Academy of Legal Studies in Business

Employment Law Section Newsletter

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In This Issue

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Employment Law Breakfast in New Orleans

The Annual Conference of the Academy of Legal Studies in Business will be held August 9-13, 2011 at the Roosevelt Hotel in New Orleans. The Employment Law Section will engage in early morning edification with a breakfast on Thursday, August 11 from 7:30-9:00. David Korn, a partner in Phelps Dunbar and fellow member of the employment law section, will be our speaker. Mr. Korn has extensive experience in representing employers, both private and governmental, as well as insurance companies. Please renew your Employment Law Section membership, and join us in the "The Big Easy".

Journal of Employment and Labor Law Online

The Employment Law Section's *Journal of Employment and Labor Law* (JELL) has published online the Spring 2011 issue of Volume 12, with six peer reviewed articles: "The Legal Fiction of Constructive Discharge as Decided by Federal Courts in Employment Discrimination Claims," by Stephanie Sipe and Michael Wiggins, "A Comparison of U.S. and Chilean Labor and Employment Law," authored by Patricia Pattison and John W. Mogab, "You Can't Ask That! Unmasking the Myths about 'Illegal' Pre-Employment Interview Questions," submitted by Laura Davis, "Legal Issues in College and University Internship Programs," by Tammy Cowart and Mildred Blowen, "All Acts are not Created Equal: An Analysis of the Mixed Motive Claim Post *Gross v. FBL Financial Services*," submitted by Brian Winrow, Diane May, and JoEll Bjorke, and "The *Ricci v. DeStefano* conundrum: Did the Supreme Court Get It Right?" authored by Bonnie Roach.

JELL articles are available at: www.eiu.edu/~alsb . It is indexed in Cabell's under the title *ALSB Journal of Employment and Labor Law.*

We are grateful to all the section members who volunteered to serve as articles reviewers who provided considered comments, and to Denise Smith, editor-in-chief and articles editors Robert Sprague and Patricia Pattison for their excellent work.

The *Journal of Employment and Labor Law* is seeking manuscripts for its next issue, with an anticipated online publication in January 2012. The deadline for submissions is September 1, 2011. If you are willing to serve as a reviewer or as an articles editor, please contact Denise Smith at **dssmith3@eiu.edu.**

Websites & Blogs of note:

JELL

Workplace Prof Blog

ADR Prof Blog

Current Employment

The Adjunct Law Prof Blog

ALSB

Employment Law Section

Newsletter

Colleagues' Corner

Accomplishments, Activities, Advancements of the Academy

Donna J. Cunningham, Associate Professor of Management and International Business at Valdosta State University is developing a new employment law topics course for the MBA program.

Linda S. Ficht, Assistant Dean and MBA Director, Indiana University Kokomo, has co-authored an article with ***Julia Levashina***, *When Lying, Cheating and Stealing Isn't Necessarily Illegal: The Need to Adopt a Commercial Fraud Standard in Employment Law Cases.* The article has been accepted for publication in the S. L. J., Vol. (21) (2) (forthcoming December 2011).

Kelly, E. P., Ellis, A. and Rosenthal, S. *Crisis of Conscience*: *Employee Refusal to Provide Health Care Services on Moral Grounds*, EMP. RTS. & EMP. POL'Y J. Vol. 23(1), 37-54 (2011).

Bernard E. Jacques, of McElroy, Deutsch, Mulvaney and Carpenter, /PH, LLP, and adjunct professor at the University of Connecticut, successfully defended Ducci Electric Company in a suit for wrongful termination in violation of a collective bargaining agreement. While the court held that the union had breached its duty of fair representation by failing to take the plaintiff's grievance to the next step, the employer had grounds for termination.

James F. Morgan, Professor of Legal Studies, accepted the position of Associate Dean of the College of Business at California State University, Chico, in August, 2010. He is responsible for internal operation of three departments, numerous centers, and various college programs.

Pagnattaro, Marisa Anne and Stephanie Greene, *'Say on Pay': The Movement to Reform Executive Compensation in the United States and European Union*, **NW**. J. INT'L L. & BUS**.** (forthcoming 2011). Marisa will also be leading an MBA study abroad trip to Beijing and Shanghai in April.

