are limited to an amount which, when combined with any grant-in-aid, covers only the cost of attendance. Neither can they profit from their reputations as athletes, receive royalties from the sale of the jerseys that their numbers make famous or from their video game likenesses. The reality is many of these athletes live below the poverty line.

In short, we concluded that these young men are under the pervasive control of their coaches and athletic departments — greater control than that experienced by any other employee at those institutions. Moreover, many if not most of them are wholly dependent upon their universities, even for their food and shelter.

The *Brown* standard imposes a requirement in addition to the common law standard. Under *Brown,* the question is whether these young athletes are primarily students at their universities or whether, instead, their relationship with their universities is primarily commercial. By this measure, the answer became apparent. The weight of the evidence shows that although some of these athletes earn a degree, the majority are not primarily students. On the contrary, most of them are inadequately prepared for academic inquiry and, once enrolled, face enormous obstacles to fully experiencing the intellectual aspect of university life.

Under new NCAA rules, a high school senior who misses every question on the Scholastic Aptitude Test, but has a grade point average of 3.55 may be admitted to an NCAA member school where he will be eligible (and expected) to compete as a freshman in intercollegiate athletics. Thus, the NCAA requires no demonstration of any objective academic ability whatsoever to become eligible. And while the 3.55 GPA may appear academically demanding, grades have notoriously been subject to manipulation by high school teachers and administrators. Moreover, special, and sometimes sham,



"Dressed and ready to go to work!"

high schools, created to enable athletes to obtain the requisite grades to render them eligible for NCAA competition, have begun to proliferate.

Once the athletes arrive on campus, their extensive practice and playing schedules monopolize their lives leaving little time for academic pursuits. Weak curricula also characterize many athletes' college experiences. Universities regularly devise academic majors with minimal academic rigor to enable athletes to devote maximum time to their sports. Athletes report passing classes they rarely attended, having tutors sometimes do their work for them, being told in advance which version of an exam will be administered, being allowed to take an oral test in lieu of the regular exam and similar academic misconduct. Nearly three dozen NCAA Division I universities award academic credit simply for participating in varsity sports. Most such courses have no syllabus or exam, require no written work and are graded on a pass/fail basis. One basketball course at the University of Georgia did have a twenty-question final examination. Among the questions were: "How many halves are in a college basketball game?" and "How many points does a 3-point field goal account for in a Basketball Game?"

Graduations rates for football and men's basketball players — the athletes who generate the revenue to support the entire athletic department at most major universities — are appallingly low, especially at the most successful programs. In football, for example, the graduation rates for the eight teams that played in the four 2004-05 BCS bowl games were significantly lower than the rates for the overall student body at those schools. At the University of Texas, the graduation rate for football players was thirty-four percent while that of the student body was seventy percent. This pattern was evident in basketball too.

In the end, we concluded, NCAA athletes in Division I revenue-generating sports are employees, and we published our findings in *"The Myth of the Student-Athlete: The College Athlete as Employee"*[8] Our inquiry persuaded us that so-called "student-athletes" amply meet the common law and statutory standards for that classification and should be treated as such under the law. After all, it is by virtue of their labor that intercollegiate athletics has become such a dazzlingly commercial activity. In reality, it has become a professional enterprise, abandoning amateurism in all respects save one: the treatment of the players. As Bobby Bowden, the most successful coach in the history of college football, candidly conceded, "The boys go out and earn millions for their university. Everyone benefits except the players."[9]

In the meantime, feel free to call my a hypocrite. I just got my tickets for the next game, and I'll be there — in the stands cheering on the Spartans!

— END NOTES —

[1]Walter Byers with Charles Hammer, *Unsportsmanlike Conduct: Exploiting College Athletes* (1995) (emphasis in original).

[2]*Brown Univ.,* 342 N.L.R.B. No. 42, slip op. at 8 n.27, (2004).

[3]332 N.L.R.B. 1205 (2000).

[4]342 N.L.R.B. No. 42 (2004).

[5]214 N.L.R.B. 621 (1974).

[6]342 N.L.R.B. No. 42, slip op. at 1 (2004).

[7]*Id.,* slip op. at 5 (2004).

[8]Robert A. McCormick and Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee,* 81 Wash. L. Rev. 71 (2006) available on Lexis, Westlaw and the Social Science Research Network at http://ssrn.com/abstract=893059.

[9]Bob Oates, "In the Never-Ending Scramble to Uphold the So-Called Amateur Code by Catching and Punishing Great Universities, the Student-Athlete has Become the Forgotten Man," L.A. Times, Oct. 3, 1993, at C3. ■

NLRB RULINGS CLARIFY SUPERVISORY EXEMPTION

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On September 29, 2006, the National Labor Relations Board ("Board" or "NLRB") issued a series of decisions that provide guidance for determining which workers are "supervisors" and therefore ineligible for inclusion in a bargaining unit and otherwise excluded from the coverage of the National Labor Relations Act ("Act'). The various stake-holders' reactions exemplify the significance of the Board's rulings in *Oakwood Healthcare*,[1] *Croft Metals*[2] and *Golden Crest Healthcare Center*.[3] While employers applaud the new standards, unions decry them as a "partisan decision" that will allow employers "to reclassify workers as 'supervisors' so they are automatically excluded from union representation."[4]

Collectively, the trilogy of decisions attempts to clarify ambiguous statutory phrases by providing an objective framework for the Board to apply in specific situations.[5] Section 2(11) of the National Labor Relations Act ("Act") defines a supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[6]

Consequently, a statutory supervisor "(1) has the authority to engage in any one of twelve statutorily enumerated activities; (2) uses independent judgment in exercising that authority; and (3) holds that authority in the 'interest of the employer.'"[7] In *Oakwood Healthcare,* the Board explained what it means to "assign" and "responsibly to direct" employees with "independent judgment," ultimately determining that 12 permanent charge nurses at an acute care hospital were statutory supervisors while the remaining 169 nurses were "employees" within the meaning of the Act.[8] Subsequently, the Board the applied the *Oakwood Healthcare* guidelines to a proposed unit of charge nurses in *Golden Crest Healthcare Center*, and a group of lead persons at a manufacturing facility in *Croft Metals*, concluding that disputed workers in each case were entitled to union representation.

Prior to delving into the meaning of the terms "assign" and "responsibly to direct," the Board observed that the two elements of supervisory status were not intended to be synonymous. As a result, it attributed different meanings to each phrase – a practice that it believed avoided a redundancy.[9]

"Assign"

According to the Board, "assign" involves "designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee."[10] The Board clarified, however, that designating significant overall duties does not include "ad hoc instructions that the employee perform a discrete task."[11] For example, while assigning an employee to a certain department, shift or significant overall tasks would be

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indicative of supervisory status, directing an employee to perform discrete tasks in a certain order, such as restocking toasters before coffee makers would be insufficient.

The majority rejected the dissent's view that an assignment under Section 2(11) must affect the "basic" terms and condition of employment or an employee's "overall status or situation," finding that it is enough that an assignment affect the employee in a manner similar to the other listed supervisory functions.[12] Accordingly, granting a "plum assignment" by assigning the nurse less demanding patients "will make all the difference in the work day of the employee."[13] Moreover, the majority held that assigning an employee an easy task is not necessarily a "reward" already covered in Section 2(11). Instead, such an assignment "could signal lack of confidence in the employee's ability to accomplish anything more challenging." Conversely, providing a nurse with a demanding assignment might not be "discipline," but "could we be a prelude to advancement."[14]

The dissent argued for an interpretation of "assign" that required the worker to determine an employee's job classification, work site or shift. Countering, the majority felt that this definition blurred the distinction between "assign" and "transfer." Defending its interpretation of "assign," the majority stated it was eschewing a results-oriented approach.

"Responsibly to Direct"

Next, the Board construed the phrase "responsibly to direct," in light of legislative history indicating "that this statutory exemption of Section 2(11) encompassed those individuals who exercise basic supervision but lack the authority or opportunity to carry out any of the other statutory supervisory functions."[15] For example, an employer who maintains a human resource department responsible for hiring, promoting and discharging employees who violate company policies might be unable to classify an individual responsible for the work of others as a supervisor, absent this exemption. Thus, the Board held that an individual may have the authority "responsibly to direct" even if he or she is not a department head and the individual need not possess "substantial" authority, as the dissent suggested. It is sufficient that the individual directs the work of "men under him," provided the direction is responsible. Consequently, "direction" might involve instructions to perform a series of discrete tasks, an undertaking that falls outside the definition of "assign."

Explaining when a supervisor provides "responsible" direction, the Board wrote that the individual "must be accountable for the performance of the task by the other [employee], such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly."[16] In other words, "the emphasis on accountability"[17] would avoid a result that blurs "the distinction between individuals with 'essential managerial duties' and those with only 'minor supervisory' duties."[18]

"Independent Judgment"

Defining the contours of the modifier "independent judgment,"[19] the Board held that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."[20] The Board acknowledged, however, that the existence of company policies does not preclude supervisory status, providing an example of an employer that has a policy detailing how a charge nurse should respond to an emergency. Working within the policy, if the charge nurse has the discretion to determine "when an emergency exists or the authority to deviate from that policy," independent judgment would exist.[21] Therefore, the existence of policies and the presence of independent judgment are not mutually exclusive.

"The NLRB decreed it: we are all supervisors now!"

"Independent judgment" also exists when a nurse weighs individualized patient needs with the skill set and training of available personnel before making an assignment. On the other hand, if there is a single obvious choice in making an assignment, independent judgment is absent. Thus, assigning the only Spanish-speaking nurse to a patient who only speaks Spanish would not implicate independent judgment, but would rather be "merely routine or clerical in nature."

The majority dismissed concerns that its' analysis would exclude most "professional employees" from the Act's coverage. Under Section 2(12) of the Act, an employee is a "professional employee" if he/she consistently exercises "discretion and judgment" in the exercise of "predominantly intellectual and varied" work.[22] According to the Board, a nurse who makes a professional decision that a patient requires a certain level of care "is not a supervisor unless and until he or she assigns an employee to that patient or responsibly directs the employee."[23]

***Oakwood Healthcare* Standards in Practice**

While an employer might have an easier time establishing supervisory status, any determination will still involve scrutinizing the actual authority and responsibility possessed by the putative supervisor. The Board's application of the *Oakwood Healthcare* standards provides valuable guidance as to the evidence necessary to establish whether a putative supervisor has authority to "assign" or "responsibly to direct" others with "independent judgment."

In *Oakwood Healthcare*, the charge nurses "assigned" employees when, at the beginning of each shift, they assigned staff to patients. In the emergency room, the charge nurses' assignment of staff to particular geographic locations fell within the statutory definition because it determined what would be required of each employee during a shift, thereby materially affecting their terms and conditions of employment. Contrastingly, the employer in *Croft Metals* failed to establish that lead persons "assigned." Among other things, the employer did not show the factors that the lead persons take into account when reallocating work. Moreover, because the evidence failed to indicate how frequently the lead persons reallocated work, the Board concluded it was akin to an *ad hoc* instruction by an employee to perform a discrete task. Similarly, authority to assign did not exist in *Golden Crest*, where, despite the employer's allegations that charge nurses could order employees to stay past the end of their shift, the evidence merely showed they *requested* and could not *require* this action. Additionally, the nurses did not assign workers by calling nursing assistants to come

in because they exercised a ministerial function where seniority dictated the calling order and where an admitted supervisor authorized the action.

Responsible direction did not exist in *Oakwood Healthcare*, where there was no evidence that the charge nurses must take corrective action if a staff member improperly performs their job. Additionally, there was no evidence that the charge nurses received discipline for the inadequate performance of a subordinate's work. Similarly, while the Board concluded that the charge nurses in *Golden Crest* "directed" nursing assistants, the employer did not present any evidence, positive or negative, that the charge nurses experienced material consequences to their terms and conditions of employment resulting from the direction provided. On the other hand, the lead persons in *Croft Metals* responsibly directed crew members where they instructed employees how to perform jobs properly and the employer disciplined lead persons for their crew's failure to meet production goals.

As explained above, even if the evidence establishes the existence of supervisory authority, the putative supervisor must exercise the authority with "independent judgment." Thus, the leads persons in *Croft Metals* were not supervisors because they did not use independent judgment when directing crew members where they followed a pre-established delivery schedule and a standard loading pattern. Moreover, there was sparse evidence regarding the degree of discretion employed by the leads and no evidence of the factors weighed by in providing direction.

Contrastingly, the employer in *Oakwood Healthcare* provided several examples of how its charges nurses exercised independent judgment in assigning nursing staff. Specifically, testimony illustrated a "myriad" of factors the charge nurses considered in making assignments. Additionally, the Board concluded that the charge nurses were not merely equalizing workload, which does not require the use of independent judgment, but rather were assessing the quantity and of work assigned and the competence of the staff available to complete the work. Finally, the presence of written policies for assigning staff did not preclude the exercise of independent judgment where, among other things, the policies did not "prescribe a formulary approach" and did not list every factor considered.[24]

Repercussions

According to the two Board members who vigorously dissented in *Oakwood Healthcare*, the decision "threatens to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."[25] Echoing this sentiment, the AFL-CIO writes that "employers can classify or reclassify as 'supervisors' employees with minor or sporadic oversight over coworkers even when such oversight is far short of genuine managerial or supervisory authority."[26] It is unclear, however, how an employer would be able to deprive employees of their right to organize simply by reclassifying them as a supervisor. Under the Board's *Oakwood Healthcare* standards, a worker will not became a supervisor merely by performing a "minor supervisory" duty that is routine and clerical. An employer would need to provide objective evidence of one of the twelve listed Section 2(11) functions.

Nonetheless, the *Oakwood Healthcare* trilogy has become a political target for unions, which estimate that the decisions affect nearly 8 million workers.[27] Indeed, the AFL-CIO has indicated that it plans to seek restorative legislation "to restore the traditional, more balanced test for supervisory status."[28] It is, however, possible that the United States Supreme Court eventually will address the validity of the Board's latest attempt at construing the Act's supervisory exemption. Furthermore, the Board may reverse course with a change in the Board's composition, with a majority of members appointed by a Democratic President.[29]

At present, it is premature to predict the effect of the *Oakwood Healthcare* standards on unionization. Indeed, the *Oakwood Healthcare* dissent recognized that:

The consequences of today's decision . . . will take time to play out [and] . . . [will] depend, in some measure, on how the Board applies in practice the principles announced here, on whether the federal appellate courts uphold these principles, and on the extent to which employers seek to take advantage of the Board's decision.[30]

Accordingly, employers, unions and workers will experience the true ramifications of *Oakwood Healthcare* in the coming years.

