The Year in Review: What's Been Happening in Employment Law?

Louis B. Kushner, Esquire
Alan C. Blanco, Esquire
Rothman, Gordon, Foreman & Groudine, P.C.
Third Floor – Grant Building
Pittsburgh, PA 15219
(412) 338-1100
E-Mail: lbkushner@rothmangordon.com
acblanco@rothmangordon.com

Lynn C. Outwater, Esquire
Joseph S. Palmiero, Esquire
Jackson Lewis LLP
One PPG Place, 28th Floor
Pittsburgh, PA 15212
(412) 232-0404
E-mail: outwatel@jacksonlewis.com
palmierj@jacksonlewis.com

I. INTRODUCTION 1

II. SUPREME COURT EMPLOYMENT DECISIONS OF THE 2003-2004 TERM 1

A. Employment Discrimination/Civil Rights 1
1. *Pennsylvania State Police v. Nancy Drew Suders* 1
2. *Raytheon Company v. Hernandez* 4
3. *General Dynamics Land Systems, Inc. v. Cline* 6
4. *Jones v. R.R. Donnelley & Sons Company* 7
5. *Scarborough v. Principi* 8

B. Employee Benefits 9
1. *Aetna Health Inc. v. Davila* and *CIGNA Healthcare of Texas, Inc. v. Calad* 9
2. *Yates v. Hendon* 10
3. *Central Laborers Pension Fund v. Heinz* 11

C. Other 11
1. *Doe v. Chao* 11
2. *McConnell v. FEC* 12

III. UPCOMING SUPREME COURT CASES 12

A. *Smith v. City of Jackson, Mississippi* 12
B. *Jackson v. Birmingham Board of Education* 13

IV. THIRD CIRCUIT DEVELOPMENTS 13

A. Employment Discrimination/Civil Rights 13
1. *Williams v. Philadelphia Housing Authority Police Department.* 13
2. *Fiscus v. Wal-Mart Stores, Inc.* 15
3. *Thomas v. Town of Hammonton* 17
4. *Detz v. Greiner Industries, Inc.* 18
5. *Potence v. Hazleton Area School District* 20
6. *Nesbit v. Gears Unlimited, Inc.* 21

B. FMLA 22
1. *Conoshenti v. Public Service Electric & Gas Company* 22

C. Arbitration of Individual Claims 24
1. *Parilla v. IAP Worldwide Services VI, Inc.* 24
2. *Lloyd v. Hovensa, LLC* 26
3. *Palcko v. Airborne Express, Inc.* 28
4. *Hay Group, Inc. v. E.B.S. Acquisition Corp.* 29

D. Employee Benefits 30
1. *Barber v. UNUM Life Insurance Company of America* 30
2. *Difelice v. Aetna U.S. Healthcare* 31

E. Employment Contracts 31
1. *Fields v. Thompson Printing Co.* 31

F. Employee Privacy 33
1. *Fraser v. Nationwide Mutual Insurance Co.* 33

G. Traditional Labor Law 33
1. *Carino v. Stefan* 33
2. *Asplundh Tree Expert Co. v. NLRB* 35
3. *White v. Communication Workers of America* 36
4. *Trimm Associates, Inc. v. NLRB* 37
5. *Major League Umpires Association v. American League of Professional Baseball Clubs* 38
6. *Allegheny Health, Education and Research Foundation, et al. v. National Union of Hospitals and Health Care Employees* 40
7. *Morris v. Hoffa* 41
8. *Board of Trustees of Trucking Employees of North Jersey Welfare Fund Inc. – Pension Fund v. Kero Leasing Corp.* 42

H. OSHA 42
1. *George Harms Construction Co., Inc. v. Chao* 42
2. *Avon Contractors, Inc. v. Secretary of Labor* 43

I. Other 45
1. *Mele v. Federal Reserve Bank of New York* 45
2. *Camphill Soltane v. United States Department of Justice* 46

V. PENNSYLVANIA STATE COURT DEVELOPMENTS 46

A. Unemployment Compensation 46
1. *Behers v. Unemployment Compensation Board of Review* 46
2. *Burchell v. Unemployment Compensation Board of Review* 48

B. Employment Discrimination 49
1. *Buynak v. Pennsylvania Department of Transportation.* 49
2. *Velocity Express v. Pennsylvania Human Relations Commission* 50