THE NLRB MOVES IN A DIFFERENT DIRECTION

SOCIAL MEDIA

On October 27, 2010, the NLRB filed a complaint against an ambulance service alleging that it illegally terminated an employee who posted negative remarks about her supervisor on her personal Facebook page. An NLRB investigation determined the employee's Facebook postings constituted protected concerted activity, and that the company's blogging and Internet posting policy contained unlawful provisions, including one that prohibited employees from making disparaging remarks when discussing the company or supervisors and another that prohibited employees from depicting the company in any way over the Internet without company permission. Such provisions, according to the NLRB, constitute interference with employees in the exercise of their right to engage in protected concerted activity. This action is an

apparent retreat from the NLRB's earlier position regarding social media policies. In December 2009, the NLRB issued an Advice Memo concluding that a policy that prohibited discussion by employees through social media that included "[d]isparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects" did not chill employees' exercise of their right to engage in protected concerted activity. The NLRB announced the settlement of the AMR case on February 8, 2011, noting that AMR had "agreed to revise its *overly-broad* 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, and that they would not discipline or discharge employees for engaging in such discussions []" (emphasis added). The AMR Complaint and subsequent settlement imply that the NLRB will consider not just whether a social media policy is used to suppress Section 7 rights, but also whether the existence of an overly-broad social media policy in and of itself can interfere with Section 7 rights.

Prepared by Robert Sprague, Employment Law Section President

IS RULEMAKING ASSUMING NEW IMPORTANCE AT THE NLRB?

A subcommittee of the Congressional Labor and Workforce Committee held a hearing on February 11, 2011 to investigate emerging trends at the NLRB. The hearing began 11 days before the end of the comment period regarding the proposed rule which would require all private sector employers who are subject to the NLRA to post a notice informing workers of their rights under the act. The concern from the standpoint of the committee is that the NLRB is a quasi judicial body that has traditionally exercised its powers through deciding disputes rather than through rulemaking. At issue, is how broadly the NLRB will apply its rulemaking power in other contexts, and whether the NLRB will lose millions from its budget.

While there is concern that prior decisions of the NLRB might be revisited by rulemaking, Congress seems to be interested in preventing the NLRB from bypassing the Congressional rejection of the Employee Free Choice Act by promulgating a rule that would have the same effect. The act would have permitted the NLRB to certify a union based on a majority of the workers signing authorization cards rather than by holding an election with a secret ballot. This apprehension is supported by the fact that on January 26, 2011, President Obama once again appointed Craig Becker, former Associate General Counsel for the Service Employees International Union to the NLRB. Craig Becker had been appointed to the NLRB in March 2010 as a recess appointment after his nomination failed to obtain Senate approval. The controversy over Becker's nomination stems from the fact that he suggested in an article entitled *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, (1993) that an employer should be barred from challenging elections or attending NLRB hearings regarding elections. The view that the NLRB may assume a more active advocacy function seems to be supported by a letter written earlier this year by the acting general counsel of the NLRB, Lafe Soloman, to the States Attorneys General in Arizona, Utah, South Dakota, and South Carolina asserting that the secret ballot protection measures that had been ratified as amendments to the state constitutions conflicted with federal labor law and were unconstitutional under the Supremacy Clause. The attorneys general were also advised that the general counsel had been authorized by the board to bring legal proceedings to enjoin their enforcement. In a letter dated

February 2, 2011, the NLRB indicated that since the unanimous response of the relevant Attorneys General was that the amendments may be interpreted in a manner that does not conflict with federal law, staffs of the federal and state agencies would explore the matter further. The battle to define the limits of preemption, a necessary concomitant of federalism, is now active on three compelling fronts, labor, immigration and healthcare. The current budget battles in Congress indicate that the federal legislators are prepared to use financial reins and gavel pounding to signal a desire for a change of direction by the NLRB.