— END NOTES —

[1]348 NLRB No. 37 (2006).

[2]348 NLRB No. 38 (2006).

[3]348 NLRB No. 39 (2006).

[4]UAW Will Support Nurses' Fight For Quality Patient Care, Despite New Restrictions On Workplace Rights, available at www.uaw.org/news/newsarticle.cfm?ArtId=409 (last visited October 17, 2006). On October 23, 2006, the AFL-CIO filed a complaint with the International Labor Organization claiming that the decisions violate international labor law standards. *See* Complaint by the AFL-CIO to the ILO Committee on Freedom of Association against the United States of America for violation of fundamental rights of freedom of association and protection of the right to organize and bargain collectively concerning employees classified as "supervisors" under the National Labor Relations Act, available at www.aflcio.org/joinaunion/voiceatwork/upload/ilo_complaint.pdf (last visited October 24, 2006)[hereinafter "ILO Complaint"]. In its complaint, the AFL-CIO asks the ILO "to lend its voice and its moral standing to support workers' freedom of association [and] . . . . urge Congress and the administration to amend the National Labor Relations Act. . . ." *Id.* at 19.

[5]The Supreme Court rejected the Board's prior approach for evaluating supervisory status in *NLRB v. Kentucky River Community Care*. 532 U.S. 706 (2001).

[6]29 U.S.C. § 152(11).

[7] *NLRB v. Dole Fresh Vegetables*, 334 F.3d 478, 484 (6th Cir. 2003)(quoting *NLRB v. Health Care Ret. Corp. of Am.*, 511 U.S. 571, 573-74 (1994)).

[8]The *Oakwood Healthcare* majority declined to depart from established precedent regarding the status of individuals who engage in supervisory duties only part of the time, noting that a supervisory determination depends upon "whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions." *Oakwood Healthcare*, 348 NLRB No. 37, at *9. "Regular" is "according to a pattern or schedule, as opposed to sporadic substitution." *Id.* The Board does not maintain a numerical definition of "substantial" and has found supervisory status when individuals exercised Section 2(11) duties ten to fifteen 10-15 percent of the time. *Id.*

[9]Interestingly, however, the dissent viewed the majority's definition as redundant. *Oakwood Healthcare*, *supra* note 1, at *18 (Members Liebman and Walsh, dissenting).

[10]*Id* at *4.

[11]*Id*.

[12]*Id*.

[13]*Id*.

[14]*Id.*

[15]*Id.* at *5.

[16]*Id.* at *7.

[17]*Id.*

[18]*Id.* at *22 (Members Liebman and Walsh, dissenting).

[19]The "independent judgment" requirement applies to all of supervisory actions listed in Section 2(11). *See supra* note 7 and accompanying text.

[20]*Id.* at *8.

[21]*Id.* at *9.

[22]29 U.S.C. § 152(12)(2006).

[23]*Oakwood Healthcare*, *supra* note 1, at *9.

[24]The Board, however, concluded that the charge nurses in the emergency room did not exercise independent judgment where the record did not demonstrate that they considered the skills of the staff and patient needs in making assignments. *Id.* at *13.

[25]*Id.* at *15.

[26]ILO Complaint, *supra* note 4, at 2.

[27]AFL-CIO President Sweeney On Today's Bush Labor Board Decision That Will Strip Workers of Union Rights (October 3, 2006), *available at*, www.aflcio.org/mediacenter/prsptm/pr10032006.cfm (last visited November 2, 2006).

[28]*Id.* at 19.

[29]The Board consists of five members, three members of the President's party and two members of the opposition's party.

[30]*Oakwood Healthcare, supra* note 1, at *25 (Members Liebman and Walsh, dissenting). ■

ON *CHUTZPAH, GISSEL* BARGAINING ORDERS, THE LAWYER-SECRETARY EMPLOYMENT RELATIONSHIP, AND OTHER NOTABLE LEGAL ISSUES

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The importance of the word *"chutzpah"* to American jurisprudence — addressed in my article *"Chutzpah* And Other Legal Terms," Vol. 15, No. 4 *Labor and Employment Lawnotes* 10 (Winter 2006) — grows. My October 2005 Westlaw search produced 331 decisions using *chutzpah,* variously-spelled by various courts, state and federal, trial and appellate. My identical search in November 2006 produced 353 decisions. That's a 6.67% annual growth rate. In the world of legal terms, that's not chopped liver.[1]

1. Justice Delayed is Justice Denied.

When it comes to labor law, *chutzpah* often is the *bon mot,* the good — and most precise — word. For example, take *Cogburn Health Center, Inc. v. NLRB,* 437 F.3d 1266 (D.C. Cir. 2006) — please.

In *Cogburn,* the National Labor Relations Board issued a *Gissel* bargaining order five years after an employer's unfair labor practices.[2] Five more years after that, the case came to the Court of Appeals. When you're dealing with the National Labor Relations Act, the wheels of justice grind slowly. Anyway, the Board unsuccessfully tried to defend the *Gissel* order. The Court of Appeals rejected the Board's effort to minimize the significance of the passage of time. Judge Edwards wrote:

> This matter is now 10 years old, largely because of the Board's extraordinary delays in case processing. In this situation it is the height of *chutzpah* for the Board to pronounce that the passage of time is irrelevant.

No *Gissel* bargaining order. Still, the wrongdoer had a price to pay. The employer was ordered to "make whole" six "former" employees. Of course, the employees were "former" — and long gone — because the employer unlawfully fired them for the peskiness of exercising their NLRA rights. In addition, the employer had to perform acts of penitence and remediation: to "cease and desist from engaging in any further unfair labor practices" and to "post appropriate notices to advise employees of their rights under the Act." So, after ten years the employer had to shell out a few bucks and promise to be good, and employees can exercise their NLRA rights into the future. Who would have the *chutzpah* to say this isn't justice?

2. A *Chutzpahnik* Lawyer?

Chutzpah was the right word to address the employer's conduct in *Roberts v. Wyman,* 135 Idaho 690, 23 P.3d 152 (2000), *reh'ng den., review den.* (2001).

The employer was a lawyer, sued by his former legal secretary. The secretary quit and later filed a wage claim with the Idaho DOL because she didn't timely get paid for her last work week.

"A secretarial malpractice tort waiting to happen?"

Her weekly salary: $328.70. The DOL upheld the claim and imposed a $1,500 penalty on the lawyer-employer. The Idaho appeals court addressed the secretary's enforcement action and the lower court's dismissal of the lawyer's counterclaims.

The lawyer complained that the secretary put a trial notice in the lawyer's in-basket instead of recording it on his calendar. The lawyer counterclaimed for this infraction, characterizing it as breach of employment contract and negligence.

The appeals court affirmed the decision below, which found that putting the trial notice in the in-basket was not a *material* breach of employment contract. The appeals court also affirmed the determination that the lawyer's "own negligence in overlooking the notice of trial setting that was placed in his in-basket exceeded any negligence" on the part of his secretary and that this barred the lawyer's negligence counterclaim.

Judge Alan M. Schwartzman "specially" concurred. He did not ruminate on in-basket materiality or relative degrees of negligence or similar legal *mishegas.*[3] Judge Schwartzman opined about the counterclaims:

> In a shameful display of *legal chutzpa,* [the lawyer] counterclaimed against [the secretary] for legal secretarial malpractice. Such a tort does not exist — there is no legal duty of care owed in this context that the law or torts would seek to protect.
>
> * * *
>
> This claim is patently frivolous. Were it otherwise, the opportunity for *mischief* would be rampant, ranging from "I cannot tell a lie, your honor, it's all my legal secretary's fault," to "Let's sue the legal secretary!"

Judge Schwartzman continued, addressing employment law and the lawyer-legal secretary relationship:

> As long as an "at-will" legal secretary puts in her hours, she is entitled to her agreed-upon salary. If she performs her duties incompetently, the remedy is NOT to withhold earned wages and/or file some sort of breach of contract claim for damages, but simply to FIRE the employee.

In addition, Judge Schwartzman lamented that the litigation would continue. Some issues were still to be addressed on remand in a "mini-retrial of the statutory penalty phase of the lawsuit." He noted, too, that this protracted litigation was not cheap. The secretary's legal fees at the time of the appeals court decision were over $18 thousand, more than 57 times the "original amount in controversy." Judge Schwartzman suggested that the lawyer-employer's conduct was characterized by "intransigence" and was "inexcusable," that the case was "embarrassingly over-tried," and that the matter "should have settled on day one [in 1994] . . . the day [the secretary] demanded her unpaid wages." So, *nu,* a *chutzpahnik* lawyer going to *chutzpahdik* extremes?[4]

3. Eye Of The Tiger

As indispensable as *chutzpah* may be to effective legal argument, it may not be the right word to use with every judge, even if opposing lawyers and parties indisputably are full of *chutzpah.* Judge Sidney H. Stein, for example, *kvetches* that the word *chutzpah* "is now vastly overused in the legal literature." *Yates v. The City of New York,* 2006 WL 2239430 (S.D.N.Y.) at *1.

Hoo-ha, some judges are never satisfied, like the restaurant patron who complains that the food is terrible and the portions are too small. Still, it's maybe understandable how a judge in New York might get jaded over the use of the word *chutzpah,* New York being the *chutzpah* capital of North America. Anyway, Judge Stein acknowledged that *chutzpah* was "a most appropriate term to use" to address Mr. Yates' lawsuit.

Here are excerpts from Judge Stein's opinion (citations to the record omitted) addressing plaintiff Yates' suit against New York City and the police who entered Mr. Yates' apartment. The police were following up after Mr. Yates was mauled by Ming, the Siberian tiger Mr. Yates had been raising in his apartment along with Al, Mr. Yates' alligator.

> In the early afternoon of October 1, 2003, Antoine Yates was mauled by his pet 10-foot long, 450-pound adult male Siberian tiger named Ming that Yates had been raising inside his fifth floor Harlem apartment. An anonymous caller twice dialed 911 and said that a man had been "bitten by dog" at Yates's address, 2430 Seventh Avenue, Apartment 5E. Police officers responded to the apartment building, which was owned and operated by the New York City Housing Authority, and found Yates "lying face-up on the floor" near the fifth story elevators "screaming and crying in pain." His wounds included a gash below his right knee that exposed the bone and a half-inch cut to his right forearm. Yates told the officers he had been bitten by "a large brown and white pit bull." EMS personnel arrived on the scene and took Yates to Harlem Hospital; all the while Yates continued to insist that a "pit bull" or "dog" had bitten him.
>
> Two days later, on October 3, the New York City Police Department ("NYPD") received an anonymous tip that a tiger was living inside 2430 Seventh Avenue, Apartment 5E, and that the tiger had mauled a man who was recuperating at Harlem Hospital. Officers responded to the location but did not enter the apartment because no one answered the door. Later that evening, the police returned to the building and interviewed one of Yates's neighbors, who said that there was "a large wild animal," apparently a "full-grown tiger," living in Yates's apartment. The neighbor said that Yates had shown the animal to her daughter and that "large amounts of urine" sometimes cascaded from Yates's window down into the window of her apartment.
>
> The police also went to Harlem Hospital to speak with Yates, who insisted that he had been bitten by a pit bull in the stairwell of his residence and that he did not own a tiger. At midnight, NYPD Captain Michael Polito interviewed Yates's brother Aaron, who said that Yates had both a fully-grown tiger and a large alligator living inside his apartment. Aaron also said that on the night before, he had opened the door to his brother's apartment, thrown in several pieces of raw chicken and watched as the tiger came toward the food. He added that Yates had acquired the tiger when it was a cub, about one-and-a-half to two years ago, and had raised the tiger in the apartment since then. Polito notified the NYPD's Emergency Services Unit ("ESU") that there was reason to believe that a large dangerous animal was living inside Apartment 5E.
>
> At approximately 1 a.m. on October 4, ESU officers arrived at Yates's address. In an attempt to determine — without entering the apartment — if in fact, a tiger were inside, the officers removed the peephole in the apartment's front door and also lowered cameras from the windows of the apartment directly above Yates's. However, the officers could not see the tiger. An hour later, two directors of the Center for Animal Care and Control ("CACC"), which advertises itself as "the only animal care organization in New York City that never turns away animals," arrived and told the officers that CACC did not have the ability to transport or house the tiger. The NYPD contacted a veterinarian at the Bronx Zoo, who said that the zoo also did not have personnel or means to transport a fully-grown tiger from a fifth floor apartment. Unable to confirm the presence of the tiger and without a means of moving it out, the NYPD re-secured the apartment's front door and stationed two officers at the door to stand guard.
>
> * * *
>
> The police proceeded to hold several strategy meetings in which, according to Chief of Police John Seymour, they determined that the situation was an "emergency" because "there was a large tiger roaming around inside an apartment" and "the tiger had recently mauled a man." Seymour said that the police also determined that there was "an urgent need to remove the animal from the apartment" because of "concerns for the safety of residents of the apartment building and the safety of people in the area surrounding the apartment building" as well as concern for the "safety of the animal itself." After consulting several agencies with experience in dealing with wild animals, the police, unsurprisingly, concluded that the best option was to tranquilize the tiger before attempting to remove it.
>
> The NYPD began the removal operation on the afternoon of October 4. In order to pinpoint the tiger's location inside the apartment, officers raised a camera from the apartment beneath Yates's to look through Yates's windows, inserted a second camera into the peephole in Yates's front door and cut through one of the apartment's walls in order to conduct a "room by room tactical search." After Ming — along with a large alligator — was located by the window camera, the police stopped the room-by-room search, sealed the apartment and spoke with several experts in animal rescue who were on location, including Robert Cook, the Chief Veterinarian of the Wildlife Conservation Society, to determine what to do next.
>
> In a maneuver that police and Cook say was intended to minimize the risk to the tiger and to those in the area, an NYPD officer rappelled off the side of the building from a seventh-floor window and, through a half open window of Yates's apartment, shot Ming with a tranquilizer dart. Ming charged at the window, breaking the glass, and then

(Continued on page 8)

ON *CHUTZPAH, GISSEL* BARGAINING ORDERS, THE LAWYER-SECRETARY EMPLOYMENT RELATIONSHIP, AND OTHER NOTABLE LEGAL ISSUES

(Continued from page 7)

ran through the apartment, hid in another room and fell unconscious fifteen minutes later. Several ESU officers, along with members of the Wildlife Conservation Society, entered the apartment to remove Ming and the six-foot-long alligator, both of which were transported to an animal refuge area.

