

# Journal of Collective Bargaining in the Academy

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Volume 0 *NCSCBHEP Proceedings 2011*

Article 24

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April 2011

## Together at the Table: Moving the Academy Forward Through Collective Bargaining

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### Recommended Citation

DiGiovanni, Nicholas Esq. (2011) "Together at the Table: Moving the Academy Forward Through Collective Bargaining," *Journal of Collective Bargaining in the Academy*: Vol. 0 , Article 24.  
Available at: <http://thekeep.eiu.edu/jcba/vol0/iss6/24>

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**NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING  
IN HIGHER EDUCATION AND THE PROFESSIONS**

**38th ANNUAL NATIONAL CONFERENCE**

*Together at the Table: Moving the Academy Forward  
Through Collective Bargaining*

**Hunter College**

**April 10-12, 2011**

*Annual Legal Update*

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## **The Sea Change at the NLRB**

We live in odd times in the world of labor relations. On the one hand, the past year has seen a Republican resurgence in Congress, the final collapse of the Employee Free Choice Act- at least for now - and the stunning roll back of public sector labor rights in several states around the country. In this climate, it is hard to think of too many bright spots for labor. But clearly if there is one, it is centered in Washington at the National Labor Relations Board.

Since President Obama's 2010 appointments of three new members to the National Labor Relations Board, the Board has shown a decided shift in its agenda towards a more pro-union stance. Recent NLRB decisions, advisories, rulemaking and other signals, as well as speeches by Board Members, all indicate that the Board is clearly taking steps to change the legal landscape surrounding the National Labor Relations Act in a manner which would be favorable towards unions.

The current Board's makeup includes Board Chair Wilma Liebman (D) (term ends August 2011); Mark Pearce (D) (term ends August 27, 2013) and Brian Hayes (R) (term ends September 16, 2012). Member Craig Becker (D), serving on a recess appointment until the end of 2011, has not yet been confirmed by the Senate for a full term. In January of this year, the President nominated lawyer Terence Flynn to the Board, but he has not yet been confirmed yet, and thus the Board stands today with a 3-1 Democratic majority. If not yet at full strength, the Board is large enough again to issue consequential decisions that will alter previous pro-employer rulings.<sup>1</sup>

The new Board is going to leave its mark on the labor law landscape through three primary methods: 1) case law, including revisiting and possibly reversing Bush Board precedent; 2) General Counsel memoranda and guidance and 3) rule making.

First, the case law front: There is little doubt that the Obama Board, led by Board Chair Wilma Liebman, will reconsider many cases decided during the Bush era, and

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<sup>1</sup> In a 5-4 ruling issued on June 17, 2010, the Supreme Court held that a two-member National Labor Relations Board lacked authority to issue rulings. *New Process Steel, L.P. v. NLRB*, -- US --, 130 S.Ct. 2635 (2010) Writing for the Court majority, Justice Stevens interpreted the quorum requirements of Section 3(b) of the National Labor Relations Act as mandating three participating members "at all times" in order for the Board to act. Thus, the Board could not delegate authority to decide cases with only two Board members.

Between January 1, 2008 and March 27, 2010, Members Leibman and Schaumber became the only sitting members of the Board. During this period, the two members decided almost 600 cases based on a delegation of authority issued on December 27, 2007, when the Board consisted of four members. (Two recess appointments expired on December 31, 2007.) However, they were careful not to issue rulings that fundamentally changed prior case law to any significant degree. Such impediments are now gone.

undoubtedly will reverse many of those rulings. Indeed, the Board has already taken steps in this direction over the past year, with more to come.

## **Case Law: Reconsideration of Earlier Precedent**

As noted last year, there are many areas where it was anticipated that the new Board would seek cases to reverse prior Bush era rulings. Some examples of key decisions that might be subject to reconsideration included:

**1. *Brown University*** 342 NLRB No. 42, 175 LRRM 1089 (2004) where the Board, in a 3-2 decision, reversed its decision in *New York University*, 332 NLRB No. 111 (2000) and held that graduate students working as teaching assistants or research assistants are *not* employees covered by the Act. The Board majority held that such individuals “have a predominantly academic rather than economic relationship with their school.”

**2. *Oakwood Healthcare Center, Inc.***, 348 NLRB 686 (2006), the NLRB clarified its stance on when an individual is deemed a “supervisor” and thus excluded from the coverage of the Act and provided a liberal interpretation of who would qualify as a supervisor. Labor contends that many individuals who have marginal authority have been denied the right to organize under this decision.

**3. *IBM Corp.***, 341 NLRB No. 148 (June 9, 2004), where the Board reversed *Epilepsy Foundation*. In *IBM Corporation*, the Board decided that the precedent of *Epilepsy Foundation* should be overruled, and, by a 3-2 majority, the Board concluded that the *Weingarten* rights do not extend to a workplace where employees are not represented by a union.

**4. *The Register Guard***, 351 NLRB 1110 (2007), where the Board held that employees have no statutory right to use an employer’s email system, and thus, an employer could regulate its use by prohibiting employee use of the system for non-job related solicitation. In that case, even though employees used the email system for personal communication, a rule banning its use for *solicitation* was still deemed appropriate as long as it was not discriminatorily enforced.

The dissent argued that email was the virtual lunch room of the 21<sup>st</sup> century and that any restrictions on employee use of the system for union solicitation, especially when personal use was allowed should be presumptively discriminatory and illegal under the long line of cases dealing with employee solicitation.

**5. *Harborside Healthcare, Inc.***, 343 NLRB 906 (2004), where the Board held that when supervisory pro-union activity is objectionable conduct when it interferes in the freedom of choice so as to materially affect the election outcome. It also held that

supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances. The majority opinion said that the Board would look to whether the supervisory conduct was generally interfering with employee free choice, and, secondly, whether such conduct interfered with freedom of choice to the extent it materially affected the election outcome.

The dissent contended that supervisory solicitation of union cards should not be *inherently* coercive, even when the person is unaware that he or she is a true statutory supervisor or where that status is unclear. Also, the dissent would look at such cases in the total context of the employer's anti-union campaign.

**6. *Tradesmen International***, 338 NLRB 460 (2002) There are numerous Board cases in which employer work rules are scrutinized to determine whether or not they interfere with employees' Section 7 rights to engage in collective activity. At issue in *Tradesman* was whether the following employer rules would "reasonably chill employees in the exercise of their Section 7 rights": (1) prohibition of disloyal, disruptive, competitive or damaging conduct; (2) prohibition of slanderous or detrimental statements; (3) requirement that employees represent the employer in a positive manner.

The Board held that these rules did not violate the Act because they serve a legitimate business purpose and reasonable employees would not construe such rules as intended to proscribe Section 7 activity. The dissent thought otherwise, arguing that such rules do chill employees in organizing and coming together for collective action to improve the workplace. The dissent would require an employer to specifically state that such rules do not include Section 7 activity.

**7. *Dana Corporation and International Union, United Automobile, Aerospace, and Agricultural Implement Workers***, 351 NLRB No. 28 (9-29-07), where the Board modified its recognition bar doctrine in cases *where the union's original majority status was based on a card check rather than a Board-supervised election*. In the case of Board supervised secret ballot elections, no Board election can be held in the bargaining unit for at least 12 months following the election. But in cases where an employer voluntarily recognizes a union, the rules barring a decertification petition had been less clear. Under prior law, an employer's voluntary recognition of a union in good faith and based on a demonstrated majority status immediately bars an election petition filed by an employee or by a rival union "for a reasonable period of time." *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). Any collective bargaining agreement negotiated during this insulated period bars Board elections for up to three years of the contract's term.

In *Dana*, the Board said it will strike a balance between the interest of employee free choice and the promotion of stable labor relations. It established a policy that no election bar will be imposed after a voluntary card check agreement *unless* 1) employees in the unit are given notice of the recognition and of their right, within 45 days, to file a decertification petition; 2) 45 days pass from the date of notice without the filing of a petition. Thus, unlike Board supervised elections, in cases where there is a card check recognition, disgruntled employees, or rival unions, who wish to file a decertification

may immediately do so within a 45 day window period. Once that period passes, however, the union's majority status will be irrebuttably presumed for a reasonable period of time to enable the parties to engage in negotiations for a first collective bargaining agreement. Once any such agreement is reached, such a contract will further bar elections for up to three years.

## **Already being reconsidered**

The Board has already waded into the waters of reconsideration in several cases and is likely to do more in the months ahead. Some examples:

### **1. *Dana Corporation.***

In *Rite Aid Store, #647 and Lamons Gasket Co*, No. 16-RD-15976 the Board majority agreed to revisit *Dana Corp.* The Board sent out an invitation to file briefs to interested parties and is now considering the case of *Lamons Gasket Company* in light of such filings. At some point in the next year, the Board will undoubtedly issue a new ruling on the subject of when a union voluntarily recognized by management may be challenged through a decertification petition.