Prepared by Ilse Hawkins, Employment Law Section Secretary

MARCH MADNESS IN THE MIDWEST

Senator William Seitz, Republican State Senator from Cincinnati, Ohio, utilized March Madness and the lack of an impartial arbiter device such as a jump ball in Ohio Senate Bill 5, to argue against the bill's passage. He also expressed concern about the possibility of age discrimination, the failure to exempt police and fire unions in Ohio as the Wisconsin public employee collective bargaining bill did, and the state's overreaching rather than limiting the bill to measures that the public might support in a referendum. Meanwhile in Wisconsin, a more limited bill passed amidst frenetic opposition, and has been challenged in the courts. The State Supreme Court race will not be certified for a few more weeks, but it appears that the conservative candidate has been reelected. Justice David Prosser's election would maintain the current conservative majority on the court that may decide whether Wisconsin Act 10 was passed in accordance with its open meeting laws.

While some members of the ALSB such as Alan Levy of Brandon University, have argued that it may not be possible to have a truly pluralistic society without unions, and Elaine Ingulli from Richard Stockton College, has urged that the Obama administration might be more receptive to a national educational labor law, Faculty *Unions: We Need A National Educational Labor Law*, ALSB J. EMP. & LAB. L., Volume 11, No. 2, 124-145, the state legislatures in Ohio and Wisconsin have sought to limit the influence of public employee unions. Both states face deficits and the failure of some local governments to fully fund the retirement promises they made.

As first reported in a January 3, 2011 article in the *New York Times*, the American Legislative Exchange Council (ALEC) has been circulating proposals to state legislators to limit public employee collective bargaining, and where it does exist, to insist on greater transparency by giving taxpayers access to public employee collective bargaining session and documents. While neither the Ohio nor the Wisconsin bills use the language of the council proposals verbatim, some of the concepts can be found in both bills. For example, Wisconsin Act 10 repeals the section defining fair share agreement, and it prohibits payroll deductions for fair share representation unless a written order is presented by the employee. The order may be terminated by the employee on 30 days notice, WIS.STAT.§111.06(1)(i). Ohio Senate Bill 5 amends § 4117.09(A), OHIO REV. CODE ANN. (2011) to prohibit an agreement that requires an employer to deduct fair share fees, payments to a political action committee, or requiring a union shop. It also includes provisions for decertification of the union, §4117.04 OHIO REV. CODE ANN. (2011), that was

not included in prior law. The ALEC model act Section 4 prohibits any agreement that would impose representation on a public employee who is not a member of a union and proscribes all payroll deductions except for pension plans, benefits, and contributions to 501 (C) (3) organization in Section 5.

There is also evidence of ALEC's model "Public Employee Bargaining Transparency Act." Ohio Senate Bill 5 amends §4117.14 (C) OHIO REV. CODE ANN. (2011), to provide that if an impasse is reached and a mediator is appointed by the State Employee Relations Board, "the board and the public employer promptly shall post in a conspicuous location on the web site maintained by the board or public employer, respectively, the terms of the last collective bargaining agreement offered by the public employer and the terms of the last collective bargaining agreement offered by the exclusive representative." OHIO REV. CODE §4117.26 requires that a public employer post material terms of any collective bargaining agreement including changes in compensation not addressed in the agreement but that will occur during the term of the agreement, on its web site, or if it does not maintain a web site, it is to distribute its report to newspapers of general circulation. Section 6 of the ALEC model legislation states, "The public employer shall operate a web site or contract for the operation of a web site that allows public access to all tentative and finalized collective bargaining agreements…."

While it would be difficult for most public employees to express any enthusiasm for a reduction in their paychecks in order to pay a greater portion of their retirement and fringe benefits, a bill that required only those sacrifices might have a better chance of surviving a referendum challenge of the type threatened in Ohio. In a March 9, 2011 news release, the Bureau of Labor Statistics reported that "Private industry employers spent an average of $27.75 per hour worked for total employee compensation in December 2010…. Wages and salaries averaged $19.64 per hour worked and accounted for 70.8 percent of these costs, while benefits averaged $8.11 and accounted for the remaining 29.2 percent. Total compensation costs for state and local government workers averaged $40.28 per hour worked in December 2010." The private industry statistics include highly educated financial, professional, and management workers, but exclude the self-employed, http:// **www.bls.gov/news release/pdf/ecec.pdf.**