* * *

That evening, New York City police detective Jose Ortiz, the only defendant identified by name in the complaint, traveled to Philadelphia to interview Yates, who had been admitted to University of Pennsylvania Hospital for continued treatment of his injuries. Yates told Ortiz that he had purchased Ming from a woman in Minnesota for $3,500; that he had owned "many wild animals in the past, including monkeys, alligators and scorpions"; and that he had lied to medical personnel about what had caused his wounds. Yates insisted that the only animals he currently possessed were Ming and the alligator. He had raised the alligator — whose piquant name was Al — for about eight years, since it was a mere hatchling.

Detective Ortiz applied the next day for a warrant to search the apartment.

* * *

Based on this information, Acting New York State Supreme Court Justice Michael Obus signed the search warrant, which notes that there was "reasonable cause to believe" that documents and other things related to the ownership and purchasing of exotic animals "may be found" at Yates's apartment.

* * *

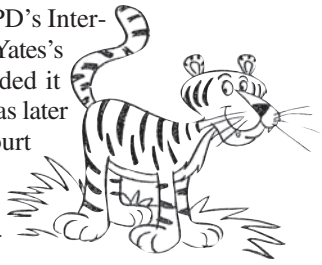
Detective Ortiz and three other NYPD officers searched Yates's apartment in the early evening of that day, October 5. The officers recovered pictures of the tiger, nine bullets, a certificate of veterinary inspection, receipts indicating that Yates had purchased a tiger and two lions in 2001 and other assorted papers.

* * *

Detective Ortiz returned to Philadelphia to arrest Yates for reckless endangerment and bring him back to New York.

On October 8, Yates returned to his apartment for the first time since the mauling a week earlier. He was accompanied by his attorney, Detective Ortiz, an assistant district attorney and others. After looking through his bedroom, Yates said that he was missing $7,000 in cash that had been wrapped inside papers on his desk, as well as more than $30,000 worth of jewelry.He later said that his brown, three-to-four pound "dwarf rabbit" was also missing, along with some clothing, his "plasma TV," a DVD player, a stereo and a "manuscript" he had written. Yates had not been able to produce receipts for any of the allegedly missing items. The whereabouts of the rabbit has not been ascertained, but there is no indication in the record that Al the alligator was questioned in that regard. The Court suggests that he may be more knowledgeable on this issue than he has disgorged to date.

Yates filed a notice of claim against the NYPD and the City of New York in December 2003 alleging that "personal property and monies [were] stolen from my apartment, while the apartment was under police dept. control." The NYPD's Internal Affairs Bureau investigated Yates's allegation of theft and concluded it was "unsubstantiated." Yates was later convicted in New York state court of reckless endangerment and sentenced to five months in prison. This federal action followed.



"Ming, the Siberian tiger." (Artist's rendition.)

* * *

Yates's amended complaint, which refers to the NYPD's entries of his apartment on both October 4 and October 5, 2003, alleges that those searches were "unlawful" and "excessive" in violation of his rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. The amended complaint also alleges a state law claim of conversion and municipal liability based on the theory of respondeat superior.

* * *

Defendant's summary judgment motion is granted because the NYPD's actions in entering Yates's apartment to look for and remove the tiger without a warrant on October 4, 2003 were objectively reasonable; Yates has presented no evidence that would permit a reasonable juror to conclude that the subsequent search of his apartment on October 5, 2003 with a warrant violated his Fourth or Fourteenth Amendment rights; and the Court declines to exercise jurisdiction over Yates's state law claims.

While *chutzpah* may be overused in the Southern District of New York, it remains essential to the lawyer's lexicon and to American jurisprudence. If *chutzpah* fits, there is no better word. As Judge Stein suggests, Mr. Yates' decision to sue New York City and the NYPD was pure *chutzpah,* and no other word would do justice. Indeed, the boundaries of the definition of *chutzpah* expanded after that fateful day when Ming the Siberian tiger, like McGruff the law enforcement dog, took a bite out of crime.

— END NOTES —

[1]*Chutzpah,* of course, is a Yiddish word generally meaning, in its negative connotation, "gall," "brazen nerve," "presumption-plus-arrogance." See Leo Rosten, *The Joys of Yiddish* (1968) and my *Lawnotes* article cited in the text above. Chopped liver in Yiddish is *gehakte leeber.*

[2]*Gissel* (rhymes with *bisl*) is not, to my knowledge, a Yiddish word, even if it should be. Actually, the *Gissel* in the term *Gissel* bargaining order alludes to *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), which held that the Board may impose a duty to bargain on an employer to remedy the employer's serious unfair labor practices that tend to undermine a union's majority status.

[3]*Mishegas* is insanity, craziness.

[4]A *chutzpahnik* is a person exhibiting *chutzpah. Chutzpahdik* is an adjective, indicating an act or person characterized by *chutzpah. Nu,* as used in the text, means something akin to: *So, you were expecting maybe that a leopard wouldn't be spotted?* ■

PRE-SUIT EMPLOYMENT CLAIMS

Daniel D. Swanson
Sommers Schwartz PC

I. AT THE OUTSET, EVALUATE THE CLIENT, THE FACTS AND LAW, AND WHETHER THERE IS A CLAIM WORTH PURSUING.

It is critical to carefully evaluate the potential client and their claim before making a decision as to whether or not to represent the person. While this may seem obvious, attorney hungry for work or careless in selecting cases routinely take cases which are weak or simply worthless. As a longtime case evaluator for employment cases in Wayne and Oakland County Circuit Courts, there are days when perhaps 80 percent of the cases I have reviewed leave me scratching my head and asking the question of how in the world plaintiff's counsel decided to take the case in the first place. These are the "nuisance" value cases in which plaintiff's counsel and their client are financial losers.

Perhaps the most important decision a plaintiff's attorney will make in developing a successful practice is deciding which clients *not* to represent. While there is no magic formula or scientific process for evaluating whether to represent a person, there are a number of common sense tactics for trying to weed out bad cases.

As a precondition for an initial meeting, require that the potential client gather critical documents i.e. resume, personnel file, employee handbook/policies, calendar, etc. In addition, require that the potential client prepare a written chronology of relevant events. If the person is either unwilling or unable to do this, you probably don't want to represent them.

Many times at the first meeting, potential clients are at their best in presenting themselves and their story; therefore, it is usually important to have at least two face-to-face meetings with the person before making the critical decision of whether to represent them. These meetings are important so as to accurately evaluate the person and to do so by asking key questions such as the following: Do they seem sincere? Are they consistent in presenting the facts of their story? How do they stand up under questioning? do they seem cooperative and responsive to instructions? Is this someone who you want to work with over the next 12 to 18 months? In addition, during the interim period between meetings, you have an opportunity to more carefully review the documents, independently investigate the facts by way of contacting essential witnesses, consult with other attorneys who have previously sued the defendant and take other steps to attempt to verify the potential client's story. Finally and most importantly, you can review the relevant law to determine what possible legal claims the potential client may have and the strength or viability of those claims.

Many times while the client may present an emotionally compelling story regarding their employment dispute and the damages they have subsequently suffered, the law regarding their potential claims may not be favorable. Other clients may have what appears to be a very strong legal claim, but have minimal damages, a desire not to litigate or lack the qualities that make for a strong and effective witness. On occasion, the client's claim may potentially be the subject of considerable publicity, directly impacting the company's or key personnel's image/reputation, and/or creating issues for the company with regulatory or law enforcement authorities. Evaluating all of these sorts of circumstances and getting to know your client is very important in making an informed decision about undertaking to represent the person and if so, the strategy you will employ to achieve their goals, including obtaining the maximum amount of compensation for their loses.

If you decide not to represent the person, it is always important to promptly prepare a letter advising them of your decision and of relevant statute of limitations periods.

If you decide to represent the person, it is critical that you promptly discuss the fee arrangement. Typically, there are at least three possible fee arrangements: hourly; contingency; and blended (reduced hourly fee and corresponding reduction in the contingent percentage). Whatever arrangement is agreed upon, retainers, costs, and billing procedures should all be discussed. Further, the fee arrangement terms should always be reduced to writing and signed by client before you begin any work.

A discussion relating to the advisability of immediately pursuing pre-suit settlement negotiations, may be highly relevant to the client's decision as to which fee arrangement she prefers and further, as to the amount of a contingent fee percentage. It is not unusual for a client to pay a lower contingent fee percentage if the matter is resolved prior to filing a complaint. Further, some clients may opt to pay an hourly fee, understanding that the cost of engaging in pre-suit negotiations will be far less than the fees likely to be incurred in litigation. Finally, consider having two different fee arrangements to present to potential clients: one, an agreement which limits your representation to only pre-litigation negotiations; and two, an agreement providing for representation in litigation. If the pre-litigation negotiations are not successful and you want to represent the client in litigation, you should ask them to sign a second litigation fee agreement.

II. EXPLORE WITH THE CLIENT THE EFFICACY OF PRE-SUIT NEGOTIATIONS AS OPPOSED TO IMMEDIATELY FILING SUIT.

Not all viable cases should be litigated. Assuming you have done a thorough job in evaluating the potential client and their case, you must consider whether litigation should be the first or only option in representing the client. This is critically important not only to your ability to effectively represent the person, but also in making the case financially rewarding for you. Litigation is costly and risky. While it may be worthwhile to represent a client in pre-suit negotiations, it may not be worthwhile to file the case for a number of reasons: limited damages, weak facts or law, the client will not be a good witness, etc.

It is important to immediately determine whether the employer had a mandatory or optional alternative dispute resolution program, which may include a pre-litigation procedure for resolving disputes. Frequently, clients are unaware what they signed at the time they began employment or what the employer's policies are. It is critically important to always have the client obtain their personnel file (where presumably all relevant written agreements would be found) and a copy of the personnel manual/employee handbook. If the employer has a mandatory alternative dispute resolution procedure, the employee may not have any choice but to pursue their rights under that procedure, including pre-litigation negotiations. On the other hand, if the procedure is optional, depending on its terms, it may provide a framework to pursue pre-litigation discussions.

Assuming the company does not have an alternative dispute resolution procedure, find out what the company's history is relative to engaging in good faith pre-litigation negotiations. Primarily based upon personal experience or my partners' experience either with the employer or employer's counsel, sometimes I am able to evaluate at the outset the likelihood that the company will respond favorably to a request to engage in pre-suit negotiations. Many times the client will offer opinions on this subject; my experience is that most clients' opinions on this subject are of marginal value. Unless the client was in a very high executive level position or worked in the human resources or the legal departments, he can only offer third

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PRE-SUIT EMPLOYMENT CLAIMS

(Continued from page 9)

hand gossip or speculation as to how the company is likely to respond. Nevertheless, exploring this issue and pursuing whatever sources you may have at your disposal, before making such a pre-suit negotiation request to the company, is important.

Get to know your client and her expectations, personality and financial needs. Depending on the client's expectations, pre-litigation negotiations may be required. For instance, if the client had been offered a substantial severance package and is confident about finding a new job, pursuing pre-suit negotiations may be the only logical way to proceed. Some clients are poor candidates for the rigors of litigation based on their personality, mental/emotional/physical health and thus, pre-suit negotiations may be required. Finally, depending on the client's financial condition/responsibilities, pre-suit negotiations may be necessary. Missing one paycheck for some clients may trigger their financial collapse and filing for bankruptcy. Other clients have immediate and critical financial responsibilities (i.e. college tuition or medical bills) that they do not want to default on.

In other cases, the client's expectations/goals for a settlement may be extremely aggressive or because of other reasons, it will be apparent that there is little or no likelihood of pre-suit negotiations having any chance for success. Finally, there may be no time to pursue pre-litigation negotiations because the statute of limitations period is fast drawing to a close on some or all of the client's claims i.e. the statute of limitations for filing a claim under the Whistleblowers' Protection Act (MCL 15.361 et. seq.) is only 90 days.

III. NECESSARY STEPS TO MAKE PRE-LITIGATION NEGOTIATIONS WORTHWHILE.

There is no question but that pre-litigation negotiations can be an excellent, cost-effective and expeditious method to resolve employment disputes. The chances for pre-suit negotiations to be successful are greatly enhanced if you and your client develop a comprehensive strategy and goals at the outset. Further, it is critical that the strategy be implemented after careful preparation and in an appropriately aggressive, yet professional manner.

Maximizing the chances that pre-suit negotiations will be successful depends on many factors including the following:

Develop a settlement demand and goal. As outlined above, getting to know your client and understanding their needs at the initial meetings is critically important to successful pre-litigation negotiations. If the client's financial demands and expectations are extremely aggressive, pre-litigation negotiations may be a waste of time. You and your client must agree upon settlement demand and goal (including all monetary and non-monetary demands) before embarking on such negotiations and that should be reduced to writing, to avoid any misunderstandings. With an established settlement demand/goal, you can determine whether the discussions are moving in positive direction toward a successful resolution of the dispute and make appropriate strategic decisions along the way.

Develop a pre-suit negotiation strategy. When I represent a client in pre-litigation negotiations, together we will develop a comprehensive strategy for pursuing pre-suit negotiations. That strategy will usually involve preparation of a letter outlining the facts that give rise to a legal claim and mentioning (briefly) the relevant statutes and legal theories. It is important that this letter be carefully thought out and well written. If the negotiations fail, this letter should contain all the information required for drafting the complaint.

Most often, that letter is addressed to the company's president, in-house counsel or human resource director. The purpose of the letter is not to attempt to intimidate the company, but rather inform it about my client's position on the facts and law and to invite it to engage in pre-litigation negotiations.

This letter is critical to whether pre-settlement negotiations will be successful. Frequently, the letter will be circulated to a number of critical corporate decision makers for their consideration and input; therefore, it is important that the letter be well written, succinct and factually accurate. By way of this letter, you have the opportunity to communicate your client's position to these critical decision makers without it being filtered through others (i.e. the human resource director, legal counsel, the former boss).

The initial letter to the company should specify that it being written for the purpose of engaging in settlement negotiations and therefore, the letter and any subsequent communications of any sort relating to settlement will be inadmissible under either federal or state rules of evidence (408).