### **2. *Brown University***

Probably the least surprising event of the past year was the Board's decision to revisit *Brown*. Thus, on October 25, 2010 the NLRB in a 2-1 decision reversed a regional director's dismissal of a union's petition which sought a vote on union representation for graduate teaching and research assistants. *New York University*, 356 NLRB 7 (2010). Through this recent decision, the NLRB stopped short of overruling its 2004 decision in *Brown University*, 342 NLRB 483 (2004), which held that graduate assistants were not employees under the NLRA. However, the Board majority of Members Becker and Pearce did state that there are "compelling reasons" to reconsider the *Brown University* decision. The Board noted that those reasons included: 1) the contention by the Petitioner that the *Brown* case was based on policy considerations extrinsic to labor law and thus not properly considered in determining whether graduate students are employees; 2) that the Petitioner offered to submit evidence of prior collective bargaining experience in higher education and expert testimony demonstrating that, even giving weight to the factors cited in *Brown*, the graduate students are appropriately classified as employees; and 3) that the *Brown* decision was incompatible with Supreme Court rulings on the definition of an employee under the Act.

Member Hayes dissented, noting that the Petitioner made no offer or claim that there were any facts at all that would distinguish the individuals sought by its petition with those found not to be statutory employees in *Brown*. The request, Hayes noted,

“does nothing more than ask that a Board, with changed membership, view precisely the same evidence and argument considered by a prior Board but reach an opposite result. This is not a proper basis for reconsideration.”

This decision signals a potential change in the Board’s position on who are considered to be “employees” covered by the NLRA.

While the full effect of this decision is not yet entirely clear, it does indicate that the Board may be inclined to broaden the context of who is considered an “employee” under the NLRA. With this decision, the NLRB laid the foundation for the potential reversal of the *Brown University* decision by remanding the case to the region in order to develop a full evidentiary record. Once the Board has this full record, it may then have the necessary support to fully reverse the prior precedent and to thereby expand the current scope of NLRA covered employees.

### **3. *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154 (2010): Can Dues Check off be Stopped after Expiration of the Collective Bargaining Agreement?**

In this case, the Board dismissed an unfair labor practice complaint that dealt with the unilateral cessation of dues check off following the expiration of a collective bargaining agreement. While the right of the employer to unilaterally cease such check off following contract expiration has been understood for decades,<sup>2</sup> it had been revisited in this case and the Ninth Circuit, in dealing with an earlier appeal, had instructed the Board to articulate a rationale as to why the dues check off issue was in a separate category from other terms and conditions of employment and thus could be exempt from the unilateral change doctrine articulated in *NLRB v. Katz* 369 U.S. 736 (1962). Under that doctrine, most contractual terms and conditions of employment must be maintained, as a matter of law, after contract expiration as part of the status quo.

Upon remand, however, there were only four sitting members of the Board (Member Becker had to recuse himself because of prior associations with the parties) and the four of them deadlocked on the issue. Because of this even split, the Board had to dismiss the complaint. However, the two opposing camps expressed their contrary views on the subject.

Chairman Liebman and Pearce would have changed past policy on this issue. They wrote:

We concur in the dismissal of the complaint. We write separately to express our substantial doubts about the validity of *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963), and its progeny, particularly as applied in right-to-work states, where the collective-bargaining agreement

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<sup>2</sup> *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963),



contains no union-security clause. As explained more fully in the dissenting opinion in *Hacienda I*, the Board has never provided an adequate statutory or policy justification for the holding in *Bethlehem Steel* excluding dues-check off from the unilateral change doctrine articulated in *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Further, even assuming that *Bethlehem Steel* was correctly decided, the Board has never provided a reasoned analysis for applying the holding in *Bethlehem Steel* in a right-to-work context where dues check off could not lawfully be linked with union security arrangements.

On the other hand, Members Hayes and Schaumber would uphold the case law that was established fifty years earlier and allow an employer to cease dues check off after the expiration of the contract. They wrote:

Unlike our colleagues, however, we respectfully maintain that application of the Board rule regarding post-contract expiration of the dues check off obligation is warranted for important legal, policy and equitable reasons.... There is a major distinction to be made between terms and conditions subject to the *Katz* rule and the exceptions to that rule. The exceptions, including check off, are uniquely of a contractual nature. In other words, provisions relating to wages, pension and welfare benefits, hours, working conditions, and numerous other mandatory bargaining subjects typically appear in a collective-bargaining agreement, but those aspects of employment can exist from the commencement of a bargaining relationship. The obligation to maintain them does not arise with or depend on the existence of a contract. On the other hand, the obligation to check off dues, refrain from strikes or lockouts, and submit grievances to arbitration cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound.

In light of the deadlock and the fact that it is a tradition of the Board not to overrule precedent without a three member majority, existing precedent had to be followed in this case, leading to the dismissal of the complaint.

While this case did not change precedent, it is now clear that, with the right future case, and with Member Becker's future participation, this long standing precedent of allowing cessation of dues check off may very well fall.

**4. *MV Transportation*, 337 NLRB 770 (2002).** The successor bar rule. This 2002 decision had overruled *St. Elizabeth Manor*, 329 NLRB 341 (1999). However, this case is now being reconsidered as a result of the Board granting of a request for review in ***UGL-UNICCO Services, Co.***, 355 NLRB No. 155 (2010). The Board issued an invitation for briefs last August.

In *MV Transportation*, 337 NLRB 770 (2002), the Board reversed the "successor bar" doctrine. Under the successor bar doctrine, once a successor employer's obligation to recognize an incumbent union attached, the union was entitled

to a reasonable period of time for bargaining without challenge to its majority status. *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). In *MV Transportation*, the Board overruled *St. Elizabeth Manor* and held that “an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve to bar an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union’s majority status.

## **Other Cases and Invitation for Briefs**

### **1. Scope of bargaining units**

On occasion, the Board will solicit briefs from the public on pending cases. This approach is different from the “public comment” period that the Board must apply when engaged in formal rulemaking, but no less important. A request for briefs can signal a change in direction in Board case law where input from the public – in the form of legal briefs – is desired before the Board changes courses. And in some recent situations, the Board has called for briefs to help them interpret issues raised by particular cases.

One area where this occurred was in the health care field. In the 1980s, the Board engaged in rulemaking in establishing presumptively appropriate bargaining units in acute health care facilities. Now, the Board has turned to long term care facilities, such as nursing homes. But rather than engage in rulemaking, it decided to invite briefs on a pending case that involves the determination of appropriate units for collective bargaining in long term care facilities. In *Specialty Healthcare and Rehabilitation Center*, 356 NLRB No. 56 (2010), the issue centered on whether a single unit limited to certified nursing assistants at one facility was appropriate, or, as the employer contended, the only appropriate unit was an larger unit of all nonprofessional employees at that facility. The case is still pending and the Board invited briefs from the public, over the dissent of Member Hayes, who expressed concern that Liebman, Becker and Pearce intended to use the case to overrule precedent or establish broadly applicable rules concerning determination of bargaining units. The briefing period closed on March 8 but was recently extended.

While arising out of the health field, the call for briefs has raised larger questions as to whether the Board is establishing a different standard for assessing community of interest in all unit cases. Business groups, including the U.S. Chamber of Commerce, have argued that NLRB should not depart from its traditional community of interest approach in favor of a standard that would allow a union to seek certification among any unit of employees performing the same work at the same facility *without regard* to whether there are *other employees* sharing a community of interest with the workers sought by a union. A case by case approach remains the preferred approach.

And indeed that has been the approach for non-acute facilities ever since *Park Manor Care Center*, 305 N.L.R.B. 872, (1991), where the Board held that in nonacute health care facilities it preferred to take a pragmatic or empirical approach to unit determinations that could include consideration of recurring factual patterns as well as traditional “community of interest factors.” The *Park Manor* board said “after various units have been litigated in a number of individual facilities, and after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate.” In the instant case, the Board now seeks input on such unit questions in nonacute care facilities.

But the Board also asked broader questions in calling for briefs that drew a dissent from Member Hayes and vigorous comment from several organizations. The last two questions the board invited amicus filers to address were:

(7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities? Should such a unit be presumptively appropriate as a general matter?