VI. SIGNIFICANT STATUTORY, REGULATORY, AND ADMINISTRATIVE DEVELOPMENTS 51

A. Department of Labor FLSA Overtime “White Collar” Exemption Regulations 51
B. COBRA Notice Regulations 58
C. Department of Labor’s Final Rule Requiring Posting of Beck Rights 64
D. The Fair and Accurate Credit Transactions Act...64
E. Sarbanes Oxley: *Welch v. Cardinal Bankshares Corp.*...66
F. *Weingarten* Rights for Non-Union Employees: *IBM Corp.* 67

I. INTRODUCTION

In the past year, the United States Supreme Court, the United States Court of Appeals for the Third Circuit, and Pennsylvania state courts have decided a number of high profile cases that cover a wide breadth of employment and labor issues. The U.S. Supreme Court has continued its trend toward hearing more benefits cases and fewer labor cases. The Third Circuit had also been particularly busy in exploring issues ranging in topic from benefits to arbitration to labor relations. These cases contribute significantly to the constantly evolving and changing body of labor and employment jurisprudence.

II. SUPREME COURT EMPLOYMENT DECISIONS OF THE 2003-2004 TERM

A. Employment Discrimination/Civil Rights

1. *Pennsylvania State Police v. Nancy Drew Suders*: Constructive discharge not necessarily adverse action which precludes assertion of affirmative defense.

In *Pennsylvania State Police v. Nancy Drew Suders*, 124 S.Ct. 2342 (2004), in an 8-1 decision, the U.S. Supreme Court held that a claim of constructive discharge is not necessarily a tangible employment action which would always preclude the employer from asserting the Ellerth/Faragher affirmative defense under Title VII of the 1964 Civil Rights Act.

Specifically the Supreme Court held:

- Title VII encompasses employer liability for a constructive discharge. (The Supreme Court had not previously recognized constructive discharge as a viable claim under Title VII although lower courts had.)

- To establish "constructive discharge" in a hostile environment claim the plaintiff must prove that she was the victim of a hostile work environment and that "the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Id*. at 2347.

- The employer may avoid liability if it can prove "(1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus." *Id*.

- A plaintiff may avoid the affirmative defense to a claim of constructive discharge if she can show that she quit "in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in

> pay, or transfer to a position in which she would face unbearable working conditions." *Id.*

Nancy Drew Suders alleged sexually harassing conduct by her supervisors, officers of the Pennsylvania State Police (hereinafter "PSP"), of such severity that she was forced to resign. Suders commenced work for the PSP in March 1998. Suders alleged that her male supervisors subjected her to repeated offensive sexual comments and gestures during the course of her employment with the PSP.

In June 1998, after an incident where Suders was accused of taking a missing accident file home with her, Suders approached an equal employment opportunity officer and told her she "might need some help." *Id.* at 2348. The officer gave Suders her telephone number, but neither woman followed up on the conversation. Two months later, in August 1998, Suders contacted the EEO officer again. Suders told the officer that she was being harassed and was afraid. The officer told Suders to file a complaint, but did not tell her how to obtain the necessary form. Suders felt that the officer's response was insensitive and unhelpful.

Two days later, Suders' supervisors arrested her for theft and she resigned from the PSP. The arrest was over the alleged theft of some exams. Suders had taken a computer-skills exam to satisfy a PSP job requirement several times. Her supervisors had told her she failed the exams. Suders discovered the exams in a set of drawers in the women's locker room and she concluded that the exams had never been graded. Suders considered the tests her property and, therefore, she took them.

Once the supervisors discovered that the tests were missing, they dusted the drawer with a theft-detection powder that turns hands blue when touched. When Suders attempted to return the tests, her hands turned blue. The supervisors apprehended her, handcuffed her, photographed her, and brought her to an interrogation room and read Suders her Miranda rights. After this incident, Suders resigned. She was never charged with a crime.

In September 2000, Suders sued the PSP in Federal District Court, alleging, *inter alia*, that she was subjected to sexual harassment and constructively discharged in violation of Title VII. The District Court granted the state's motion for summary judgment, finding that although Suders established an actionable hostile environment; the employer effectively defended itself by asserting the *Ellerth/Faragher* defense and showing that Suders never gave the employer the chance to respond to her complaints. The District Court did not address Suders' constructive discharge claim.

The Third Circuit reversed and remanded the case. The Third Circuit found that Suders had presented evidence sufficient for a trier of fact to conclude that supervisors had engaged in a pervasive and regular pattern of sexual harassment. It also held that "genuine issues of material fact existed concerning the effectiveness of the PSP's 'program . . . to address sexual harassment claims.'" *Suders*, 124 S.Ct. at 2350. It further held that a constructive discharge, when proved, constitutes a tangible job action that precludes the employer from asserting the *Ellerth/Faragher* defense.