Usually, I omit a specific settlement demand or proposal from the letter. My primary goal in writing the letter is to learn whether the company is interested in engaging in pre-litigation discussions. For any number of reasons, the company may not have any interest in engaging in such discussions; therefore, any settlement demand presented will be rejected and may be used to your client's detriment in the course of later settlement negotiations occurring in the course of the litigation. There is usually no good purpose served to outline a specific settlement demand in the initial letter. If the company responds that it is prepared to enter into good faith settlement discussions, there will be plenty of opportunity to communicate a comprehensive settlement proposal.

How pre-suit negotiations proceed is always an open question. Old fashioned face-to-face, telephone or written negotiation approaches are obvious options. Today, many companies are interested in attempting to settle cases by way of alternative dispute resolution approaches including, using a facilitator or mediator. In addition, having a facilitator may be critical to your client feeling that she had an opportunity to tell her story to a respected authority (the facilitator) and thus, being able to more dispassionately evaluate the company's settlement proposal, with the facilitator's input/guidance. The company's willingness to pay the mediator's fees and costs, is also an excellent indication of its good faith in proceed-

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ing with negotiations. What is critically important regardless of the agreed upon negotiation process, is determining early on whether the company is willing to engage in good faith negotiations or is it just wasting your time, having no intention but to make a nuisance value offer and to stick to it.

Remember that the purpose of the negotiation process is to persuade the company to pay your client money to settle the dispute and that most companies are not easily intimidated by the threat of a suit. Plaintiff's counsel should never forget that their success in representing the client is dependent on the company paying their client money. Negotiations will not be successful if plaintiff's counsel immediately presents herself as a Rambo-type litigator, being highly confrontational, flamboyant and bombastic. It is much more likely that strong, confident, professional and personable advocacy will result in a successful early resolution. There will be plenty of time and opportunity to display one's courtroom skills if the negotiations are not successful. Knowing when not to display one's courtroom skills is critical for pre-suit negotiations to have any chance of success. Finally and most importantly, remember that your credibility is like a piece of fine crystal, once broken, it may never be repaired. Even if the pre-suit negotiations fail to result in a settlement, your credibility remains critical to successfully litigating the case and perhaps settling it at a later date.

Consider what the company wants out of pre-suit negotiations. Most times, the company sincerely believes that it did the right thing in terminating your client. At the same time, most companies also recognize that the road to hell is paved with good intentions. In other words, supervisors screw up, fail to provide relevant and important facts about an employee to human resources prior to the termination, act in a vindictive manner, ignore the law and believe that the end justifies the means. Sophisticated and knowledgeable human resource directors and corporate counsel are not shy or afraid to educate their client about potential issues or problems arising out of a termination and will provide a candid assessment of the situation. Companies understand that litigation is expensive, time consuming and diverts managers' attention from achieving corporate goals. Further, companies realize terminating an employee who for whatever reason is no longer considered a productive asset, frequently costs money in the form of a severance package.

While companies do not want to be perceived as open cash registers for every terminated employee, they nevertheless understand that frequently it is in their best interest to resolve an employment dispute by way of pre-suit negotiations and the payment of severance. Bringing an employment dispute to closure early, at a reasonable price and without incurring significant legal fees and costs, is important to most companies and thus, many companies are willing to make a good faith effort to resolve such disputes through pre-suit negotiations.

Be prepared to walk away from the negotiations and file suit if the company is unable or unwilling to resolve the dispute on a satisfactory basis. Again, it is critically important that at the outset, you and your client determine what the settlement goal is. With an established goal, you can determine whether the negotiations are moving forward toward a successful resolution of the dispute. Further, if there is insufficient movement by the company toward that goal, you will have determined whether litigation is a viable option and will be prepared to terminate the negotiations and proceed with the lawsuit.

Remember that even if the pre-suit negotiations fail, 95 percent of all cases settle and eventually, you will likely reengage in negotiations. Never burn your bridges in pre-suit negotiations. Litigation is a long and uncertain road and usually the parties resume negotiations later, up to and including the day before trial at the mandatory settlement conference in the judge's chambers. Pre-suit negotiations many times may lay the groundwork for a later settlement, even if they are not immediately successful and litigation results. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Off-Label Uses for Labor Arbitrators

It is widely known that physicians may prescribe drugs for uses that were not originally intended. This is part of the practice of innovative medicine and it is perfectly legal except with respect to controlled substances. Less well known is that labor arbitrators also have off-label uses. Here are a few:

Labor arbitrators can be used to frighten opponents into settlement. The appearance of a man or woman with gray temples, a dark suit and shiny black shoes often causes even the most self-confident litigant to lose his nerve. On many occasions it is not even necessary for the arbitrator to be physically present. Merely the threat that an old man in a dark suit will soon arrive and decide their fate is often sufficient to cause the parties to experience what psychologists call a "flight into health."

This is what justifies arbitrator's cancellation fees. It is also what prompted the most deeply wounding observation my wife ever made about my professional life. She said she didn't see any reason why she couldn't keep my job after I die.

Arbitrators can also insulate a party from hard feelings. A union that takes a losing termination case to arbitration can protect itself from an angry member and the threat of a duty of fair representation suit. An employer with a losing termination case can defend itself against a critical constituency. They can say, "We tried to keep (or fire) the guy! We did our best. The fact that he's gone (or not gone) is the arbitrator's fault!"

A party may not throw a case and no legitimate arbitrator will participate if he knows that is what is going on. But it is appropriate to turn a problematic decision over to an arbitrator and let him take the heat for it. It is a common off-label use and we are used to it.

More problematic is the use of the arbitrator in what is called the "agreed award." In this procedure the parties agree on a result in advance and arrange to have it issued over the arbitrator's signature.

The Code of Professional Responsibility for Labor Management Disputes (available at http://naarb.org/code.html) says this:

> Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.

An arbitrator, however, has a:

> responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose.

So the agreed award is a possible off-label use, but its use is restricted to cases where the suggested award is proper, fair, sound, and lawful.

Finally, there is this story of a truly creative off-label use. I heard it recently from an old-timer who got it from an even older old-timer. This arbitrator served on a permanent panel for many years despite the fact that he never ruled in favor of the union. He couldn't figure it out. Generally, unions get tired of that kind of record very swiftly and replace the arbitrator. It wasn't until years later that he learned why they kept him on. It seems he was one of the last arbitrators who permitted cigarette smoking in the hearing. And it seems that the hated company personnel manager became physically sick around cigarette smoke. The union was willing to lose all its cases in exchange for a regular opportunity to make the personnel manager throw up.

NLRB "DEFERENCE" TO ARBITRATION AWARDS: "PALPABLY WRONG"

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"'Post-arbitral deferral' is not deferral at all, but deference, a limitation on the scope of the Board's review of arbitration awards. More importantly, pre- and post-arbitral deferral differ substantially in justification and in practice." *Hammontree v. NLRB,* 925 F.2d 1486, 1490(D.C. Cir. 1991).

Pre-arbitration deferral just delays Board consideration of the unfair labor practice charge, if certain conditions are met, until the parties have exhausted the grievance arbitration process. *Collyer Insulated Wire,* 192 NLRB 837 (1971) (sets forth standards for pre-arbitration deferral). *Collyer* found deferral appropriate when: (1) the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) there was no claim of employer animosity to the employees' exercise of protected rights; (3) the parties' contract provided for arbitration in a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issues; (5) the employer has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well-suited to resolution by arbitration.

In most cases, the grievance process does resolve the ULP. But in cases where the grievance is not dropped, settled or where the Union loses, the Board applies a post-arbitration standard, which if met, results in the dismissal of even a meritorious ULP charge.

The deferral policy of the National Labor Relations Board ("NLRB") is not mandated by the National Labor Relations Act, as amended, 29 U.S.C. §§ 151-69 ("NLRA"). The NLRA does not make reference to deferral or any similar concept. The Board's deferral policy relies in large part on sections 203(d) and 301 of the LMRA, 29 U.S.C. § 173(d), §185. Section 203 concerns the Federal Mediation and Conciliation Service and Section 301 provides federal courts with jurisdiction over contract suits between unions and employers. *Collyer* admits: "Admittedly, neither Section 203 nor Section 301 applies specifically to the Board. However, labor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress." 192 NLRB at 840. Nonetheless the Board adopted this policy and the Courts have approved of it. *Carey v. Westinghouse,* 375 U.S. 261, 271 (1964) ("Board has considerable discretion to respect an arbitration award and to decline to exercise its authority over alleged unfair labor practices if to do so will serve fundamental aims of the Act.") Rather, it is a policy decision to in essence cede jurisdiction over certain unfair labor practices.

The policy has expanded and continues to expand. For example, in 1972, the Board expanded deferral to cover 8(a)(1) and § 8(a)(3) charges, *National Radio Co.,* 198 NLRB 527 (1972). In 1985, the Board in *Alpha Beta,* 273 NLRB 1546 (1985) applied *Spielberg* to grievance settlements even if grievant disagrees. Under those cases, the Board will give deference to a pre-arbitration grievance settlement when: (1) the settlement is reached through a collective bargaining process which is "fair and regular;" (2) the parties agreed to be bound by the terms of the settlement agreement; (3) the outcome reached is not "palpably wrong," meaning that both sides have compromised to some degree; and (4) the unfair labor practice issue was "considered" in the settlement process, in that the contractual and unfair labor practice issues are factually parallel and both parties were generally aware of the relevant facts.

In 2005, the General Counsel issued deferral doctrine relating to fringe benefit and collection cases to relief under Section 301 or ERISA. And now the Board is considering deferring requests for information charges, *DaimlerChrysler Corporation,* 344 NLRB No. 94, fn. 1 (2005) (Chairman Battista and Member Schaumber, if not bound by precedent, would defer "information request cases.")

Courts, on the other hand, 'defer' to arbitration awards by creating a very limited scope of review but that limited review is logical because the parties have agreed to be bound to the arbitrator's judgment as to contract matters. It is final and binding as to contract matters. But neither the union nor charging party has agreed that the arbitrator can decide NLRA issues. Arbitrators have not been given that power by the union or charging party and arbitrators do not possess expertise as to NLRA matters, as most will admit.

The NLRB's post-arbitration deference policy was first announced in *Spielburg Mfg.Co.,* 112 NLRB 1080 (1955). Under *Spielburg,* as revised in *Olin Corp.,* 268 NLRB 573 (1984), the Board grants deference to an arbitration award where:

(1) the arbitration proceedings appear to have been fair and regular;

(2) all parties agreed to be bound;

(3) the arbitrator's decision is not "clearly repugnant" to the purposes and policies of the NLRA; and

(4) the arbitrator considered the unfair labor practice issue.

Olin, 268 NLRB at 573-74: *Spielberg,* 112 NLRB at 1082.

Speilberg was clarified in *Olin Corp.,* where Board reversed some prior Board decisions (which had placed burden on respondent and required a showing that Award was consistent with the NLRA, e.g., *Propoco, Inc.,* 263 NLRB 136 (1982)) (Board ruled arbitration awards are appropriate for deferral only when the Board determines on *de novo* consideration that the award disposes of the issues just as the Board would have. *Olin* rejected that standard) and clarified that an arbitrator has adequately considered the unfair labor practice issue, (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (3) the decision is susceptible to an interpretation consistent with the Act. Id. at 574. The party seeking to have the Board reject deferral bears the burden of proof. Id.

Three recent Board decisions — 2 to 1 vote — show that the deference is being stretched and that the Board will appear to go out of their way to rubberstamp an arbitration award. In all three cases, the Board majority reversed the ALJ in 2 of the 3 cases:

1. *Kvaerner Philadelphia Shipyard, Inc.,* 347 NLRB No. 36 (2006) ("arbitrator upheld the discharge of employee William Smith. The judge deferred to the arbitral decision and thus dismissed the 8(a)(3) allegation regarding Smith. Although asserting that he would find the discharge unlawful, the judge determined that the arbitrator's decision was not palpably wrong, and thus deferral was appropriate under Board law.");

2. *Aramark Services, Inc.,* 344 NLRB No. 68 (2005) ("We find, contrary to the judge, that the conclusion of the arbitrator that the respondent properly disciplined Charging Party Leslie Lauria for harassing other employees in connection with a union-related issue, was not 'clearly repugnant to the Act' within the meaning of *Spielberg");*
3. *Smurfit-Stone Container Corp.,* 344 NLRB No. 82 (2005) (Board found arbitrator's award allowing unilateral implementation of its new attendance control policy meets the Board's standards for deferral because his award was based on the management-rights clause of the parties' agreement and because the arbitrator considered virtually the same facts as were presented at the ULP hearing.)

Even before these three decisions the NLRB deferral policy effectively allows the winning party to use the arbitration award to deny the charging party (i.e., union or individual) of the right to pursue a charge and have the unfair labor practice decided on the merits.

These cases make the point that an arbitrator's decision is not "clearly repugnant" to the NLRA unless it is "palpably wrong" — that is, "not susceptible to an interpretation consistent with the Act" — and the burden is on the opponent of deference to show that the conditions for granting deference have not been met. *Olin Corp.,* 268 NLRB at 574, 577. The standard for determining whether an arbitral decision is *clearly repugnant* is whether it is "susceptible" to an interpretation consistent with the Act. *Olin,* 268 NLRB at 574; see *The Motor Convoy,* 303 NLRB 135 (1991). "Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award. *Smurfit-Stone Container Corp.,* 344 NLRB No. 82 (2005).

In *Kvaerner,* the Board stated:

> The burden is on the party opposing deferral to show that the arbitrator's decision is palpably wrong; the party must show that it is clearly repugnant to the Act and not susceptible to an interpretation consistent with the Act. As the Board noted in *Aramark,* supra, this burden is a heavy one, and the Board will not lightly set aside an arbitrator's resolution of an unfair labor practice issue where the contractual issue was factually parallel, and the arbitrator was presented generally with the facts relevant to the unfair labor practice issue. Thus, even where the Board would reach a different conclusion than that of the arbitrator, deferral is appropriate if the arbitrator's conclusion is susceptible to an interpretation consistent with Board law.

Slip Op. at 2 (citation omitted)

What did William Smith do in *Kvanerner?* Smith was fired for handing out a leaflet to three coworkers complaining about what he thought were excess deductions from their paychecks. The arbitrator found the employer did not make any improper deductions and the employee should have inquired of management before he gave a leaflet/memo to three coworkers and accused the employer of improper deductions. Anyway, putting an arbitral stamp of approval on firing the employee for exercising his right to engage in protected, concerted activity — i.e., complaining to co-workers about the boss — just isn't clearly repugnant to the Act anymore.