(8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 [48 LRRM 1152] (1961), the employees in the proposed unit are ‘readily identifiable as a group whose similarity of function and skills create a community of interest’? ”

Hayes wrote that none of the parties in the *Specialty Healthcare* case sought the “broad inquiry” announced by the board, and he warned that “the notice and invitation to file briefs is a stunning initiative by my colleagues to consider replacing decades of Board law applying the community-of-interest standard with a test that will likely find that any group of employees who perform the same job in the same facility is an appropriate bargaining unit, without regard for whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.” (See Daily Labor Report, BNA, March 11, 2011).

The U.S. Chamber of Commerce weighed in on the unit issues in the case but was more concerned about the direction the Board was heading by posing the last two questions. The Chamber also addressed the issues concerning the nonacute health care industry, but began its argument by noting that the Board's invitation in questions 7 and 8 asked whether a bargaining unit should be considered presumptively appropriate in any industry if the unit includes only employees who performed a single job at a single facility. The Chamber expressed its concern that NLRB intends to consider its traditional position that the interests of employees in a unit sought by a petitioning union must be sufficiently distinct from those of other workers to justify the establishment of a separate unit and pointed to a dissent by Member Becker in *Wheeling Island Gaming Inc*, 355 NLRB No. 127 (2010) that suggests such a direction. The Chamber, however, noted that Section 9(c)(5) of the NLRA provides that “[i]n determining whether a unit is

appropriate” for purposes of collective bargaining “the extent to which the employees have organized shall not be controlling.”

The Board cannot, as suggested by Member Becker in *Wheeling Island Gaming*, comply with Section 9(c)(5) merely by pointing to some community of interest factors that are consistent with the extent of the union's organizing effort.....

The Board should continue to consider whether the scope of a proposed unit is conducive to the bargaining that would follow certification and “should not, as Member Becker suggests, simply approve the narrowest unit sought by the petitioning labor organization and then leave it to the parties to reshape the unit” if they find that a different unit would be more manageable or practical.

The Chamber also challenged the assertion that disputes over the scope of bargaining units have been delaying resolution of representation cases in the health care industry. Arguing that in health care and other industries the “overwhelming majority” of NLRB elections are conducted pursuant to employer-union stipulations or agreements within reasonable time frames, the chamber said “the data simply do not support the assertion that unit scope issues are delaying elections in this industry.” (Daily Labor Report, BNA, March 11, 2011

## **2. Duty to Provide Witness Statements to Union**

*Stephen Media and Hawaii Newspaper Guild*, 356 NLRB No. 63 (2011).

In that case, the Board had found employer violated the Act by failing to provide certain information to the union. But Board severed the question of whether the employer had a duty to provide a particular statement provided to it by an employee or other statements provided during the investigation of an employee's alleged misconduct.

On March 2, 2011, the Board called for an “Invitation to File Briefs” on this issue. The *Notice and Invitation* states:

Board precedent establishes that the duty to furnish information “does not encompass the duty to furnish witness statements themselves.” *Fleming Cos.* 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch, Inc.* 237 NLRB 982, 985 (1978).... This case illustrates, however, that Board precedent does not clearly define the scope of the category of “witness statements.” This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. We have therefore decided to sever this allegation from the case and to solicit briefs on the issues it raises.

The questions raised were: What is a witness statement? And if a statement is not a witness statement, is it nevertheless an attorney work product?

By way of background, Board precedent establishes that the duty to furnish information to a union “does not encompass the duty to furnish witness statements themselves” that may be obtained by an employer during an investigation. *Fleming Cos.* 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch*, 237 NLRB 982, 985 (1978). In *Anheuser-Busch, supra*, there were two conditions precluding disclosure. The first is that the employee adopted the employer’s summary of his or her statement. Second, that assurances of confidentiality had been given to the employee. The names of any witnesses must be given in any event.

In *Central Telephone of Texas*, 343 NLRB 947 (2004), the Board noted that witness statements prepared in anticipation of litigation were protected under the work product privilege and did not have to be disclosed to a union. To qualify, the party directing the statement must have a reasonable belief that litigation was a possibility.

In *California Nurses Assn.*, 326 NLRB 1362 (1998), it was held that a union is not entitled to pre-arbitration discovery. However, in *Ormet Aluminum Products*, 335 NLRB 788 (2001), the Board distinguished *California Nurses* in a case where the request for the statement was made at the grievance stage, not the arbitration stage. Since the grievances were not “pending arbitration,” it cannot be said the union was seeking pretrial discovery.

In the *Stephen Media* case, the administrative law judge noted that, under the facts of that case, a witness statement had been made before there was even a decision on discipline cannot be construed as such a work product. Under those circumstances, the judge found that the statement of an employee made during the course of the investigation had to be disclosed.

### **Actions of General Counsel:**

The General Counsel’s Office can also be a source for subtle changes in the law under the Act and in recent months, Acting General Counsel Lafe Solomon has been aggressive in carving out some particular areas of concern and altering past Board practice in these areas. His GC Memoranda of particular note thus far follow.

#### **GC Memorandum 11-05.**

***Regarding the Board’s standards for deciding whether to defer to an arbitration award as a resolution of an unfair labor practice charge.***

When conduct alleged as an unfair labor practice is also the subject of a grievance alleging that the conduct violated a collective bargaining agreement, the NLRB has two concerns: 1) to carry out its statutory mandate to prevent unfair labor practices by

investigating and deciding the charge; 2) but on the other hand, to foster the statutory policy in favor of private resolution of disputes through the collective bargaining process.

Under the *Collyer* doctrine, the Board implements both policies by suspending the processing of the unfair labor practice charge and awaiting the outcome of the grievance-arbitration process.

On occasion, grievants claim that although the arbitration resolved the contract claim, it did not properly deal with the unfair labor practice issues. The Board's *Spielberg/Olin* line of cases articulated a test for deciding whether to defer to the arbitration award. The Board will accept the arbitrable resolution of the statutory claim provided: 1) the contractual and statutory claims were "factually parallel," and 2) the facts relevant to the statutory claim were "presented generally" to the arbitrator and 3) the arbitrator's award was not "clearly repugnant" to the Act or "palpably wrong."

General Counsel Lafe Soloman believed that these standards should be revisited. He indicated in his Memorandum that he will urge the Board to challenge the *Spielberg/Olin* standard and defer "only if the arbitrator or parties to the grievance settlement had the authority to, and did, consider the statutory claim. General Counsel would preserve the "clearly repugnant" aspects of the standard, however. In particular, the Memorandum stated:

In Section 8 (a)(1) and 8 (a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have been adequately considered by the arbitrator.... [the party seeking] deferral must demonstrate that : 1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and 2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing the Board should defer unless the award is clearly repugnant, i.e. the arbitrator's award is not susceptible to an interpretation consistent with the Act." (GC Memorandum 11-05 at page 7)

Additionally, the Memorandum directed before the Regions defer to arbitration under *Collyer*, they should take affidavits from the charging party and all witnesses within the control of the charging party before they make their "arguable merit" determination.

### **GC Memorandum 10-07 and 11-01**

#### ***Re effective remedies for unfair labor practices during union organizing campaigns***

Guidance by General Counsel that remedies for serious violations of the Act during campaigns be dealt with quickly, including the use of Section 10(j) injunctive relief. The type of cases to which this initiative is directed include: discharge or retaliation against key union activists; threats of discharge; threats of closure or other adverse consequences of employees support unionization, interrogation, and solicitation

of grievances and promise or grant of benefits. GC 11-01 in particular is premised on the principle that the impact of a nip-in-the-bud violation is not confined to the individual victim of the violation but resounds among all employees. Remedies in these types of cases can include:

- reading of a Notice of employee rights and cease and desist orders to assembled groups of employees
- Access remedies.

“Where an employer unlawfully interferes with communications between employees, or between employees and a union, the impact of that interference requires a remedy that will ensure free and open communication. Allowing union access to an employer’s bulletin board and providing the union with the names and addresses of employees will restore employee/union communication and assist the employees in hearing the union’s message without fear of retaliation.” (GC 11-01, page 8)

NOTE: “Where an employer customarily uses electronic means to communicate to employees, “regions should submit to the division of advice on whether to seek a remedy including union access to those electronic means of communication.” *J. Picini Flooring*, 356 NLRB No. 9 (2010)

GC 10-07 deals with Section 10 (j) injunctions and is designed to streamline that process and avoid duplicative efforts.

### **GC Memorandum 11-06**

#### ***Re Remedies for first contract disputes***

General Counsel Solomon also gave regional offices more authority to seek additional remedies in unfair labor practice cases involving first contract bargaining. Remedies such as mandated bargaining schedules, extension of the certification year, and reimbursement to unions of negotiating costs can now be ordered by the regions without having to obtain advice from the Board’s Division of Advice. In addition, “notice-reading” remedies can also be ordered by the regions without going through the Division of Advice. Solomon said he was authorizing the regions to seek notice reading remedies in first bargaining cases, depending on the facts, that might involve certain situations of outright refusal to bargain; where an employer rejected all of the union’s proposed bargaining dates; where an employer makes unilateral changes and refuses to provide information to the union; where there was bad faith bargaining and discrimination against union stewards, etc.