The Ohio and Wisconsin bills both require that public employees contribute more to their retirement, 8% in Ohio, and one half of the actuarially required amount in Wisconsin. Employers are prohibited from paying that amount on behalf of the employee. Wisconsin public employers may not pay more than 88% of the cost of the employees' health insurance, WIS. STAT. §40.51**,** and in Ohio the employer may pay only 85%, §124.81 (I) OHIO REV. CODE ANN. (2011). Managerial employees receive the same health benefits as other employees of the same employer. Ohio public university faculty are *now* considered managerial employees if they participate in decisions with respect to courses, curriculum, and personnel, §4117.01 OHIO REV. CODE ANN (2011). While managerial employees are not public employees, according to §4117.01, OHIO REV. CODE ANN., Senate Bill 5 left intact § 4117.03 (C) that states "nothing in Chapter 4117 of the Revised Code prohibits public employers from electing to engage in collective bargaining, to meet and confer, to hold discussions or to engage in any other form of collective negotiations with public employees who are not subject to Chapter 4117…" because of

Subsection C of §4711.01,OHIO REV. CODE ANN. (2007) Faculty who were once public employees are now managerial employees, excepted from the definition of public employee in §4117. 01 (C). This seems to suggest that shared governance is still quite possible, perhaps by accident, but the willingness of the administration and of the Board of Trustees to continue to include faculty organizations in shared governance may depend on the degree of support. The desire to have some control over the discussion, along with the desire to submit Senate Bill 5 to a referendum, might explain the recent solicitations to join the union that have appeared in state university faculty mailboxes.

As in any labor dispute there are compensation issues. Wisconsin Act 10 restricts increases in wages to the increase in the Consumer Price Index. If a municipal employer wishes to increase wages beyond the percentage increase in the consumer price index, it must submit that request to a public referendum. Therefore, the worker's wages are actually maintained at the initial buying power level, regardless of the length of employment, unless the worker receives merit pay which may not be the subject of collective bargaining according to WIS. STAT.§111.70(4)(mb). While the concept of merit pay, or pay based on performance as provided in Ohio Senate Bill 5, sounds commendable, it works well only if the administrator has sufficient money at his or her disposal to provide merit pay for everyone who might deserve it, an unlikely prospect given the current state of public budgets. In addition, it may lead to age discrimination, particularly with regard to teachers and professors. A teacher or professor who is only a few years from retirement may not be awarded merit pay regardless of the measurement system utilized because an administrator knows that he or she unlikely to leave. Particularly at the university level where there is a shortage of faculty holding terminal degrees in certain areas, an administrator could simply rank older workers excellent and younger workers, who might be more likely to relocate if they did not receive a raise, as superior, regardless of other measures of performance. An example of the difficulty with the term "performance" is that "performance based budgeting" can refer to the number of student credit hours offered, causing colleges to offer auditorium size classes. It is doubtful that most students would regard those classes as illustrating improved performance on behalf of the educational institution.

While basing retention solely on seniority may not always result in the retention of the Milwaukee teacher of the year, http://online/wsj.com, reducing seniority as an important factor, also provides ample opportunity to engage in age discrimination. William Seitz argued that there should be some exception for those employees who have invested twenty or more years, particularly in the more dangerous public safety occupations. Police and fire fighters are permitted to bargain regarding safety equipment, and they may not be evaluated solely on the number of citations issued, §124.14 OHIO REV. CODE ANN. (2011). Exempting public safety as Wisconsin did, might not be the best fiscal decision. The *Cincinnati Enquirer* reported on February 13, 2011, that given the city's generous leave accumulation policy, its analysis of city records revealed that at least 120 employees would be entitled to cash payments of nearly a year's salary, and one police lieutenant had saved up over 10,000 hours entitling him to a payout of over $430,000. During the battle over Ohio Senate Bill 5, Cincinnati entered into another contract with the police department, freezing wages for two years, but reportedly keeping benefits the same, http//www.enquirer.com/editions/pdf/OH_CE290311.pdf. The City

entered into the agreement before Ohio Senate Bill 5 limited the weeks of paid accumulated leave. OHIO REV. CODE ANN. 124.134 (A)(F).