What did Leslie Lauria do in the *Amarack* case? Lauria asked coworkers to sign a petition countering another petition that called for elections of a new steward. Lauria opposed a new election and was said to have harassed a coworker. For this, she was fired. The arbitrator reinstated but with no back pay in what appears to be baby splitting arbitration award.

What was management's right clause the *Smurfit-Stone* case that made the Board defer to the arbitrator's award that *allowed* unilateral implementation of its new attendance? Art. XVI, the contract's management-rights clause, provided: "The operation of the plant and the direction of the work force therein is the sole responsibility of the company. Such responsibility includes, among other things, the full right to assign work, to discharge discipline, or suspend for just cause, and the right to hire, transfer, promote, demote, or layoff employees because of lack of work or for other legitimate reasons." But see *United Cerebral Palsy of New York City,* 347 NLRB No. 60 (2006) ("In sum, we find that deferral to arbitration is not appropriate in this case. We further find that by distributing the handbook to employees, the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in terms and conditions of employment, and by directly dealing with its employees.")

These three decisions place most arbitration awards "beyond the pale." The Board's post-arbitration deferral standard 'even before these three cases set standards' uses language — "heavy burden," "clearly repugnant to the Act," "even where the Board would reach a different conclusion" — that places an almost impossible burden on the charging party.

Deference extends to the remedy as well. The Board will not second-guess the remedy granted by the arbitrator. The Board defers even if arbitrator granted lesser relief than Board would have granted. *Laborers International Union, Local 294 (AGC of California),* 331 NLRB No. 68 (2005) (Board deferred to arbitrator's determination that employee deserved a loss of pay suspension rather than a discharge, and found that employer nevertheless did not commit an unfair labor practice by discharging the employee because the arbitrator found employee's misconduct permitted discipline.) Thus, even if the grievance is upheld in part, the Board will not second-guess arbitrators who appear to "split the proverbial" baby.

Overall, the Board's post-arbitration standard is too deferential and too heavy a burden placed on the charging party. This standard is not supported by the text of the NLRA since it does not even require the Board to defer any charges, let alone defer to arbitration awards that are wrong. The Board should eliminate "clearly repugnant" standard and defer to Awards which are consistent with the NLRA and place the burden on the party seeking to deny the charging party access to the Board. The Board should not defer to arbitrator's whose finding are really conclusions or who 'split the baby' when there is in fact no justification for such a remedy. ■

DEFERRAL: THE NLRB'S VERSION OF THE PUNT, PASS AND KICK

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I. Introduction

Section 10118 of the NLRB's Casehandling Manual states that "it may be appropriate for a Regional Director to defer making a determination on the merits of a charge pending in the parties' contractual grievance procedure or before the Agency or other Federal, State, or local agencies or courts." Through July of fiscal year 2006, of the 19k097 cases filed Agency-wide, 2,257 were deferred. That represents 11.8 percent of all cases filed nationally. In Region 7 for the same time period, of the 1,060 cases filed, 155 were deferred. That represents 14.6 percent of all cases filed in the Region. Statistical data for the past several years reveal similar numbers.

These are not insignificant numbers, and represent a large volume of cases sitting in filing cabinets pending resolution in another forum. Indeed, once deferred, the case remains in such status an average of about 15 months. This article discusses the various circumstances when deferral is and is not appropriate.

II. The Basics

a. *Punting under Collyer/United Technologies: Pre-arbitral deferral to the parties' grievance/arbitration process.* Though not the first case in which the Board addresses the issue of deferral, *Collyer Insulated Wire,* 192 NLRB 837 (1971), is the seminal case. In that case, the Board decided to defer the unfair labor practice charge to the parties' grievance-arbitration process, reasoning that ". . . because this dispute in its entirety arises from the contract between the parties and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes."

In *Collyer,* the Board found deferral to be appropriate only when certain conditions exist: (1) the underlying dispute arises within the confines of a long and productive collective-bargaining relationship; (2) no claim is made of employer animosity to the employees' exercise of protected rights; (3) the parties' contract provides for arbitration in a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer has asserted its willingness to arbitrate the dispute; and (6) the dispute is well suited to resolution by arbitration. *Id.* at 841-842. It is important to note that a charging party is required to utilize the grievance machinery available to it or face dismissal of its charge. See *North American Pipe Corporation,* 347 NLRB No. 78 (July 31, 2006); and *Caritas Good Samaritan Medical Center,* 340 NLRB 61, (2003).

Under *Collyer,* only charges alleging violations of §§8(a)(5) and (b)(3) of the Act were uniformly subject to deferral. In *National Radio Co.,* 198 NLRB 527 (1972), the Board extended the pre-arbitral deferral policy to cases involving §8(a)(3) by deferring allegations that the employer discriminatorily suspended and discharged a union representative. The Board determined that the issues presented were essentially the same as those presented in *Collyer,* in that the underlying dispute concerned the meaning of certain contractual provisions.

Illegal Procedure — false start. In *General American Transportation Corp.,* 228 NLRB 808 (1977), a Board plurality rejected the holding in *National Radio,* and returned to the limits set forth in *Collyer.* In so doing, the Board reasoned that the protection afforded employees by the Act is an individual right, not a group or union right; hence the Board should not force arbitration on an alleged discriminatee. The Board's retreat was ultimately halted in *United Technologies Corp.,* 268 NLRB 557 (1984). In overruling *General American Transportation,* the Board expanded the breadth of deferral to include when appropriate, charges alleging violations of §§8(a)(1) and (3), and §§8(b)(1)(A) and (2) of the Act.

III. The NLRB Playbook

GC's Arbitration Deferral Policy Under *Collyer/United Technologies — Revised Guidelines* (1973), and *GC Memo 84* (March '84). These documents provide the nuts and bolts of the deferral process. Generally, deferral is appropriate only when the disputed issue(s) are susceptible to resolution under the parties' grievance machinery and the issue(s) would be "effectuated" in a manner compatible with the purposes of the Act. This "playbook" articulates the circumstances where deferral to the parties' grievance/arbitration machinery is appropriate.

1. Deferral is appropriate only as to alleged violations of certain section of the Act (see above).

2. **ULP issue likely resolved per the grievance.** Deferral is appropriate only if circumstances indicate a reasonable probability that the unfair labor practice issues raised by the charge will be resolved in the grievance-arbitration procedure in a manner consistent with the Board's decision in *Spielberg Manufacturing Co.,* 112 NLRB 1080 (1955) (see below). For example, deferral is clearly appropriate, if other prerequisites are met, where the unfair labor practice issue and the arbitration issue both turn on the meaning or application of a particular disputed contractual provision.

However, in situations where a contractual provision is free from ambiguity, the Board will find deferral inappropriate. For example, in *Grane Health Care, Inc.* and *Lexington, III, Inc., D/B/A Nittany Manor Care Associates,* 337 NLRB 432 (2002), the Board upheld the ALJ's determination that the terms of the parties' agreement regarding wage issues were clear and unambiguous, "therefore the special interpretation skills of an arbitrator would not be helpful." Likewise, in *Caritas Good Samaritan Medical Center,* supra, the Board considered the issue of whether the parties' agreement was "free from ambiguity so as to make arbitration unnecessary." In a plurality decision, the Board determined that the agreement was not free from ambiguity and hence, ripe for an arbitrator to decide.

Deferral is also inappropriate when an arbitrator is unable to prove a sufficient remedy. *North American Pipe Corporation,* supra. In that case, the Board upheld, in relevant part, the ALJ's determination that deferral was not appropriate. The complaint alleged, *inter alia,* the employer, which operated several facilities throughout the U.S., maintained an unlawful no-solicitation rule at its Van Buren, Arkansas facility. Because the rules, which the ALJ found to be unlawful, were corporate-wide, an appropriate remedy would require Notice posting at every facility where the rules were in effect. Because the arbitrator could impose no remedy at the employer's other facilities, deferral would be inappropriate. See also *Clarkston Industries,* 312 NLRB 349, 351-352 (1993).

That said, even where the unfair labor practice and arbitration issues do not involve a substantive contractual provision and even where no contractual provision specifically privileges the conduct, deferral may still be appropriate. For example, in *E.I. Dupont de Nemours and Co.,* 293 NLRB 896 (1988), the Board deferred a charge which alleged the transfer of work from a higher paid unit employee to another unit employee without support of specific contractual language. The Board reasoned that the underlying dispute was cognizable under the contract because it centered on the employer's contractual right to assign work to unit employees. See also *August A. Busch & Co.,* 309 NLRB 714 (1992).

But compare *Blue Cross Blue Shield of Michigan,* 286 NLRB 564 (1987), where the Board decided not to defer an 8(a)(3) allegation where discrimination based on union activity was not included among the enumerated kinds of discrimination prohibited by the contract.

See also *Bio-Science Laboratories,* 209/796, fn.3 (1974), where the underlying controversy centered on the reinstatement rights of economic strikers. In finding that the case was inappropriate for deferral under *Collyer* to arbitration, the Board relied on the fact that the contract itself was silent as to whether the recall from layoff clause applied to the reinstatement of economic strikers, and the fact that during negotiations, the parties did not discuss applying that clause to the reinstatement of strikers.

3. **Willingness to Defer.** Deferral is appropriate only when the charged parts is willing to defer and to waive any applicable time limitations in the contract on the filing, processing, or requesting of arbitration of grievances. It should be noted that this is true even when the charged party intends to contend before the arbitrator that the grievance was untimely filed.

For example, *Everlock Fastening Systems,* 308 NLRB 1018 (1992), where the Board refused to defer an 8(a)(5) allegation to the parties' grievance arbitration procedure because the employer did not unequivocally express its willingness to arbitrate. See also *Burroughs Credit Union,* 280 NLRB 292, fn. 3 (1986).

4. **Non-Deferrable Issues.** Deferral is appropriate only if the charge raises no issues considered non-deferrable under General Counsel and Board policy.

• *8(a)(4) allegations.* The Board will not defer alleged violations of §8(a)(4) to arbitration so to "protect the integrity of the statutory rights granted employees under the Act." *Commercial Workers Local 1776,* 325 NLRB 908, fn. 2 (1998), citing *Wabeek Country Club,* 301 NLRB 694 fn. 1, 699 (1991).

• *Representational Issues: accretion, QCRs, and Unit Appropriateness.*

In *Carr-Gottstein Foods Co.,* 307 NLRB 1318 (1992), the Board considered the issue of whether certain food service employees, known as OE employees, were an accretion to an existing unit. The Union asserted that the OE employees constituted an accretion to its existing unit of deli department employees, notwithstanding the fact that the OE employees outnumbered the existing unit of deli employees. The Board determined that accretion was not appropriate. At the same time, an AFL-CIO umpire ruled that the OE employees were covered by the existing contract, and the Union argued that the Board should be bound by the Article XX proceeding. The Board concluded that it would not defer the determination of questions of representation, accretion, or unit appropriateness to arbitrators, as they "involve application of statutory policy and are singularly within the Board's province," at 1319, citing *Williams Transportation Co.,* 233 NLRB 837 (1977).

The rule cited in *Carr-Gottstein Foods* is (of course) not iron-clad. On the sidelines lurk exceptions. For example, in *Central Parking System, Inc.,* 335 NLRB 390 (2001), the Board, in upholding the regional director's dismissal of an RM petition filed by the employer, concluded that the question of whether the employer agreed to an "after-acquired" clause requiring union recognition at future employer locations upon proof of majority status was contractual and appropriate for resolution by an arbitrator. The Board stated that, "although the Board only infrequently defers to arbitration in representation proceedings, the Board will find deferral appropriate when the resolution of the issues 'turns solely on the proper interpretation of the parties' contract," citing *St. Mary's Medical Center,* 322 NLRB 954 (1997); see also *Hershey Foods Corp.,* 208 NLRB 452, 457 (1974). I would note that then Chairman Hurtgen dissented. He argued that by dismissing the RM petition, the Board left representational issues like employer waiver, single employer, unit appropriateness, the attainment of majority status, and accretion, to a non-Board forum.

• *Information Cases.* Presently, the Board does not defer where the charge alleges a party has failed to supply information in violation of §8(a)(5) or §8(a)(b)(3). *Clarkson Industries,* 312 NLRB 349, 353 (1993). This is particularly true where the information is requested in support of a pending grievance scheduled for arbitration or collective bargaining negotiations.

Such cases are not deferred because the obligation to provide the information is derived from the statutory duties independent of the contract. *IMTT-Bayonne,* 304 NLRB 476, 481 (1991); *United Technologies,* 274 NLRB 504, 505 (1985).

Despite this clear precedent, several employers, in the concluding paragraphs of their respective position statements addressing the information allegations, include boilerplate assertions that the charge should be deferred to the parties' grievance-arbitration procedure. Such assertions generally fall on deaf ears. However, certain fact scenarios have produced robust disagreement by Board members about the appropriateness of deferring information cases (See Section V below).

• *Two-tiered Arbitration.* The Board has long held that it is unwilling to institute a two-tiered arbitration process. *Fleming Companies, Inc.,* 332 NLRB 1086 (2000). The situation typically arises when a union must file a grievance to obtain information potentially relevant to its processing of a second, underlying grievance. *General Dynamics Corp.,* 268 NLRB 1432, fn. 2 (1984). The situation arises in other circumstances as well. In *American National Can Company, Foster Forbes Glass Division,* 293 NLRB 901 (1989) the union sought access to the employer's premises in order to measure heat levels in preparation for a "heat relief" grievance. In overruling the ALJ, the Board determined that deferral under these circumstances would result in two separate arbitration proceedings.

• *Unlawful contractual provisions.* The Board has consistently refused to defer to arbitration where the contractual clause that is the subject of the grievance-arbitration proceeding is itself illegal. *Auto Workers Local 1161 (Pfaudler Co.),* 271 NLRB 1411 (1984), enfd. Sub nom. *NLRB v. Auto Workers Local 1161,* 777 F.2d 1131, 1140-1141 (6th Cir. 1985).