## **GC Memorandum 11-07**

### ***Re Back Pay issues***

In GC 11-07, Acting General Counsel urged reconsideration of two 2007 Board decisions that require illegally discharged employees to start looking for a new job within two weeks of being fired, and shifted the burden from the wrongdoer to the General Counsel to prove that they have diligently pursued work throughout the backpay period. Earnings from these other jobs are deducted from backpay awards. Earnings from these other jobs are deducted from backpay awards. Mr. Solomon directed officials in the agency's 31 regional offices to identify cases in the field that could be used as vehicles to ask the Board to reconsider the 2007 decisions. The first of those decisions was *Grosvenor Resort*, 350 NLRB 1197 (2007), where the Board ruled that:

If a discriminatee began a reasonably diligent search anytime within [a two week] period following discharge, then his or her backpay would run from the date of the Respondent's unlawful action. If, however, a discriminatee failed to commence a search at some point within this two week period, then his or her backpay would not begin to accrue until the discriminatee commenced a proper job search.

In *St. George's Warehouse*, 351 NLRB 961 (2007), the Board ruled with respect to back pay issues:

We reaffirm that a respondent has the burden of persuasion as to the contention that a discriminatee has failed to make a reasonable search for work. However, we reach a different conclusion with respect to a part of the burden of going forward with evidence. The contention that a discriminatee has failed to make a reasonable search for work generally has two elements: (1) there were substantially equivalent jobs within the relevant geographic area, and (2) the discriminatee unreasonably failed to apply for these jobs. Current Board law places on the respondent-employer the burden of production or going forward with evidence as to both elements of the defense. As to the first element, we reaffirm that the respondent-employer has the burden of going forward with the evidence. However, as to the second element, the burden of going forward with the evidence is properly on the discriminatee and the General Counsel who advocates on his behalf to show that the discriminatee took reasonable steps to seek those jobs. They are in the best position to know of the discriminatee's search or his reasons for not searching. Thus, following the principle that the burden of going forward should be placed on the party who is the more likely repository of the evidence, we place this burden on the discriminatee and the General Counsel.



## **GC Memorandum 11-08**

In this memo the General Counsel outlined new methods for calculating backpay that includes daily compounded interest as recently ordered by the Board, and compensates for such things as expenses to search for employment and tax penalties for lump sum payments. This was designed to implement *Jackson Hospital Corporation d/b/a Kentucky River Medical Center*, 356 NLRB No. 8 (2010), where the Board changed its policy with regard to the assessment of interest on make whole orders. Under the new policy, interest on make-whole awards is to be compounded on a daily basis, using the established methods for computing backpay and for determining the applicable rate of interest. This change was made in order to bring the National Labor Relations Board in line with other comparable legal regimes (including the Internal Revenue Code) and to better serve the remedial policies of the Act. In order to effectuate the change to daily compound interest, it is necessary to make changes to the manner in which backpay and other monetary awards are calculated.

### ***General Counsel's views regarding initiatives in Four States on guaranteeing the right of employees within those states to a secret ballot election when deciding upon a union***

Four states have enacted state constitutional amendments governing the method by which employees would choose union representation. Such amendments would require a secret ballot election in all cases, initiatives that were filed to head of the enactment of the Employee Free Choice Act.

In January, the National Labor Relations Board advised the Attorneys General of Arizona, South Carolina, South Dakota, and Utah that those recently-approved state constitutional amendments governing the method by which employees choose union representation conflict with federal labor law and therefore are preempted by the Supremacy Clause of the U.S. Constitution.

The states were also advised that the Board has authorized the Acting General Counsel to file lawsuits in federal court, if necessary, to enjoin them from enforcing the laws. In letters to the attorney generals of each of those states, Acting General Counsel Lafe Solomon indicated that the NLRA provides two paths to union recognitions: one through the election process and the other through voluntary recognition of majority status. The state amendments prohibit the second method and therefore interfere with the exercise of a well-established federally-protected right. For that reason, they are preempted by the Supremacy Clause of the U.S. Constitution. The amendments have already taken effect in South Dakota and Utah, and are expected to become effective soon in Arizona and South Carolina.

All four attorney generals responded with a defense of their states' constitutional amendments, and the ball is now back in the General Counsel's office to determine what route he will take.

Rep. Jeff Duncan (R-S.C.) has introduced legislation (H.R. 1407) that would protect such state initiatives for secret ballots in union representation elections. His bill, the State Right to Vote Act, was introduced on March 11 and is now sitting in the House Education and Workforce Committee.

The bill would amend the National Labor Relations Act by adding the following language:

Nothing in this act shall be construed as authorizing or recognizing a labor organization as the representative of employees unless the labor organization has been selected by a majority of such employees in a secret ballot election conducted by the National Labor Relations Board in any state or territory in which such labor organization recognition is prohibited by state or territorial law unless recognition is accomplished through a secret ballot election conducted by the board.

In addition, it would provide:

No agency of the federal government may bring any challenge against a state statute or constitutional provision which protects the right of employees to choose labor organization representatives through secret ballot elections.

### **Rulemaking:**

The third method by which the Obama Board will move in the direction of labor will be through its power of rulemaking. The NLRB is authorized by statute to make rules and regulations to enforce the Act, and although little used in the past, this Board has already shown a propensity for using such powers. Chair Liebman has stated that "Rule making is something that certainly academics have been talking about for some time... I think it's worth consideration." Some examples of rule making activity thus far include:

#### **1. Required Posting of Rights under NLRA**

The Board has proposed that all employers be required to post a notice informing employees of their rights under the National Labor Relations Act. Public comment closed on February 22, after thousands submitted their views pro and con. Opposition to the proposed rule centered on the Board's lack of statutory authority to require notice postings by employers not specifically involved in NLRB proceedings. In addition, some argue that the concept of a Board notice is an antiquated concept, not needed in this age of Google and internet information. One lobbying group said that a quick Google search of "forming a union" generated 17,000 hits – the first being an AFL-CIO posting on how to form a union in the workplace.

Those in favor argue that the rule requiring postings is within the Board's authority and will assist employees. The NLRA is unique among federal labor laws in that it does not require such a posting within the statute itself, and union lobbying groups contended employees remain unaware of their rights in many cases. Further, such a posting of the law's requirements would hardly be a serious burden for employers.

## **2. "Members Only" Bargaining**

In August 2007, the United Steelworkers and six other unions filed a petition asking the Board to engage in rulemaking to recognize members only bargaining. The petition claims that nothing in the Act requires that a union representing employees must have a majority status, and that the purposes of the Act can be served by allowing employees to join together in labor organizations and be recognized by their employers, even if they do not constitute a majority. In June 2010, forty six law professors sent a letter to the NLRB urging them to use internal rule making to allow for members' only collective bargaining when a union does not have majority support.

The Board Division of Advice had expressed its view during the Bush Board period that members only bargaining should not be required. In 2006, the NLRB's Division of Advice issued a memorandum in *Dick's Sporting Goods*, Case No. 6-CA-34821, in which the Board's general counsel determined that a complaint should not be issued on allegations that an employer unlawfully refused to bargain with an employee council that representing a minority of the company's employees.

Whether this issue will now be revisited by the Board through rulemaking is a pending matter.

## **3. Possible shortening of time between petition and election?**

In addition, recently appointed Board Member Mark Pearce gave a speech at Suffolk University Law School in Boston in October 2010 during which he foreshadowed some other potential changes through the NLRB's rulemaking which could benefit unions. One issue which Pearce discussed was the possible shortening of the time period between the filing of an election petition and an election. While this change has not yet been made, Pearce's comments on it demonstrate that the Board is interested in making changes to the legal landscape through its rulemaking process as well as its decisions.

Other issues that might be susceptible to rulemaking include the amount of information that must be provided to an organizing union. For example, the *Excelsior* list of names and addresses of unit employees prior to an election may be expanded to include email addresses of unit employees.

Employers should be alert to this shift by the NLRB towards a more pro-union agenda. In particular, with the proposed Employee Free Choice Act (“EFCA”) seemingly remaining stagnant in Congress, there may be cause for concern that the NLRB could attempt to endorse significant portions of the EFCA through its rulemaking process instead of through the legislature. To some degree, the more aggressive stance by the General Counsel’s office on dealing with first contract violations and the suggestion that rulemaking might solve the problem of undue delays between petition and election are indicators that the Board may stretch as far as it can, within the bounds of statutory restrictions, to provide some of the union wish list items that sat in the EFCA package.