Wisconsin Bill 10 prohibits strikes, but it does submit disputes to binding arbitration. Ohio Senate Bill 5 declined to give unelected arbitrators the right to decide how taxpayer money would be spent, so in the event that there is an impasse not resolved by mediation and a fact-finding panel, the legislative body or other governing body) is to conduct a hearing and vote to accept either the last best offer of the union or public employer, or take no action and the last best offer of the public employer constitutes the terms of the contract. If a legislative body of a defined geographical area (this excludes boards of trustees of universities) selects the more expensive offer, and there are not sufficient funds as determined by the chief executive officer or such officer refuses to make that determination, the proposals are to be submitted to the electors, §4117.141 OHIO REV. CODE ANN (2011). While politicians might select the last best offer of the unions whose endorsements carry some weight with the electorate, the taxpayers may not be inclined to vote for increased pay.

The resolution mechanism seems contrary to procedural due process, but surprisingly other states entrust the final resolution after mediation, fact finding, and a hearing to the legislative body or other governing body, *See*, *eg.*, KAN. STAT. ANN. §75- 4332 (2008), and FLA. STAT. §447.403 (2010).

While the Supreme Court of the United States has not dealt with the specific constitutional issues raised by those opposed to Senate Bill 5, it has held that final decisions could be made by hearing officers which work for the same department that awards or denies entitlements in *Matthews v. Eldridge,* 424 U.S. 319 (1976), and *Goldberg v Kelly,* 397 U.S. 254, (1970), so long as those hearing officers were not involved in the prior determination. While the facts of those cases are distinguishable, the Court said that in determining whether the requirements of due process have been met, three factors are to be considered, "the private interest affected by the official action, the risk of erroneous deprivations of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews, supra at* 332-335.

Ohio's workload model was challenged on equal protection grounds, in *Central State University v. American Association of University Professors, Central State University Chapter,* 526 U.S. 124 (1999). The AAUP argued that §3345.45 OHIO REV. CODE ANN. (1997) created a class of employees not entitled to bargain regarding their workload, and that the classification violated the Equal Protection Clauses of the constitutions of the United States and the State of Ohio. The Supreme Court found that one of the statute's policies in setting a workload model was to increase teacher time in the classroom, and that this objective might be undercut if it were subject to collective bargaining. It concluded that the Ohio legislature had a rational basis for the disparity of treatment and the legitimate governmental purpose, which is all that is required when there is no fundamental right or suspect classification involved.

William Bennett Munro observed that "People vote their resentment, not their appreciation." Will the electorate resent the states' heavy handed behavior, or the reluctance of public employees to make the contributions required of some workers in the private sector two or more years ago?

Prepared by Ilse Hawkins, Employment Law Section Secretary

SUPREME COURT ACTION

Thompson v. North American Stainless, LP, No.09-291, 562 U.S. ___ (January 24, 2011) *available at* **http://www.supremecourt.gov/opinions/10pdf/09-291.pdf.**

Plaintiff Thompson was the fiancé of Miriam Regalado who filed a sex discrimination complaint against their mutual employer, North American Stainless. Three weeks after North American Stainless was notified of Regalado's complaint by the EEOC, the company fired Thompson. Thompson then filed suit against North American Stainless, and the district court granted summary judgment to the employer on the basis that Title VII of the Civil Rights Act does not permit claims for third party retaliation. The Supreme Court, in an opinion by Justice Scalia, held that if the facts alleged by Thompson are true, then he had stated a cause of action under Title VII for unlawful retaliation. The court relied on the standard articulated in *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53,68 (2006), that an employer's illegal action is one that "well might dissuade a reasonable worker from making or supporting a [discrimination] charge." The court concluded that a reasonable worker might be dissuaded from bringing a discrimination charge if she knew her fiancée might be fired. The court declined to identify a fixed group of relationships which could form the basis for a claim of illegal third party retaliation. The court did state that firing a close family member will almost always meet the *Burlington* standard.