• *Direct Dealing/Bypass.* In *E.I. Du Pont De Nemours, Inc.,* supra, the Board upheld the ALJ's conclusion that deferral was appropriate where allegations of direct dealing are involved, so long as the employer indicated a willingness to go to arbitration and abide by the arbitrator's decision, and "it is likely that the outcome before the arbitrators would resolve the central issue of th[e] dispute." In arriving at such a finding, the ALJ distinguished *Texaco, Inc.,* 233 NLRB 375 (1977), wherein the Board considered independent violations apart from direct dealing allegations. Moreover, the employer in *Texaco* manifested intent not to comply with the arbitration award.

Likewise, in *Public Service Company of Oklahoma,* 319 NLRB 984 (1995), the Board upheld the ALJ's finding that deferral is appropriate where the arbitrator could provide an adequate remedy for unlawful direct dealing, even where there have been no collateral unilateral changes, simply by ordering the employer to honor its contractual obligation to deal exclusively with the union and to stop dealing with the employees. But see *Kenosha Auto Transport Corporation,* 302 NLRB 888, fn.2 (1991), wherein the Board, in agreeing with the ALJ, held that an 8(a)(5) "direct dealing" allegation should not be deferred, noted the conduct in that case essentially amounted to a refusal to deal with the "chosen representative," that the right to bargain through a chosen representative is a basic principle, and a refusal to honor such is a rejection of the principles of collective bargaining.

• *Adverse Employee Interests (e.g. CB charges alleging failure to process the Charging Party's grievance).* The Board has consistently refused to defer in advance of arbitration where the union representative is hostile to the grievant, *Amstead Industries,* 309 NLRB 860 (1992); *Consolidated Edison Co.,* 286 NLRB 1031, 1038 (1987). In *Amstead Industries,* the Board adopted the ALJ's conclusion that deferral to the parties' grievance-arbitration

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procedure was inappropriate because the Respondent Union's interests were adverse to those of the Charging Party as to the issue in the arbitration proceeding. Moreover, the Board has refused to defer to arbitration awards when the union's interests were adverse to those of the employees. *Russ Togs, Inc.,* 253 NLRB 767, 768 fn. 8 (1980); and cases cited therein; cf., *Bailey Distributors,* 278 NLRB 103 (1986). See also, *Regional Import Trucking Co.,* 292 NLRB 206, 231 (1988).

Similarly, the Board refused to defer issues raised in the compliance proceeding to arbitration even when the arbitration is court ordered, because, in part, the interests of the employer and union were aligned against the charging party. *Regional Import and Export Trucking Co., Inc.,* 306 NLRB 740 (1992); adopted as modified by *Regional Import and Export Trucking Co., Inc.,* 323 NLRB 1206 (1997) (other cites omitted).

On the other hand, in *Laborers Local No. 294,* 331 NLRB 259 (2000), the Board reversed the ALJ's determination that deferral was not appropriate. There, the Board noted that the judge relied on cases (like *Regional Import & Export)* where the union represented the grievants before the arbitrator. In *Laborers Local No. 294,* the grievants pursued grievances against the Union and were represented by independent counsel. So, while the Union's interests were adverse to the grievants, the Union did not represent the grievants and there was no showing that independent counsel failed to adequately represent the grievants' position.

• *Cases containing both appropriate and inappropriate issues.* The Board has long held that there is no compelling reason for deferring one aspect of a dispute to the grievance-arbitration machinery, even though appropriately deferred standing on its own, when another aspect of a dispute is not deferrable and both have a close interrelationship. *Flatbush Manor Care Center,* 315 NLRB 15 (1994), distinguished by *Honeywell Intern., Inc. v. NLRB,* 253 F.3d 119 (D.C. Cir. 2001); *S.Q.I. Roofing, Inc.,* 271 NLRB 1 (1984).

On the other hand, in *Clarkston Industries,* 312 NLRB 349 (1993), the Board reversed an ALJ and determined that issues regarding unilateral changes should be deferred to the parties' grievance-arbitration machinery. In *Clarkston,* the Board found the unilateral change issues to have no factual or legal interrelationship with other issues rendered non-deferrable because of the arbitrator's inability to fashion an appropriate remedy.

IV. Not-so-Instant Replay: Review under *Spielberg*

The typical collective bargaining agreement provides for final and binding arbitration. Pursuant to Section 203(d) of the Act, the Board has long regarded arbitration as an effective forum for peaceful resolution of labor disputes. *Wabeek Country Club,* 301 NLRB 694 (1991). Conversely, Section 10(a) of the Act provides in part that the Board's "power shall not be affected by any other means of adjustment or prevention . . . established by agreement, law, or otherwise." In *Spielberg Manufacturing Company, supra,* the Board strikes a balance between these two competing interests.

Simply put, the Board will defer to an arbitrator's decision when the arbitration proceedings are: (1) fair and regular; (2) all parties agree to be bound by the decision; (3) the award is clearly not repugnant to the Act; (4) the contractual issue before the arbitrator is factually parallel to the unfair labor practice issue; and (5) the arbitrator was presented generally with the facts relevant to resolve the unfair labor practice.

This important case (since cited 1192 times), involved a situation wherein the employer refused to reinstate four strikers it deemed had engaged in picketing misconduct at its plant. The employer's action was bolstered by the decision of an arbitration panel, which ruled that the employer was not required to offer reinstatement to said strikers. The union subsequently filed an unfair labor practice charge that resulted in the issuance of a complaint. In its defense, the employer argues that its refusal to reinstate the strikers comported with the arbitration decision. The ALJ rejected the argument, stating that the Board is not bound by the award. In the cases relied upon by the ALJ, the Board, in ignoring the arbitration decisions, determined that the awards were at odds with the statute.

In overturning the ALJ's decision, the Board in *Spielberg* noted that the arbitration proceeded pursuant to contractual constraints; three of the four strikers were present at, and testified in the arbitration hearing; all of the strikers were represented by an attorney who filed a brief on their behalf; and that the parties agreed to be bound by the decision. In a nutshell, the Board held that under those circumstances, the "desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award." *Id.* at 1082.

If each of the above enumerated conditions is met, then the Board will dismiss the deferred unfair labor practice charge. *Olin Corporation,* 268 NLRB 573 (1984). The Board may or may not agree with the arbitrator's conclusion, but deferral does not depend upon whether or not the Board agrees or disagrees. Instead, the Board requires the party seeking to avoid deferral to establish that the arbitrator's decision was "palpably wrong." *Olin,* supra.

Palpably Wrong. In *Wabeek Country Club,* supra, the Board affirmed the ALJ's finding that deferral of the arbitrator's decision was not entitled to deference because one of the bases upon which the decision rested was "palpably wrong." In that case, the arbitrator ruled the employer was justified in discharging an employee who, in continuing to discuss terms and conditions of employment with other employees, breached a settlement agreement from which she was reinstated. The Board held that discharging the employee in part for engaging in Section 7 rights is palpably wrong and hence repugnant to the Act.

Undue Delay. In *WSNCHS North, Inc., d/b/a/ New Island Hospital,* 344 NLRB No. 3 (2005), the Board held that deferral was inappropriate because the "arbitrator did not resolve the parties' information-request dispute in a reasonably timely manner." (The Board noted that, given its finding regarding undue delay, it need not pass on whether, absent the delay, it should defer an information request allegation to arbitration where the Charging Party invoked the grievance-arbitration process and filed a charge).

In sum, when considering whether or not an arbitrator considered the unfair labor practice at issue, one must consider whether the contractual issue is factually parallel to the ULP issue and the arbitrator is presented generally with the facts relevant to resolving the unfair labor practice charge. *Olin,* supra.

a. *Kicking under Dubo:* In *Dubo Manufacturing Corporation,* 142 NLRB 431 (1963), the Board, citing Congressional preference for the voluntary resolution of labor disputes, deferred action on allegations of unlawful discrimination under the Act pending completion of the grievance-arbitration process where the dispute was already being handled within that process pursuant to a court order. In that case, the union petitioned the U.S. District Court for the Northern District of Ohio, Eastern Division, for an order requiring the employer to arbitrate grievances filed by 12 discharged employees named in the unfair labor practice charge. The Court issued the Order at about the same time the Region issued a complaint that encompassed the discharges.

The Board noted that in effectuating the Congressional intent of the 1947 LMRA (that final adjustment of labor disputes by a method agreed to by the parties is preferred), it has in the past recognized existing arbitration awards, and in certain circumstances, required parties to utilize the grievance/arbitration process before resorting to Board processes. The Board held that such policy con-

siderations were applicable where the parties have available a dispute resolution mechanism plus a court order to use it. See *Rappazzo Electric Co., Inc.,* 281 NLRB 471 (1986).

Over time, the Board's *Dubo* policy expanded beyond its original decision, which relied upon the court-ordered arbitration. Indeed, former General Counsel John S. Irving discussed the policy in *GC Memorandum 79-36.* In that document, he stated that the Board's *Dubo* police "is to defer the further processing of an unfair labor practice case, where the matter in dispute in that case is being processed through the grievance-arbitration machinery, and there is a reasonable chance that use of that machinery will resolve the dispute or set it at rest." He went on to note that "consistent with the essential condition of volunteerism, a case should be deferred under *Dubo* only after the individual and the charging union have been given the opportunity to choose between the grievance-arbitration machinery and the Board's processes," and they voluntarily choose the grievance process.

Hence, unlike in *Collyer,* where only the consent of the charged party is required, deferral under *Dubo* requires consent of the *charging party* as well. This, of course, means that a party's failure to utilize the grievance process will not subject it to case dismissal on that basis.

Moreover, no right to appeal the Regional Director's decision to defer is afforded. Consequently, the Regional office will defer under *Dubo* only if the charging party has initiated and continues to process a grievance involving the same issue. See *CHM* 10118.1 (b).

Additionally, the Board's deferral policy is effectuated under *Dubo* even if deferral under *Collyer* is inappropriate. (From a practical point, *Dubo* deferral is appropriate only when *Collyer* deferral is inappropriate). For example, *Dubo* deferral is appropriate where a contract would not permit arbitration of a particular issue, but the parties voluntarily agree to arbitrate.

b. *Passing under Alpha Beta: deferral to grievance settlements.* In *alpha Beta Co.,* 273 NLRB 1546 (1985), (cites omitted), the Board announced its intention to apply the deferral principles of *Spielberg* and *Olin* to settlement agreements reached during grievance and arbitration proceedings. In making such a determination, the Board noted that deferral on that basis furthered its long-held policy favoring private resolution of labor disputes. The Ninth Circuit affirmed the decision, finding that the Board did not abuse its discretion in applying the *Spielberg/Olin* standards to grievance settlements. In *Alpha Beta,* the employees expressly authorized the unions to accept the settlement. However, in discussing the relevant deferral principles, the Board specifically noted that the settlement was intended to resolve the parties' contractual dispute, and that if deemed necessary by the union, it could waive the employees' statutory rights.

c. *The Lateral Pass under United States Postal Service: deferral to grievance settlements over the objections of the grievant.* In *United States Postal Service,* 300 NLRB 196 (1990), the Board determined it appropriate to defer a settlement agreement in accordance with *Alpha Beta,* despite the grievant's opposition to the settlement terms. In *United States Postal Service,* the employer raised as an affirmative defense that the Charging Party filed a grievance concerning his suspension, and that the suspension was resolved at the second step of the grievance process, and that deferral was consequently appropriate.

— END NOTES —

[1]The views and analysis expressed herein, including those on the applicability of the cases and other material cited herein, are the author's, and not necessarily those of the Regional Office, the General Counsel, or the National Labor Relations Board. Large portions of this article were presented at the 4th Annual Bernard Gottfried Memorial Labor Law Symposium held on October 12, 2006. ■

WESTERN DISTRICT UPDATE

Brent D. Rector and Keith E. Eastland
Miller Johnson

Title VII claim dismissed because plaintiff was not defendant's employee.

In *Lantz v. U.S. Postal Service,* 2006 WL 2882347 (W.D. Mich. 2006), the plaintiff alleged he was subjected to sexual harassment as an employee of defendant Postal Service. Judge Bell dismissed the action, since undisputed facts showed that plaintiff was an independent contractor, not an employee, and only employees are protected by Title VII. Citing Sixth Circuit precedent, the court used a ten-factor common law agency test to determine that the plaintiff's relationship was as an independent contractor, and thus not covered by Title VII.

FLSA class action notice approved

In *Carlson v. Leprino Foods Co.,* 2006 WL 2375046 (W.D. Mich. 2006), Judge Enslen rejected objections to a report and recommendation adipting and approving of a form notice and consent to sue for potential FLSA class action members. The plaintiffs in *Carlson* allege that Leprino Foods Co. violated the FLSA by failing to pay employees for time spent putting on and taking off required protective clothing, and walking to and from locker rooms to work stations. Plaintiffs also allege failure to pay overtime for work in excess of forty hours per week. The notice will allow affected employees to join the class action or opt out.

Striking expert witness for counsel's breach of mediation confidentiality

In *Irwin Seting Co. v. Int'l Business Machines Corp.,* Case No. 1:04-CV-568 (W.D. Mich. 2006), Magistrate Judge Brenneman issued an order striking plaintiff's expert witnesses. Plaintiff provided a copy of confidential mediation summaries and exhibits to plaintiff's experts. On motion of the defendants, plaiintiff's experts were barred from testifying as a result of this breach of mediation confidentiality: "Striking an expert witness is a harsh remedy, but not an unfair one, where a party has placed its experts at risk by infusing them with knowledge to which they were not entitled." Although not an employment case, the holding could apply to any case involving experts and mediation confidentiality.

KELMAN'S CARTOON

"I'll just bet you're a Capricorn too. As you know, we Capricorns tend to be rash, unpredictable, and totally illogical."

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long, P.C.

The Court Has Less Than the Usual Number of Employment Cases Scheduled for Argument during the 2006-2007 Term

The U.S. Supreme Court opened its 2006-2007 term with only four employment cases scheduled for oral argument. The cases involve a wide-range of issues, from the constitutionality of a Washington law requiring unions to get authorization from nonmembers before using their agency fees for political purposes, to the definition of "causation" under the Federal Employer Liability Act ("FELA").

On October 10, the Court heard oral argument in the first of these cases, *Norfolk S. Ry. Co. v. Sorrell,* U.S. No. 05-746. In *Norfolk,* Sorrell brought a FELA suit against his employer, Norfolk Southern Railway Corporation, after he was injured in a truck accident involving another employee. Norfolk argued that the jury should receive an instruction that if Sorrell's negligence "contributed in whole or in part" to his injury, then Sorrell's contributory negligence must reduce any verdict. Sorrell argued that the proper standard for contributory negligence was whether his actions "directly contributed" to his injuries. The trial court gave the jury Sorrell's requested instruction, and the jury returned a $1,500,000 verdict in favor of Sorrell, without indicating Sorrell's percentage of fault.