## **Other Cases of Note from the Board**

### ***Research Foundation of SUNY*, 355 NLRB No. 170 (2010)**

In this case, a petitioning union sought to represent the post-doctoral associates at the SUNY-Buffalo campus. The associates were technically employees of the Research Foundation of SUNY, a private educational foundation that serves as a fiscal agent for SUNY. In this regard, the Foundation administers the grant, hires the associates and sets their pay and benefits within the parameters of the grant.

During the organizing campaign, a union organizer, Amy Melton, asked to visit one of the associates in his office. Upon hearing about this planned meeting, the manager of the Foundation checked with SUNY Human Resources to see whether he had to allow the meeting to take place. He was told he did not. Consequently, the manager confronted Ms. Melton in the office of the associate and told her that she had to leave since she was on private property and if she did not, she would be arrested.

After the union lost the subsequent election (the tally was tied at 35-35), the union filed objections. The Board majority of Chair Liebman and Member Pearce explained:

Objections 4 and 13 allege, collectively, that the Employer interfered with employees’ protected activity by “threaten[ing] to have Union agents arrested in or near the workplace, in such a manner as to interfere with employees’ rights to organize and support the Union.” In support of these objections, the Petitioner’s organizer testified that during her visit to the office of a unit employee to solicit his support for the Union, an Employer official told her to leave the building or he would call the police.

The Board began by citing the general rule under *Lechmere* decision is that nonemployee organizers, like Melton, are not entitled to engage in Section 7 organizing activity on the private property of others. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992). However, the Board quickly added:

However, an employer has no right under *Lechmere* to exclude union representatives engaged in Section 7 activity from areas in which it lacks a property interest. *Bristol Farms*, 311 NLRB 437, 438 fn. 6 (1993) Therefore, as the judge correctly noted in citing *Indio Grocery Outlet*,<sup>4</sup> the threshold question in cases such as this is whether the employer possessed a property interest entitling it to exclude the union representative(s) from the area where the proposed organizing activity was to occur.

On the factual question of property rights, the Board noted that the employer was on state property, not property it owned. Second, there was no evidence of a lease between the employer and the State of New York (though the administrative law judge had called the employer a lessor). Further, the Board disagreed with the judge that the employer's right to take action derived from a state guideline prohibiting union organizing by outside labor organizations on state property. While the State may have such a guideline to take action, the employer is not the State and could not assert rights under that guideline. Next, while the employer said he had been delegated the right to expel the union organizer on behalf of the state since he contacted SUNY's Human Resources Director. The Board noted that, while there was discussion about whether the manager had to let Ms. Melton stay, there was no direct delegation by the Human Resources Director to the manager to enforce the state's guidelines.

Given the fact that no property rights could be established, there was no basis for the manager to throw Ms. Melton out of the building. Once this was established, the Board had little difficulty in finding the conduct of the manager in throwing out the organizing and threatening arrest to be objectionable conduct. The Board overturned the decision of the ALJ, who had found no objectionable conduct, and ordered a new election.

Member Schaumber disagreed with the majority. He began by writing:

I agree with the judge that the Petitioner failed to establish that the Employer engaged in objectionable conduct when one of its officials informed a trespassing union organizer, who was on the premises in violation of state regulations, that the organizer could not meet with an employee on the property during work hours. It simply cannot be said that this isolated directive had such a tendency to interfere with employee free choice that it could have affected the election results. Rather, as the judge found, both the employee and organizer had ample alternative opportunities to discuss the pros and cons of unionization prior to the election, ***and the incident was disseminated to no other employee.*** Contrary to my colleagues, therefore, I would adopt the judge's overruling of the Union's Objections 4 and 13, and certify the results of the election.

Member Schaumber notes that the majority was so entranced by whether or not the employer had a property interest in the building (he felt that they did anyway) that it avoided confronting the real question, namely,

...whether the alleged objectionable conduct, taken as a whole, warrants a new election because it has “the tendency to interfere with the employees’ freedom of choice” and “could well have affected the outcome of the election.” *Metaldyne Corp.*, 339 NLRB 352 (2003). My colleagues, focused as they are on property interests not at issue, fail to explain how the directive to Melton to leave Sherman Hall could possibly have affected the election outcome.

He noted that the employee involved and Melton did not even know each other, that the two could have met off site and that the Foundation manager did not tell the employee he could not engage in protected activity, but rather simply told an intruder to leave the building.

***Manhattan College, Case No. 2-RC-23543 (Region 2 decision involving adjuncts and religious institutions)***

On January 10, 2011, the Regional Director for Region 2 issued a Decision and Direction of Election at Manhattan College in New York for a unit of “all individuals employed at part-time faculty with an adjunct academic rank who teach a minimum of a three (3) credit college degree level course for a full semester (or the equivalent hours of a semester length courses).”

This decision followed a complex hearing on the question of whether the NLRB should exercise jurisdiction over the Catholic college or whether Manhattan is a “church-operated institution whose faculty are exempt from the Board’s jurisdiction under the Supreme Court’s ruling in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) *Catholic Bishop* held that the Board could not assert jurisdiction over lay teachers in a church-operated school because to do so would create a “significant risk” that First Amendment rights would be infringed. Two ways in which that could happen under *Catholic Bishop* were (1) the Board might infringe on religious freedom by inquiring into the good faith of assertions by clergy-administrators that action alleged to be unfair labor practices were mandated by the school’s religious creed; (2) the Board’s exercise of jurisdiction might require the Board to determine the terms and conditions of employment in order to define the scope of mandatory subjects of bargaining for church-operated schools.

While *Catholic Bishop* centers on parochial schools, the Board has applied the case to educational institutions at all levels on a case by case basis. *St. Joseph’s College*, 282 NLRB 65 (1986). Since then, the Board has declined jurisdiction over a school “whose purpose and function in substantial part are to propagate a religious faith.” *Jewish Day School*, 283 NLRB 757 (1987); *Nazareth Regional High School*, 282 NLRB 763 (1987)(school’s mission was “to transmit the teachings of Jesus Christ and His Church”).

The Board has asserted jurisdiction where the church involvement with the college not to a level where it “creates a significant risk of constitutional infringement.”

*Livingstone College*, 286 NLRB1308, 1309 (1987); *University of Great Falls*, 331 NLRB 1663.

Applying these standards to Manhattan, the Regional Director found that the primary purpose of Manhattan is secular and not the propagation of a religious faith. The RD indicated that the College had asserted that it had no intention of imposing “Church affiliation and religious observance as a condition for hiring or admission, to set quotas based on religious affiliations, to require loyalty oaths, attendance at religious services, or courses in Catholic theology.” There was a commitment to a continued relationship with the Christian Brothers but the College also affirmed its commitment to academic freedom and to institutional autonomy.

The role of adjunct faculty does not involve propagating religious faith in any way, and the RD stated that “[b]ecause adjunct faculty are not required to advance a religious mission in any way, exercising jurisdiction over the College will not have any ‘potential effects’ leading to unconstitutional entanglement.

The Regional Director disagreed with the College’s argument that concluding that the college is not a church operated school within the meaning of *Catholic Bishop* based on factors that its religious activities are not compulsory and its educational activities do not include indoctrination is “a view of religious that the Board cannot endorse without imposing its own definition of approved faith in clear violation of the First Amendment.” The Regional Director said that such inquiries were part and parcel of examining the case in light of *Catholic Bishop*.

The purpose of considering whether indoctrination, proselytizing or in the Supreme Court’s terminology, “propagation of a religious faith,” is part of a school’s purpose is because rules requiring faculty to propagate faith would require bargaining over such rules and their disciplinary consequences and, further, would require the Board to scrutinize an employer’s defense to unfair labor practice charges based on asserted enforcement of faith-based rules.

The Regional Director noted that the D.C. Circuit has refused to endorse the Board cases asserting jurisdiction based on the Board’s test, and instead has ruled that an organization is exempted if it:

1. Holds itself out to students, faculty, and community as providing a religious educational environment
2. is organized as a non-profit; and
3. is affiliated with, owned by, operated, controlled directly or indirectly by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. *University of Great Falls v. NLRB*, 278 F. 3d 1335, 1343 (2002)

The Board has not adopted the D.C. Circuit test but the Regional Director indicated that, even if it did apply those tests, Manhattan would not be exempt. While conceding points two and three, the RD said that the College does not hold itself out as providing a religious educational environment.