The court then addressed the issue of whether Thompson was an "aggrieved person" who has standing to bring an action under Title VII. A person has standing as an aggrieved person if his claims "fall within the zone of interests sought to be protected by the statutory provision whose violation forms the basis for his statutory complaint." *Lujan v. National Wildlife Federation*, 497 U.S. 871,883 (1990). Since the purpose of Title VII is to protect employees against unlawful conduct of the employer, and the firing of Thompson was the unlawful act to punish Regalado for filing a complaint, Thompson was well within the zone of interests to be protected by Title VII. Therefore, he was an aggrieved person with standing to sue.

Wal-Mart v. Dukes, No.10-277. The Supreme Court heard oral argument on March 29, 2011, to determine whether a class or classes of women who work, or have worked, for Wal-Mart may be certified in an action for sex discrimination. The allegations are that women employed by Wal- Mart are paid less than men for comparable work even when they have greater seniority and higher performance ratings, and that women receive fewer, and wait longer, for in store management promotions than men.

The Ninth Circuit had affirmed the certification of a class of current employees with respect to injunctive relief, declaratory relief and back pay. However, it remanded the claims for punitive damages to the District to determine whether and under which section of Rule 23 the class should be certified, and to determine whether the claims of women who had been employed by Wal-Mart, but were no longer employed at the time of the filing of the complaint, should be certified as a class or classes.

While the court was concerned with how one would determine damages for individual members of the class who may have been affected differently, if at all, many of the justices were concerned with articulating the policy of Wal-

Mart that was common in the treatment of women that could be enjoined as a part of a class action brought under Rule 23 (b) (2). Wal-Mart has a written policy prohibiting sex discrimination, and it appears that management promotions are made in a decentralized manner in the individual stores. Because of the decentralized decision making, some justices suggested that it might be difficult to identify a common policy of Wal-Mart that would be necessary to certify the class. Justice Kagan suggested that permitting excessive subjectivity in evaluation could be a policy, and Justice Kennedy inquired whether a policy of deliberate indifference to the promotion of women could be a common policy. Justice Ginsburg suggested that a company has a duty to inquire as to whether there is gender discrimination at work and a responsibility to stop it, if a company gets reports month after month that women are disproportionately passed over for promotion and that there is a pay gap between men and women doing the same job. The transcript of oral argument is available at Oyez.org.

Prepared by Ilse Hawkins, Employment Section Secretary

Upcoming Conferences and Deadlines

Academy of Legal Studies in Business Annual Conference, August 9-13, 2011 in New Orleans. For those presenting papers in the research track, development track or organizing panels, you must respond to the call for participation by June 1. *Please remember to register for the Employment Law Section when you register for the conference.*

The Pacific Northwest 2011 conference will be held April 22-23. The Program Chair is Mark A. Bunchanan of Boise State University. Email: buchanan@boisestate.edu or telephone: 208-426-1639.

The Rocky Mountain Academy of Legal Studies in Business 2011 annual conference will be held September 23-24 at the Vail Cascade in Vail, Colorado. For more information, visit the RMALSB website at http://www.rmalsb.org or contact the 2011 Program Chair, Kathryn Kisska-Schulze, North Carolina A&T State University, 336-334-7656 x2392 or kkisskas@ncat.edu.

Tri-State ALSB Annual Meeting is scheduled for October 21, 2011 in Akron, Ohio. Please visit www.tristatealsb.org for 2011 conference details, registration forms, hotel reservations, and all other related information.

David Nagle, David Nagle, Partner in Jackson Lewis LLP addresses the Employment Law Section in Richmond, VA. His topic was “Changes in Employment Law Arbitration since *Circuit City Stores v. Adams,*” a case in which Mr. Nagle represented Circuit City.

Contribute to the Next Employment Law Section Newsletter

Help make *your* newsletter a valuable resource. Please submit employment and labor law related updates:

- brief summaries of important cases;
- recent scholarship;
- classroom activities;
- favorite blogs,
- or any other employment and labor law information.

Send contributions to Ilse S. Hawkins, ilse.hawkins@uc.edu.