Norfolk appealed the decision, and the Missouri Court of Appeals affirmed. The Missouri Supreme Court denied review, and Norfolk petitioned for United States Supreme Court review. The basis of Norfolk's appeal is that the instruction given to the jury, which was based on Missouri state law, conflicts with the contributory negligence standard of FELA, an thereby defeated federal substantive rights.

The Court heard oral argument in *Osborn v. Haley,* U.S. No. 05-593, on October 30. *Osborn* involves two issues relating to the Westfall Act. The Westfall Act is a federal statute that allows the United States Attorney General to certify that a federal employee being sued for tortious conduct was acting within the scope of his or her employment, thereby substituting the United States as a defendant in the employee's place. There were two issues in front of the Court: first, does an AG's denial that a federal employee engaged in tortious conduct amount to certification under the Westfall Act; and second, should a district court retain jurisdiction over a cause of action even if it concludes that the AG's certification is defective?

Osborn worked for a federal contractor; she sued Haley, a federal employee, in state court claiming that Haley improperly influenced the federal contractor to terminate Osborn's employment. The AG invoked the Westfall Act, denied that Haley engaged in any tortious conduct, and removed the action to federal district court. The district court concluded that the AG's denial that Haley engaged in tortious conduct did not amount to certification under the Westfall Act, refused to substitute the United States as the defendant, and remanded the case to state court. On appeal, the Sixty Circuit held that the district court erred in holding that the AG's denial did not establish Westfall Act certification, and also, by remanding the action. The court held that the case should have remained in district court, since the question of certification was an important federal question.

The Court will hear oral argument on November 27 in *Ledbetter v. Goodyear Tire and Rubber Co.,* U.S. No. 05-1074. Ledbetter was a female floor manager supervising tire production at a Goodyear plant. She sued Goodyear under Title VII, cleaning that Goodyear paid her less than it paid comparable male employees. A jury awarded Ledbetter over three million dollars in backpay and mental distress and punitive damages. On appeal, Goodyear claimed that Ledbetter should have been barred in the trial court from recovering damages for pay disparities incurred during the 180-day statutory limitations period, when those disparities were caused by a decision made prior to the limitations period. The Eleventh Circuit agreed with Goodyear and held that Ledbetter could not recover where the decision causing the alleged unequal pay occurred prior to the 180-day limitations period. The Supreme Court granted cert to address an apparent conflict in the circuits on this issue.

Finally, early next year the consolidated case, *Davenport v. Wash. Educ. Ass'n*, U.S. 05-1589, will be before the Court. The issue in this case is the constitutionality of a Washington statute providing that a union cannot use a nonmember agency fee for political purposes without the nonmenber's authorization.

The statute at issue provides that "a labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." Rev. Code Wash. (ARCW) §42.27.760. The Washington Education Association ("WEA") had a practice of using nonmember fees for political purposes if any nonmenber failed to object when given the opportunity to do so by the union. Several nonmembers sued the WEA arguing that their failure to object did not amount to affirmative authorization under the statute, and that their fees were being used improperly. The WEA argued that the statute was an unconstitutional infringement on the WEA's right of expressive association. The Supreme Court of Washington agreed with the WEA, and the United States Supreme Court granted cert to consider whether the statute is, in fact, unconstitutional. ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes.* But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Klass, Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@martensice.com.

NLRB ISSUES LONG-AWAITED DECISIONS RE: SUPERVISORY STATUS

Stephen M. Glasser
Regional Director
Region 7, National Labor Relations Board

On September 29, 2006, the NLRB issued three decisions in cases raising similar supervisory status issues; these are *Oakwood Healthcare, Inc.,* 348 NLRB No. 37, *Croft Metals, Inc.,* 348 NLRB No. 38, and *Golden Crest Healthcare Center,* 348 NLRB No. 39. As a result of the Supreme Court's decision in *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001), the Board used the aforementioned cases to refine the analysis to be used in assessing supervisory status. Specifically, the Board focused on the meaning of "assign," "responsibly to direct," and "independent judgment" as those terms are used in Section 2(11) of the National Labor Relations Act.[1] *Oakwood,* a Region 7 (Detroit) case, was the lead case for the Board's analysis. While the case involved the supervisory status of the hospital's charge nurses, the impact of the decision goes to the heart of Section 2(11)'s definition of a supervisor and cuts across all bargaining units of all employers within the Board's jurisdiction.

As to "assign," the Board construes the term to refer to the act of designating an employee to a place, appointing an employee to a time period for work, or giving significant tasks to an employee. Since an employee's time, place, and work are the essentials of his/her terms and conditions of employment, the decision or effective recommendation affecting one of these factors can be a supervisory function. The Board stated that "assign" refers to the designation of significant overall duties to an employee, not to the ad hoc instruction to an employee to perform a discrete task.

As to "responsibility to direct," the Board stated that not only must the alleged supervisor have the delegated authority to direct the work and to take necessary corrective action, but it must be shown that the alleged supervisor faced possible adverse consequences if the subordinate employee did not perform his/her tasks properly. In other words, there is an "accountability" consideration involved; if one is responsible for a task to be performed, he/she is answerable for the consequences.

As to "independent judgment," the Board stated that the *degree,* not the *kind* of discretion exercised by the alleged supervisor is determinative. Thus, the fact that professional or technical expertise is involved in exercising one's judgment does not diminish a possible finding of supervisory status **if** independent judgment is utilized involving one of the 12 enumerated supervisory factors in Section 2(11). Whether the individual is a statutory supervisor will depend on whether his/her responsible direction of others is performed with a sufficient degree of discretion to reflect the use of independent judgment.

The Board also addressed the issue of individuals engaged in supervisory functions part of their time, and as a bargaining unit employee the rest of the time. Noting the existing "regular and substantial" standard, that "regular" equates to a pattern or schedule, and the nonexistence of a Board numerical standard of substantiality, the Board reaffirmed its precedent that individuals who work as a supervisor at least 10-15 percent of their total work time are deemed to be statutory supervisors.

As to the *Oakwood* charge nurses, the Board held that the 12 permanent charge nurses are statutory supervisors, but that the employer did not meet its burden[2] of establishing that its 112 rotating charge nurses are statutory supervisors.

The ultimate impact of the *Oakwood* decision will be reflected in the cases remanded by the Board to the various Regions for supplemental decisions consistent with *Oakwood,* and in the cases yet to come. Stay tuned.

MERC CORNER

Ruthanne Okun
Director, Bureau of Employment Relations

On October 6, 2006, Governor Jennifer M. Granholm announced the appointment of Christine A. Derdarian to the Chair of the Michigan Employment Relations Commission.

MERC Chair Derdarian has a long history of work in the labor field. Prior to her retirement from state service in 2002, she supervised the labor section of the Michigan Attorney General's office. In this capacity, Ms. Derdarian managed a cadre of attorneys working in the area of labor law enforcement, including issues related to MERC, labor relations, wage claims, and disability concerns. During her 28 years at the AG's office, she provided expertise as a cabinet member to two attorneys general.

Besides her familiarity with labor matters, MERC Chair Derdarian has extensive experience in matters related to administrative law and governmental issues. Her background includes service as the Chief Legal Counsel to the transition team for Governor-Elect Granholm and as Special Legal Counsel to the Governor on the reorganization of State's largest department — the Michigan Department of Labor and Economic Growth — a department which houses MERC and the Bureau of Employment Relations. Presently, Ms. Derdarian is in private practice specializing in government relations, professional licensing, negotiations, and corporate matters.

MERC Chair Derdarian has a plethora of honors and accolades in her background, including recognition in "Who's Who of Emerging Leaders," "Who's Who of American Women," and "Who's Who in American Law." In a 2002 publication, the CORP! Magazine listed Ms. Derdarian as one of "Michigan's Most Powerful Women." She previously was President of the Women's Economic Club of Detroit, the International Institute of Detroit, and the Michigan Chapter of the International Women's Forum, of which she was a founding member. She has served on the Board of the Detroit Institute for Children, the Haven, and other organizations.

Ms. Derdarian received her B.A. in Sociology from the University of Michigan and her J.D. from Detroit College of Law. She has received trial advocacy training at Oxford University in England and, in 2002, was a candidate for a Fellowship in Public Service at Harvard Law School. She has been an active member of the State Bar, having served on a number of committees, including on the Character and Fitness Committee, Health Care Committee, Communication Committee, and the Administrative Law Section Council. She served as the Governor's appointee to the State Board of Ethics from 2003-2006.

MERC Chair Derdarian's appointment is for a 3-year term, expiring on June 30, 2009. For more information about MERC, visit http://www.michigan.gov/merc.

— END NOTES —

[1]Section 2(11) states; "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[2]In all cases involving the claim that certain individuals are statutory supervisors, the burden rests with the party making such assertion. *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047 (2003). ■

CONVICTION

Joan Blair
Michigan Department of Civil Rights

As country singer Merle Haggard said:

I'd like to hold my head up and be proud of who I am,

But they won't let my secrets go untold.

I paid the debt I owed them but they're still not satisfied.

Now I'm a branded man out in the cold.

Of course, Haggard was talking about life for the ex-con. It is also the sentiment of Michigan would-be employees with a criminal conviction.

Since May 1, 2006, new workers in hospices, home health programs, and psychiatric hospitals must undergo criminal background checks.[1] Such checks are also required in nursing homes, adult foster care homes, and homes for the aged. The Department of Education also has set standards that require criminal checks for school employees. Other employers have routinely required such checks.

In this environment of constant concern about security, terrorism, theft, and workplace violence it is important for employers and their attorneys to review the state of the law on conviction records and hiring. A blanket policy that denies employment to applicants with felony convictions may constitute unlawful discrimination. This facially neutral policy could have a disparate impact on a protected group even though no discriminatory intent can be established.

In Michigan 14% of the population is black, yet 49% of the prison population is black.[2] Nationally, although blacks account for 12% of the population, 44 % of all prisoners are black.[3] 1.9 million black men have served time in a state or federal prison.[4] One-half of state prison inmates are serving time for non-violent crimes.[5]

Title VII of the U.S. Civil Rights Act[6] prohibits discrimination on the basis of a condition which adversely affects a protected group on a disproportionate basis, unless the practice is job-related and consistent with business necessity.

The Equal Employment Opportunity Commission (EEOC) has provided direction on this issue. In 1987 the EEOC issued a notice that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks and Hispanics because they are convicted at a rate disproportionately greater than their representation in the population.[7]

An employer's policy about hiring individuals with conviction records should consider:

- the nature and gravity of the offense or offenses
- the time that has passed since the conviction and/or completion of the sentence
- the nature of the job held or sought

An employer may consider the job-relatedness of the conviction and the time frame involved. Employers may also consider the circumstances of the offense and the number of offenses. However, unless covered by a state or federal statute, an absolute bar to employment based solely on an individual's conviction record may be unlawful.

The courts have also provided direction. *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975), held that allowing an employer to flatly deny employment to applicants because of their conviction records has a disparate impact on blacks and Hispanics.

Once the applicant or employee shows that the employer's conviction policy predominantly affects one race and a prima facie case of disparate impact is made, the burden shifts to the employer to justify the employment practice as job-related and consistent with business necessity.

Employers may use conviction records as a cause for rejection if the number, nature and proximity in time of the offense deem the applicant unsuitable for the position. In *Craig v Department of Health, Education and Welfare*, 508 F.Supp.1055, 1981, a black employee, who was engaged in processing checks, challenged her termination after the employer discovered that she had recently been convicted of possession of a stolen government check. The court held that the plaintiff's dismissal was not based upon race discrimination.

While the safety of the vulnerable is of utmost importance, as background checks become mandatory and criminal history is routinely sought by employers, it is prudent to be alert to the question of the policy's disparate impact on protected classes.

— END NOTES —

[1]Michigan Public Acts 28 and 29 of 2006

[2]http://www.hrw.org/backgrounder/usa/incarceration/Human Rights Watch Backgrounder, Incarcerated America, April 2003

[3]www.gibbsmagazine.com/blacks_in_prisons.htm and http://www.motherjones.com/news/special_reports/prisons/atlas.html

[4]http://keithboykin.com/arch/2004/01/01/2004_racial_ind

[5]*Human Rights Watch Backgrounder*

[6]Civil Rights Act of 1964. Pub. L. No. 88-352, Title VII, as amended, 42 U.S.C. §§ 2000e-2.(a)(2)

[7]EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 USC. §§2000e et seq. (1982). (2/4/87) ■

MICHIGAN SUPREME COURT UPDATE

Kurt M. Graham
Varnum, Riddering, Schmidt & Howlett LLP

Paige v. City of Sterling Heights, 476 Mich 495 (2006) involved a workers' compensation claim pursuant to MCL §§418.375(2), which requires an employee's dependent to establish that the employee's injury "was the proximate cause of his or her death." In determining whether the son of a deceased firefighter was entitled to death dependency benefits, the Supreme Court interpreted the term, "the proximate cause," to mean the sole proximate cause (*i.e.*, the most immediate, efficient, and direct cause of the employee's death). In reaching this definition, the Supreme Court overruled *Hagerman v Gencorp Automotive*, 457 Mich 720 (1998), which defined "proximate cause" to mean "a substantial factor" in causing an employee's death. The Supreme Court then remanded the case back to the Workers' Compensation Appellate Commission for reconsideration.

MERC UPDATE

Michael M. Shoudy
White, Schneider, Young & Chiodini, P.C.

Since the previous issue of *Lawnotes,* the Michigan Employment Relations Commission has issued 13 Decisions and Orders in a variety of cases. A brief summary of some of those cases follows. Of the 13 cases, nine were unfair labor practice hearings and/or duty of fair representation hearings, two were unit clarification hearings and/or representation hearings, and there were two decisions on motions. Recent decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis..

Unfair Labor Practices

City of Detroit (Dept. of Transportation)
Case No. C03 B-029 (October 19, 2006)

On October 17, 2005, the ALJ issued a Decision and Recommended Order finding that Respondent City of Detroit did not commit an unfair labor practice by failing to respond to a demand by Charging Party American Federation of State, County, and Municipal Employees Council 25 that it bargain over commercial drivers license requirements. Charging Party filed timely exceptions. In brief, the Commission reversed the ALJ's Decision and Recommended Order, finding that Respondent violated Section 10 of PERA.