While a recent Trustee Report, the Sponsorship Covenant and the new Catholic Studies academic requirement would seem to point in the direction of exemption, the RD explained that the Trustees Report actually tries to disengage the educational scholarship work of the founder of the Order, De La Salle, from its roots in Catholic France of the 17<sup>th</sup> century. Admissions brochures make reference to De La Salle “but not to the Church, religion or Catholicism,” and the De La Salle references are secular in nature.

Further, the College’s own Trustee Report indicates that forty years earlier, the College’s elimination of church control, adjustments to compulsory religious activities and lack of religious test for employment or admission made the College eligible for aid from New York State under the Bundy Law. Similarly, the Introduction Booklet given to all potential hires states that the College “is neither controlled by the state of the Church and is, as such, an accredited institution of higher learning in New York State. The RD concluded:

While the College may well be affiliated with the Church and take pride in its historical relationship with the Church, the College’s public representations clearly demonstrate that it is not providing “a religious educational environment” and therefore even under the D.C. Circuit test, the Board should exercise jurisdiction over the College.

### ***El Paso Electric Co., 355 NLRB No. 95 (2010) (Alleged direct dealing)***

In this case, involving allegations of direct dealing with employees but the CEO of a company during contract negotiations, the facts were that negotiations were taking place in a particular office building downtown. There was a group of employee demonstrators outside the building in support of their union. The CEO Gary Hedrick happened to be arriving at a restaurant across the street from the demonstration with his wife and heard his name called. He stopped by the demonstration, quieted the crowd and told them he stopped to hear what their concerns were. One employee told him they were concerned about the company’s driver policy and that it was too ambiguous. Hedrick said he would check into it. The employee said if he could change the policy, he’d get a contract. During this confrontation, one of the union negotiators showed up and talked a bit with Hedrick.

Later the same employee who talked to Hedrick called him at his office and asked if he had looked into the policy. Hedrick said he had, and he agreed it was ambiguous. He told the employee that he had instructed his negotiators to tighten up the language.



The Board majority of Liebman and Pearce found this to be direct dealing and undercutting the union.

The established criteria for finding that an employer has engaged in unlawful direct dealing are “(1) that the [employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union’s role in bargaining; and (3) such communication was made to the exclusion of the Union.” *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co.*, 316 NLRB 979 (1995).

The Board found that, based on the cited facts, these three criteria were met. In contrast, Member Schaumber found insufficient evidence of an 8(a)(5) violation.

The conduct at issue here falls far short of “[G]oing behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions.” *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992). In *Allied-Signal*, for example, without even notifying the union, the employer formed an employee task force to discuss the limits on management’s proposed smoking ban and any penalties that might be imposed for violating it. And in *General Electric Co.*, 150 NLRB 192, 195 (1964), cited by the majority, the employer used a broad-based direct marketing campaign to employees away from the bargaining table to promote support for its bargaining proposals and to disparage any conflicting proposals by their union bargaining representative.

Nothing like that happened here. Instead, as would any good employer interested in the concerns of his employees, Hedrick took the time to listen to Enriquez’ inquiries and to respond to them. Since the inquiries concerned a subject of bargaining, Hedrick’s responses were brief and vague. In sum, Hedrick showed concern for an employee, not the subject of bargaining about which she inquired, which at all times remained exclusively within the province of the Union’s representatives to negotiate with the Respondent. Under these circumstances, Hedrick’s conduct surely did not undercut the Union’s role in bargaining. I would therefore dismiss the allegation that the Respondent engaged.

***American Med. Response of Conn., NLRB Reg. 34, No. 34-CA-12576, complaint issued 10/27/10 (Section 7 rights in the context of social media)***

Seizing on an issue that could affect nearly any employer with a blogging or social media policy, the General Counsel of the National Labor Relations Board (“NLRB”), through one of its Regional Directors, recently issued a Complaint against an employer who terminated an employee, at least in part, for having posted on Facebook negative comments about her supervisor.

The case was scheduled to go to trial in January 2011, but AMR agreed to change the overly broad rules on employee communication under a settlement agreement approved by the Board. Under the settlement, the company agreed to revise its rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work.

The facts of the case were as follows:

The employer had received a customer complaint regarding the employee's work. The employee was allegedly called in by her supervisor to answer questions regarding the matter. The NLRB Complaint states that when the employee requested union representation at the interview the employer refused, and threatened her with discipline for making the request.

After returning home from work, the employee posted a negative comment regarding her supervisor on Facebook. She allegedly then received supportive comments from some of her co-workers, and went on to post additional negative comments about her supervisor.

The National Labor Relations Act prohibits an employer from discharging, disciplining, or otherwise discriminating against, an employee who engages in "protected concerted activity." Such activity generally includes discussions with co-workers as to wages, benefits, and other terms and conditions of employment. The NLRB alleges that the employer fired the employee for posting the negative comments about the supervisor on Facebook, and that this is unlawful interference with protected, concerted employee activity. The employer denied this, stating that the employee was discharged for multiple serious issues, not simply the negative posting.

Of particular interest is the fact that the employer has a handbook containing policies that prohibit employees from certain kinds of blogging or internet postings. Among other things, the handbook bars employees from making "disparaging, discriminatory or defamatory comments when discussing the company or the employee's superiors, co-workers and/or competitors." The NLRB Complaint alleges that such a rule is unlawful on its face.

This issue has unusually broad ramifications about employee use of internet social media and employer attempts to restrict that activity. The NLRB is typically considered a watchdog over union-management relations, but the National Labor Relations Act actually protects the right of all employees – union and non-union – to engage in "protected, concerted activity." The concept of protected, concerted activity includes employees simply discussing work-related issues, concerns or complaints, even in a completely non-union setting. "Water cooler" chit-chat has become internet social media chit-chat. If the NLRB rules that employees' disgruntled discussions about supervisors via Facebook are under the umbrella of protected, concerted activity, then *all* employers, whether or not their employees are represented by a union, have to be concerned about how they react to and attempt to regulate employee activity on the internet. This will

have implications for the specific contents of employee handbooks and policies already in place. Until the case is decided, employers should be careful in drafting, promulgating and enforcing policies as to blogging, postings on social media sites, etc.

## **Bannering**

In *United Brotherhood of Carpenters*, 355 NLRB No. 159 (2010), a 3-2 Board majority held that a union's stationary "bannering" – as opposed to picketing – of a neutral employer was not unlawful secondary activity. The case involved a primary dispute between a non-union employer and a union that wanted to represent its employees. The union displayed a large stationary banner on a public sidewalk near the entrance of a third party employer that said: "Shame [followed by the name of the neutral employer]," followed by the phrase "labor dispute."

General Counsel for the Board had argued that the posting individuals at or near the entrance of the secondary employer's facilities to hold banners declaring that a labor dispute existed constituted picketing and was coercive. Secondly, the banners were coercive because they contained fraudulent wording that would lead one to believe the dispute was with the neutral employer.

Section 8(b)(4)(ii)(B) makes it an unfair labor practice for a labor organization:

(ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce where an object thereof is –  
(B) forcing or requiring any person to .. cease doing business with any other person."

The Board ruled otherwise. The Board noted first that Congress adopted this provision with the objective of shielding unoffending employers from improper pressure intended to induce them to stop doing business with another employer with whom the union has a dispute. But according to the majority, the focus of Congress was on picketing as a pressure tactic by unions.

The Board then explained that the Act does not define "picketing." The Board stated that, through case law, picketing has usually involved "persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite." Bannering does not meet that definition.

The banner displays here did not constitute such proscribed picketing because they did not create confrontation. Banners are not picket signs. Furthermore, the union representatives held the banners stationary, without any form of patrolling. Nor did the union representatives hold the banner in front of any entrance to a secondary site in a manner such that anyone entering the site had to pass between the union representatives. The banners were located at a sufficient distance from

the entrances so that anyone wishing to enter or exit the site could do so without confronting the banner holders in any way.

In short, the Board found that the display of a stationary banner, like handbilling, is noncoercive conduct falling outside of the Act's prohibitions. The bannering lacked the confrontational aspect that is involved in picketing.

The dissent noted that the majority had taken a narrow view of picketing based on sketchy legislative history, and that the bannering in this case clearly was proscribed.

This decision was followed up by *Southwest Regional Council of Carpenters (New Star General Contractors)*, 356 NLRB No. 88 (February 4, 2011) where the Board, citing its earlier ruling, decided that similar large banners used to "shame" neutral employers into stop doing business with an employer with whom the union had a primary dispute was not violative of the Act. The General Counsel claimed that the bannering was a signal to the employees of the neutral employer to stop work. But the Board said that without further evidence that the banners were intended by the union to be a "signal" to stop work, the Board could not find a violation.

Member Hayes dissented saying that the bannering was "the confrontational equivalent of picketing."

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### ***Parexel International, 356 NLRB No. 82 (2011) (Preemptive Discharge Violates Act)***

In *Parexel International*, 356 NLRB No. 82 (January 28, 2011), the Board held that an employer violated the Act by terminating an employee in order to prevent that employee from engaging in protected activity.

In this case, a registered nurse spoke with a recently rehired employee from South Africa about whether he and his wife had received inducements to return to work. The employee, falsely, said yes, he had received a raise to come back. The nurse then went to her supervisor and claimed that entire unit should quit and then come back with a raise. The nurse also stated that the manager whom she believed approved the raise and who was also South African, looked after employees from that country.

When questioned by management, the nurse admitted she has raised these points to her immediate supervisor but noted she has not talked to any other employees about it.

About a week later the nurse was terminated. She filed charges claiming she was terminated for engaging in protected activity. At the hearing, the ALJ found that she had not engaged in protected activity, and the Board agreed. However, even though the employee had not engaged in such activity, the Board majority found that the employee was terminated because of the employer's concern that she might in the future discuss

favoritism with regard to wages and preferential treatment for South Africans. The employer, the Board majority of Liebman and Becker said, was trying to “nip in the bud” future concerted activity. This was a violation of the Act.

If an employer acts to prevent concerted protected activity – to nip in the bud—that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more

While the Board majority could cite no cases in support, it did opine that other cases have found employer’s guilty of violating the Act when the employer believed an employee was engaged in protected activity even though he was not. See for example *Metropolitan Orthopedic Assn.*, 237 NLRB 427 (1978).

What is critical in these cases is not what the employee did but rather the employer’s intent to suppress protected concerted activity

## **Court Decisions**

### ***Pye v. The Longy School of Music (Injunctive Relief for Failure to Bargain Under NLRA)***

In *Pye v. The Longy School of Music*, -- F. Supp. --, 2011 WL 18872 (D.Mass., 2011), the federal district court ruled that the Longy School of Music did not owe a duty to bargain over the restructuring of its faculty in furtherance of its plan to cancel its undergraduate program and merge with another institution. However, the school was required to bargain over how it would decide to layoff or reassign faculty, whom it would decide to layoff or reassign, whether those faculty would be given a second chance to adjust to the new model, and what would happen with the employees who were to be laid off and reassigned.

The court ruled that the balance of hardships caused by the private school’s unilateral terminations and reassignments of faculty tipped in favor of a preliminary injunction compelling the school to reinstate terminated faculty with pay.

In this case, the regional director moved for preliminary injunctive relief under section 10 (j) of the National Labor Relations Act and such relief was granted.

The school had been explored its long term future when in early 2010, its faculty unionized. The union was certified on February 1, 2010. On March 5, the President met with faculty as a whole to layout a strategic plan that included a merger with Bard College, a reorganization of the Conservatory and CP divisions of the school and the

phasing out of the undergraduate program among other items. When asked why the union was not involved in the strategic planning, the President said that “this is not business as usual, we still have management rights. This is outside the normal course of business. We are in a recession and that’s why I am making the decisions.”

On March 8, the union requested bargaining on the impact of the changes announced. The administration and union did meet and Longy told the union that the changes affected “big picture management issues” that affected non-union employees as well, and therefore a meeting with a subsection of faculty before the March 5 meeting would have been inappropriate. It also indicated, however, that the changes were not to be made until the end of the year and that Longy still had a duty to bargain over their effects.

On March 11, Longy sent notices to all faculty about their status. Eight unit members were told their contracts would not be renewed. Thirty three others were divisionally reassigned. Five chairs were relieved of their duties. Each letter invited the faculty member to contact the administration if they had questions.

In addition, Longy made changes to health insurance benefits. Coverage was switched from Harvard Pilgrim to Blue Cross, with slightly less generous benefits (some co-pays were increased) but there was also a reduction in premiums.

In the months that followed, collective bargaining did occur but without much progress. The union claimed that the school was not bargaining in good faith; the school claimed the union failed to submit a complete proposal and wanted to bargain over non-mandatory subjects. Charges were eventually filed and on October 13, 2010, the Region issued a Complaint, asserting violations of Section 8 (a) (1) and (5) by terminating employees; changing job assignments; changing health insurance carriers and benefits; and other related changes, as well as allegedly threatening faculty with termination if they were not loyal to the school.

The Region moved for injunctive relief to reinstate the eight unit members and other relief.

In analyzing this case, the Court reviewed the injunction standard of “likelihood of success on the merits.”

As a preliminary matter, it is necessary to address Longy’s assertion that faculty restructuring occurred before the Union was certified and thus before Longy was required to bargain. This would be a much closer case if Longy had already made specific plans to change employment policies but had yet to formally announce them before the union election. By the time the Union was on the scene, the school had certainly begun to consider faculty restructuring but it has yet to settle on the number of faculty it hoped to terminate or reassign or the specific criteria it would use in deciding which faculty to terminate.

But the Court went on to say:

But this does not mean the Longy necessarily had a duty to bargain over all of its decisions. Specifically, even if the NLRB could establish that the concrete decision to move towards a core faculty modeled post-dated the Union's election, Longy would not owe a duty to bargain over this broad, structural change. In *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), the Supreme Court... described a trio of categories of management decisions that might affect the terms and conditions of employment. First are those decisions like "advertising and promotion, product type and design, and financing arrangements which have only an indirect and attenuated impact on the employment relationship." Management within its entrepreneurial discretion had the authority to make these changes without first bargaining with a union. Second, are those those decisions "such as the order of succession of layoffs and recalls, production quotas, and work rules which are almost exclusively an aspect of the relationship between employer and employee. These kinds of decisions are mandatory subjects of bargaining as long as the "benefit of labor management relations and the collective bargaining process does not outweigh the burden placed on the conduct of the business. These decisions involving a change in the scope and direction of the enterprise are akin to the decision as to whether to be in business at all not itself primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

The Court went on to say that Longy's decision to move to a core faculty model falls within that third category. It was a fundamental shift in the way the school did business. The decisions to restructure its faculty and take other structural steps were 'harmonized with its plans to cancel its undergraduate program and merge with another institution. They were more analogous to a plant manager's decision to begin manufacturing a different product than a decision to subcontract work to a new set of employees in order to reduce labor costs.

Additionally, the court said, "the burdens of bargaining over the decision to move to a core faculty would outweigh any marginal benefit for employees and the Union." This decision was not about labor costs; it was as key component in a long term vision for changing the institution." Further, forcing Longy to bargain over its decision would significantly abridge its freedom to manage the academic business of the school.

But despite Longy's prerogative to pursue faculty restructuring, it did have a duty to bargain over the effects of this decision, and the effects of the decision to restructure may have included specific changes to the employment contracts of Longy's employees. The question of whether the school had to terminate a certain number of faculty could certainly have been amenable to collective bargaining.

Here, while Longy said it was bargaining over effects, it never made a serious proposal affecting those faculty who had been terminated or reassigned and it presented decisions about individual employees as non-negotiable.

Longy was entitled to develop a plan to restructure its faculty without consulting the union. But it was required to place a number of other issues on the bargaining table. These included how it would decide to layoff or reassign faculty; whom it would decide to layoff or reassign; whether these faculty would be given a second chance to adjust to the new model; and what would happen with the employees that would be laid off and reassigned.

Having found a likelihood of success on these issues, the Court turned to the matter of irreparable harm for purposes of deciding the injunction issue. While noting that the Court did not believe it was in “any better position to repair the harm caused by Longy’s alleged unilateral changes to employee health benefits than an ALJ will be a few months from now,” it noted that the changes announced in March 2010 have had a much more substantial impact on collective bargaining and how employees perceive the union.

The issue here is not just the harm to individual employees but the way that Longy’s changes impacted collective bargaining, an especially important consideration because the union and Longy had yet to negotiate a first collective bargaining agreement.... While the union represents the interests of the faculty during this tumultuous period, it should have all the advantages it is owed under the law, including the employment of terminated faculty who will be impacted by Longy’s plans.

Independent of the harm to the bargaining process, Longy’s actions have potentially impacted the union’s standing among Longy’s faculty. The Board cites a number of examples to argue that Longy’s unilateral changes likely compromised the union’s “prestige and legitimacy” among Longy’s employees. [cites omitted]. This concern is heightened in this case because of the union’s recent election. National labor policy recognizes the precariousness of union support during the first year after its certification. [cites omitted] Some form of preliminary relief is warranted in order to stave off further erosion of union support.

The Court ordered Longy to reinstate terminated faculty until Longy and the union bargain to an impasse over the effects of the decision to restructure the faculty. The school was not required to give them any specific assignments or recreate chair positions. But it was required to pay terminated faculty the salary they would have been receiving. .