Charging Party alleged that Respondent violated PERA by changing its job description for the position of general auto mechanic in the transportation department to require possession of a commercial drivers license ("CDL") as a condition of employment, and by disciplining employees who do not satisfy this requirement. The ALJ found that the CDL requirement was adopted as a condition of employment and that the auto mechanics in the transportation department were notified of this requirement in 1992.

The record also established that there was a verbal agreement between the parties that the CDL requirement would not be enforced. Respondent did not make an effort to enforce the CDL requirement until October 2002, when it suspended two bargaining unit members for failing to maintain a valid CDL. Respondent's decision to enforce the requirement through discipline was made without notice to the union.

Relying on its decision in *Southeastern Michigan Transportation Authority,* 1987 MERC Lab Op 721, the Commission noted that the consistent application of a disciplinary policy renders the policy a term and condition of employment that may not be altered unilaterally. In this case, Respondent unilaterally altered a longstanding practice allowing auto mechanics in the City's Department of Transportation to work without a CDL. Changes that significantly alter an employee's duties or hours of work constitute mandatory subjects of bargaining over which the employer must provide the union notice and an opportunity to bargain.

In its decision, the Commission distinguished its holding in *Southfield Public Schools,* 2002 MERC Lab op 53. In *Southfield Public Schools,* the Commission held that an employer's failure to enforce rights provided to it under a collective bargaining agreement did not necessarily constitute a waiver of those rights. However, the facts in this case demonstrated that the employer made an express commitment to the union that it would refrain from enforcing contractual rights. Therefore, the Commission found that the employer's commitment to the union that general auto mechanics without CDLs was sufficient to create a past practice amending the parties' contract. Therefore, Respondent violated Section 10(1)(a) and (e) of PERA when it initiated enforcement of its CDL requirement without notice and opportunity to bargain.

Waterford School District
Case No. C04 E-137 (August 7, 2006)

On July 25, 2005, the ALJ issued a Decision and Recommended Order finding that Respondent Waterford School District did not violate Section 10(1)(c) of PERA by laying off members of the bargaining unit represented by Charging Party Waterford Federation of Support Personnel. The ALJ concluded that the evidence did not establish that Charging Party's members were laid off in retaliation for engaging in protected concerted activity. Charging Party filed exceptions to the ALJ's Decision and Recommended Order. In Brief, the Commission affirmed the Decision of the ALJ.

Charging Party is the exclusive bargaining representative of approximately 470 educational support personnel employed by the Waterford School District. The parties negotiated a contract between the fall of 2002 and March of 2004 which was ratified by Charging Party on May 15, 2004. Charging Party's staff representative testified that negotiations were very contentious. During the negotiations, Charging Party's member engaged in informational picketing and attended board meetings in mass. The staff representative further testified that Respondent's chief negotiator sarcastically retorted during bargaining, "Well, you going to picket us again?"

In June of 2003, Respondent made an effort to reduce costs by closing schools and by eliminating custodial, secretarial, teaching, and administrative positions. It was recommended that 32 positions in Charging Party's bargaining unit be eliminated. The recommendations were implemented. After the parties had reached a tentative agreement, but before contract ratification, Respondent began sending out layoff notices. The notices were sent to 29 of the Charging Party's bargaining unit members, including three members of the negotiating team.

Charging Party argued that the employer violated PERA by laying off union leadership and activists in retaliation for engaging in protected concerted activity. The Commission found insufficient evidence to establish that the layoffs were illegally motivated. A discrimination finding must be based on substantial evidence and not mere suspicion or innuendo. Charging party failed to demonstrate anti-union animus on the part of the employer or that a causal nexus existed between the employees' concerted activities and their layoffs. Therefore, the unfair labor practice charge was dismissed. ■

MIOSHA UPDATE

Richard P. Gartner
Assistant Attorney General

Criminal Conviction for MIOSHA Felony (Update)

People v Lanzo Construction Company, 2006 Mich App LEXIS 3002 (October 17, 2006).

Lanzo Construction Company was convicted of a felony on October 21, 2004 for willfully violating the MIOSHA Act under MCL 408.1035. In this case, Robert J. Whiteye was part of a work crew from Lanzo which was installing sewer pipe in Southfield. The fatality occurred in an area of the excavation that was approximately 18 feet deep, with vertical walls and without the protection of a trench box, steel plates, or shoring. While working in the trench, the west wall of the trench caved in causing the death of Mr. Whiteye. MIOSHA regulations require that if a trench box and shoring are not to be used within an excavation more than five feet deep, then, in order to protect employees, at a minimum, the employer must dig the excavation with the sides sloped back far enough to eliminate the possibility of a cave in. In a bench trial, the Oakland County Circuit Court found that Lanzo willfully violated Section 35(5) of the MIOSHA Act by failing to train its work force in its work safety rules which led to the death of Mr. Whiteye and failed to provide its employees with a safe place of employment. The Defendant was sentenced to two years of probation and a fine of $10,000.00.

On appeal, the Court of Appeals affirmed. The Court held that Lanzo was vicariously liable for the criminal acts of its foreman and superintendent which lead to the death of the employee. In *Lanzo*, the Court defined a "high management official" as one having supervisory responsibility over the subject matter of the offense. The evidence established that Lanzo's foreman and superintendent fulfilled the criteria of being "high management officials", and thus, their criminal liability could be imputed to the Defendant. The Court, also, concluded, that the definition of "wilfull" in the MIOSHA Act is distinct from the elements of gross negligence.

Demolition Work (Update)

Pitsch Companies v Michigan Occupational Safety and Health Administration, No. 2004-1212.

This case involves a fatality which occurred on a multi-employer work site in Grand Rapids. The employer was a subcontractor who was responsible for the partial demolition of Welch Auditorium. This work included demolishing the balcony that went around the perimeter of the auditorium, demolishing seating on the second floor balcony, removing escalators, removing concrete and imploding the roof of the auditorium. On the morning of June 18, 2003, the deceased, a carpenter, entered an unlocked area where the demolition was occurring and was struck by demolition debris. Three other employees of subcontractors had also entered the same area earlier that morning. MIOSHA cited the demolition company for failing to inspect the work area to ensure that employees were not exposed to the hazards from the demolition. The Administrative Law Judge ruled that Pitsch did not violate the demolition safety rule because it had conducted daily inspections, it notified the other employers of its demolition plans for the day of the accident, and that it had not been informed that workers from other subcontractors would be working in the escalator area where the fatality occurred. On September 22, 2006, the Board of Health and Safety Compliance and Appeals, pursuant to MIOSHA's exceptions, reversed. The Board found that Pitsch had prior knowledge that employees were frequently in the demolition area and that Pitsch had a duty to ensure that those areas were free of detectable hazards or unsafe conditions. The Board also concluded that notwithstanding the fact that Pitsch did not have control over the entire demolition area before the demolition work commenced, they had the duty "by whatever means necessary" to conduct an inspection of the demolition areas to ensure that no employees were in the entire demolition areas before they started the demolition work. A Petition for Review has been filed in Kent County Circuit Court.

General Duty Citation

Bil Mar Foods v MIOSHA, General Industry Safety Division, No. 2002-654.

This matter involved a fatality that occurred when an employee was found dead inside a 10,000 pound stainless steel mixing unit approximately 12 feet long, 8 feet in diameter and five feet deep. The tank stands five feet above the floor and accessible by two fixed stairways. A catwalk runs adjacent to the top of the tank. There is a standard 42" barrier in place between the mixer and the catwalk.

The deceased was a sanitation worker who worked the night shift cleaning meat processing equipment. No one witnessed his death and no one knew how he ended up at the bottom of the mixer with the auger blades moving. The deceased and other sanitation workers used high pressure hoses to clean the meat processing equipment. The water pressure of the hoses was between 700-900 pounds per square inch (P.S.I.). The hoses were not equipped with constant pressure nozzles. Thus, if an employee loses control of the hose, the water keeps running. A constant pressure switch would automatically shut off the water immediately. Pieces of the nozzle were found on the catwalk and the hose used by the deceased was found flailing about after the accident was discovered. Prior to the accident, there had been past accidents and injuries involving the high pressure water hose.

MIOSHA, *inter alia,* issued a "general duty" citation to the employer alleging that it had failed to provide a safe work place because it allowed employees to use high pressure water hoses at 700-900 PSI without a constant pressure type control on the hose. The employer contended that the citation was inappropriate on the grounds that requiring constant pressure nozzles was not feasible in the context of its sanitation operation. Bil Mar also argued that it had experimented with constant pressure nozzles and that they had created ergonomic problems for its employees. The Administrative Law Judge dismissed the citation concluding that although Bil Mar's use of the high pressure water hose presented a serious hazard to employees, that the use of the high pressure hoses was a recognized hazard for Bil Mar's employees and that an accident with the high pressure water hose would cause death or serious physical injury, MIOSHA had failed to prove that there were feasible methods to correct the involved hazard. For that reason, the citation was dismissed. MIOSHA did not appeal the ALJ's Order. ■

VIEW FROM THE CHAIR

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2 Be or not 2 Be: Public Employment Law After Proposition 2

In 2006, the citizens of the State of Michigan passed Proposition 2. This Proposition stated "The State shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting." Now, the issue is how will this affect public employment? Many municipalities in Michigan have affirmative action mechanisms in place, some of which were collectively bargained. How will unions and municipal employers address this challenge? Will the programs be dismantled, or restructured? If they are restructured, will the new programs pass constitutional muster? If they are eliminated, will it cause more litigation in the short fun for some public employers? While it is impossible to predict the future, some clues may be found in an examination of the support for Proposition 2, and where that support comes from.

Overall, Proposition 2 passed 58% to 42%. In an exit poll conducted by CNN, the measure garnered more than 50% of the vote in every income bracket from zero to $200,000; with two exceptions: Those making between $15,000 and $30,000 as well as those making between $150,000 and $200,000. However, even within these two income brackets, the measure merely tied, with "yes" and "no" each getting 50% of the vote. No income bracket saw a majority vote against Proposition 2. When voters are broken out by education, every level of education, with one exception, voted for Proposition 2. These categories included those with no high school diploma (54% to 46% in favor), to those who were college graduates (60% to 39% in favor). The only exception to this trend was with those who held post-graduate degrees; where the measure failed, but by the narrowest of margins, 51% to 49%.

It was widely reported in the campaigning leading up to the election that the primary beneficiaries of affirmative action were White women. That theory did not translate into votes. In the exit polling done by CNN, women overall voted in favor of Proposition 2, 52% to 48%. White women in particular voted in favor of Proposition 2 by a 59% to 41% margin. What explains this margin among women? Jennifer Gratz, one of the plaintiffs in the University of Michigan litigation, is the executive director for the organization that was supporting Proposition 2. In the U of M case, Ms. Gratz contended that she was the victim of race discrimination because she was not admitted to the University of Michigan Ann Arbor. The University of Michigan argued that more than 1,400 White and Asian American students with lower GPA's or test scores than Ms. Gratz were admitted the year that she was denied admission. In addition, the University of Michigan indicated that 2,000 other White and Asian American students with higher GPA's and test scores than Ms. Gratz were also rejected. The United States Supreme Court approved the University of Michigan's Law School admissions policy, but overturned the undergraduate admissions policy, finding that "diversity" is a compelling state interest, which legally authorizes the consideration of race as one factor in admissions.

Another of the arguments in favor of Proposition 2 was that we should be moving towards a more color blind society where we are all simply Americans. At the same time, it is clear that each of us takes a certain pride in our ethnicity, as well as the heritage of that ethnicity. That pride manifests itself in celebratory days for certain ethnic groups, and even within the legal profession, so-called "special purpose" bar organizations. The special purpose bar organizations clearly focus on the issues and challenges facing that particular ethnicity in the legal profession. No one contends that these bar organizations are evidence of racial intolerance or bigotry. This pride in ethnicity and heritage extends beyond the legal profession. A recent study by the University of Minnesota's Department of Sociology found that 74% of White respondents strongly believed in the importance of individual effort, hard work and family upbringing in achieving success, 46% of the Whites also agreed that laws and institutions play an important role in explaining why Whites are better off than other racial groups in this country.

Others claim that the 14th Amendment forbids affirmative action, or any race conscious public programs. Obviously, as an initial matter, the Supreme Court cases of *Gratz v. Bollinger* and *Grutter v. Bollinger* run contrary to that conclusion. In addition, the context of the Amendments themselves does not support this finding. The 14th Amendment outlaws the deprivation of life, liberty or property without due process, and grants equal protection to all persons born or naturalized in the United States. Generally, it is beyond dispute that voting rights would be among the protected privileges. However, this was apparently not so since less than two years later, the 15th Amendment was passed which guaranteed voting rights to all citizens irrespective of race or color. One of the arguments of the supporters of Proposition 2 is that the plain language of the 14th Amendment protects all people, of all races and genders. However, if this is so, then why did we need to pass the 19th Amendment? After all, the 19th Amendment, which granted women the right to vote, was not passed until 1920, some fifty-two years after the 14th Amendment, and fifty years after the 15th Amendment; which granted, by its plain language, voting rights to all citizens.

All of us are aware of occasions in which people received jobs not based on qualifications, but based on other factors such as nepotism, personal relationships such as attending the same school, parental connections, word-of-mouth, geographic proximity, or even luck. In these cases, are these people the "most qualified?" Conversely, in these cases, are we to assume that everyone else who did not get that job, and who on paper might have been "more qualified," is a victim of discrimination? It seems as if we will have to discover the answer to this question. It further seems as if the answer will only be found through years of litigation. Therefore, in spite of the election, it appears that we may only be at the end of the beginning, not the beginning of the end.

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- Joan Blair quotes Merle Haggard and addresses the civil rights implications of employer consideration of applicants' criminal convictions.
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- Michael Lee comments on Proposition 2 and what comes next.
- Barry Goldman identifies off-label uses for labor arbitrators..
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- Authors John G. Adam, Joan Blair, Regan K. Dahle, Keith E. Eastland, Adam S. Forman, Richard P. Gartner, Stephen M. Glasser, Barry Goldman, Kurt M. Graham, Stuart M. Israel, Maurice Kelman, Michael K. Lee, Andrew M. MacEachern, Robert A. McCormick, Ruthanne Okun, Brent D. Rector, Brian M. Schwartz, Michael M. Shoudy, Daniel D. Swanson, and more.

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