***Mathews v. Denver Newspaper Agency, (Applying Supreme Court’s decision in 14 Penn Plaza)***

In *Mathews v. Denver Newspaper Agency*, (10<sup>th</sup> Cir. Ct Appeals, No. 09-1233 (March 16, 2011), the Tenth Circuit Court of Appeals ruled that an employee who arbitrated and lost his arbitration case claiming national origin discrimination may still



bring his case to court, despite the Supreme Court's 2009 decision in *14 Penn Plaza v. Pyett*, 129 S.Ct.1456 (2009).

The plaintiff, John Mathews, was represented by a union. He was demoted from his role as supervisor after allegations that he had made inappropriate remarks to a female co-worker. He claimed he himself was discriminated against because of his national origin (Indian) and that he was retaliated for filing prior complaints over discrimination. The relevant portion of the collective bargaining agreement governing his grievance read:

The Employer and the Union acknowledge continuation of their policies of no discrimination against employees and applicants on the basis of age, sex, race, religious beliefs, color, national origin or disability in accordance with and as required by applicable state and federal laws.

After a multi-day arbitration, an arbitrator denied his grievance. The arbitrator explicitly reviewed the discrimination claim and ruled that although he had made out a prima facie case of discrimination under *McDonnell Douglas* standards, he had failed to show that the employer's proffered non-discriminatory reasons for demotion were pretextual.

Mathews brought suit under Title VII. At the district court level, the court said that because the union contract had an anti-discrimination clause that covered his statutory claims, then his submission to arbitration effectively waived his right to sue in court.

The Tenth Circuit disagreed. Citing *Alexander v. Gardner-Denver*, 415 U.S.36 (1974), the Court held that simply because he lost his contract discrimination claim in contract arbitration does not mean he cannot pursue the statutory claim of discrimination in court. In its ruling, the court distinguished *14 Penn Plaza* from *Gardner Denver* and the facts of this case.

*Gardner-Denver*, the Supreme Court explained [in *14 Penn Plaza*], denied preclusive effect to a prior arbitral decision "because the collective bargaining agreement did not cover statutory claims." *Id* at 1467. It therefore followed that the *Gardner-Denver* arbitrator could not decide questions of "statutory rights" regardless of whether the plaintiff's "contractual rights" [were] similar to, duplicative of, the substantive rights secured by Title VII." *Id*. This jurisprudence remained sound, but does not "control the outcome where... the collective bargaining agreement's arbitration provision *expressly covers both statutory and contractual discrimination claims.*" *Id*. At 1469 (emphasis added). Because the collective bargaining agreement in *14 Penn Plaza* did expressly cover statutory claims, *Gardner-Denver* had no bearing and the terms of the arbitration agreement controlled.

Here, however, the anti-discrimination clause did not explicitly embrace statutory claims to a degree sufficient to provide preclusive effect.

Although the parties acknowledged that violations of statutory law would *also* constitute violations of the contract, this does not mean that the CBA covered statutory claims or that the parties believed it to do so. Indeed, the district court's conclusion ignored the "distinctly separate nature" of contractual and statutory rights, which is "not vitiated merely because both were violated as a result of the same factual occurrence." *Gardner-Denver*, 415 U.S. at 50. This reasoning does not change even though the contours of the CBA's anti-discrimination protections were defined by reference to federal law. Rather, unionized employees of the Agency subjected to discriminatory treatment hold two similar claims, one based in statute and one based in contract. The operative question remains whether the CBA's arbitration provisions are broad enough to encompass Mathew's statutory claims, such that his submission to arbitration operated as a waiver of forum or election of remedy.

Applying Supreme Court precedent to the facts of Mathews's case, it is evident that no waiver of judicial forum has occurred.... Because the arbitration agreement empowered the arbitrator to resolve only the dispute submitted, and because the dispute submitted made no mention of statutory claims, the arbitral decision could in no way determine the question of Mathews' statutory rights. Appropriately, the Agency's representative at arbitration agreed that the issue before the arbitrator was whether "the company discriminated against Mr. Mathews in violation of Section 11, Article II of the contract, and the arbitral decision phrased the question decided strictly in terms of Mathews' contractual rights under the CBA: "Did the Grievant's demotion violate the contractual provisions prohibiting discrimination?"

### Some other state level cases of interest

*Portland State University Chapter of AAUP v. Portland State University*, 240 Ore. App. 108, Ore. App. LEXIS 1657 (December 29, 2010). Detailed case involving application of Supreme Court's decision in *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009). In this case, the grievance procedure failed to incorporate the statutory law, as required by the Supreme Court's decision in order for the arbitration clause to preclude the individual from agency or court filing.

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*In re Rosenberg*, 2010 WL 3259740 (Vt., 2010), a unionized adjunct professor claimed the Vermont State Colleges discriminated against her because of her protected activity when it failed to assign her courses for a given semester. In addition, the union alleged that the collective bargaining agreement was not followed in making such assignments.

The Vermont Supreme Court, affirming a Vermont Labor Relations Board finding, stated that the grievant and union failed to demonstrate that her protected activity of filing grievances was a motivating factor in the failure to assign her courses under the collective bargaining agreement. The Court noted that an employer's knowledge of an employee's protected activity is not enough to infer discriminatory motive for purposes of a retaliation claim. There must be clear nexus between the activity and the adverse action, and this is the employee's burden.

Despite the fact that the nonassignment of courses occurred after grievant filed several grievances, she produced no evidence from which the labor board or this Court could infer discriminatory motive.

Further, despite the union's claim that the contract required strict adherence to seniority when assigning adjuncts to introductory courses, the Court noted that the union contract provided no such rule. The contract stated that seniority shall govern assignments *only when* all other factors, including relative qualifications, were equal. All course assignments were subject to this standard. Any claim of oral understandings to the contrary that were allegedly made during bargaining were irrelevant in light of the clear contract language. The collective bargaining agreement was unambiguous as to the right of the College to consider relative qualifications and not just seniority in assigning *all* courses to adjunct faculty. Thus, any assignment issue must be analyzed under such language. The College's judgment to assign other adjuncts to courses instead of the grievant, despite her seniority, was reasonable under such contract standards.

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In *Mitchell v. University Medical Center*, (W.D. Ky, No. 3:07-cv-00414, August 9, 2010), the U.S. District Court for the Western District of Kentucky ruled that a nurse who talked about her Christian faith with fellow employees and described her calculations regarding the date for the end of the world cannot proceed with a Title VII claim of religious discrimination.

In this case, the employee, Claudette Mitchell, worked as an operating room nurse at the Medical Center at the University of Louisville. She claimed that she read a certain passage in the Bible and that when she did, she knew that God had told her to read other passages in order to calculate certain future events. In doing so, she said that it became clear to her that the date of December 21, 2033 would either mark the appearance of the Antichrist, or the end of the world. She became to share this information with her fellow employees, some of whom told her to stop because she was scaring them. Employees complained to her supervisor, telling her that Ms. Mitchell was plotting the end of the world; that they were uncomfortable with her discussions. Others were simply concerned about her well-being. Eventually, her supervisor told Mitchell not to discuss religion at work and told her that if it continued, she would be subject to discipline.

Mitchell said she would resign. She said she was being singled out because other employees discuss their religion at work. She did in fact leave, despite efforts by the hospital to have her stay if she would temper her remarks. She later filed charges claiming discrimination.

While recognizing that an employer has a duty to accommodate someone's deeply held religious beliefs, the Court noted that her religious accommodation claim had to fail her because the hospital could not reasonably accommodate her conflict without undue business hardship. Her conversations with employees were offensive and troubling to them and any accommodation of her behavior necessarily would infringe on the rights of other workers. Further, there was no real harassment of her because of her religion since all that occurred was a directive from her supervisor to stop talking about religion. No one degraded her or insulted her because of her religion.

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In *Maine Community College System and Maine State Employees Association, SEIU Local 1989*, (Case no. 10-UDA-01, 2010), the Maine Labor Relations Board ruled that a proposed bargaining unit of "all adjunct faculty members employed by the Maine Community College System who teach credit courses" was appropriate for bargaining. The Board rejected the employer position that such adjunct faculty were not "regular employees" under the Act because they did not occupy a "position" or discretely identifiable slot to be funded, budgeted or tracked." The Board said:

Whether a particular adjunct faculty is employed semester by semester or whether a particular course is offered from semester to semester has nothing to do with whether the position of "adjunct faculty member" exists on a continual basis – it merely reflects the needs of the college and the number of individuals who are employed and in the bargaining unit during any given semester.