The Supreme Court granted certiorari to resolve the disagreement among the Circuits on "the question whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defenses articulated in *Ellerth* and *Faragher*," rendering an employer strictly liable. *Id.*

Justice Ginsburg, writing for the majority, noted that the Supreme Court had not previously recognized that a constructive discharge claim could give rise to Title VII liability, but the Courts of Appeals have long recognized constructive discharge claims in a wide range of Title VII cases. The Court held that they "agree with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge". *Id.* at 2352. In order to establish constructive discharge, the plaintiff would have to show "that the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Id.* at 2347.

This case, Ginsburg said, involved a "subset" of Title VII constructive discharge claims: constructive discharge attributable to a hostile working environment caused by a supervisor. *Id.* Absent a "tangible employment action," she concluded, the *Ellerth/Faragher* defense is available to the employer whose supervisors are charged with harassment that leads to a resignation.

In *Faragher* and *Ellerth,* the Court looked to agency principles and decided that the employer can be liable for harassing acts of the supervisor when the supervisor is aided in accomplishing the acts by the existence of the employment relationship.

Ginsburg reasoned that constructive discharge claims are unique because "harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company actions. Unlike actual termination, which is always effected though an official act of the company, a constructive discharge need not be." *Suders*, 124 S.Ct. at 2355. Moreover, unless an official act of the employer is "the last straw, the employer would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force." *Id.*

An official act reflected in company records, *i.e.*, a demotion or pay reduction, shows "beyond question" that the supervisor used his or her management position to the employee's disadvantage, she said. *Id.* at 2355. "Absent such an official act, the extent to which the supervisor's misconduct has been aided by the agency relation ... is less certain. That uncertainty, our precedent establishes, justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable." *Id.*

The Third Circuit erred, said the High Court, when it created a bright line test holding that the affirmative defense would be eliminated in all hostile-environment constructive discharge cases, but retained in ordinary hostile environment claims. "That placement of the line, anomalously, would make the graver claim of hostile-environment

constructive discharge easier to prove than its lesser included component, hostile work environment," Justice Ginsburg wrote. *Id*. at 2355 – 2356.

Justice Ginsburg noted two contrasting, recent court of appeals decisions as illustrating how the "official act" or "tangible employment action" criterion should play out when a constructive discharge was alleged. In *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003), the plaintiff claimed constructive discharge based on repeated sexual comments, and a sexual assault, by her supervisor. No official actions, such as "an extremely dangerous, job assignment to retaliate for spurned advances," had occurred, and the employer could properly assert the *Faragher/Ellerth* affirmative defense. *Suders*, 124 S.Ct. at 2356. By contrast, in *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), an employee who complained she was sexually harassed by the judge for whom she worked was advised by the presiding judge that she would be transferred to another judge but that her first six months would probably be hell and that she was better off resigning. In *Robinson,* the Court of Appeals had properly found the employer precluded from asserting the affirmative defense.

2. ***Raytheon Company v. Hernandez*: A neutral no-rehire policy is a legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules.**

In *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S.Ct. 513 (2003), the U. S. Supreme Court held an employer's invocation of a neutral "no-rehire" policy banning the reemployment of all workers who were terminated or forced to resign always dispels a preliminary showing of disability discrimination based on a rejected applicant's claim of "disparate treatment." To prevail on the claim under the Americans with Disabilities Act (hereinafter "ADA"), the applicant must then show the employer used the policy as a "pretext" for intentionally discriminating against him.

However, in the 7-0 decision, the Court declined to rule on the primary question presented to it on which the Court granted certiorari, "whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules." *Id*. at 515. The Court said it did not need to resolve that question in this case because the Ninth Circuit improperly applied a disparate impact analysis in a disparate treatment case. The Supreme Court vacated its judgment and remanded the case for further proceedings consistent with the Supreme Court's opinion.

After 25 years of employment with his employer (then known as Hughes Missile Systems), Hernandez tested positive for cocaine as a result of a drug test. He resigned, in lieu of discharge, for "personal conduct." *Id*. More than two years later, he re-applied for a position with his former employer. On his application, he mentioned his former employment, and attached a letter from an Alcoholics Anonymous counselor stating that he attended AA meetings regularly and was in recovery.

In reviewing the application, an individual in the employer's Labor Relations Department pulled Hernandez's personnel file and read his employee separation

summary. Based on a policy against rehiring employees terminated for workplace misconduct, she rejected his application.

Claiming discrimination in violation of the ADA, Hernandez filed a charge with the Equal Employment Opportunity Commission. In its defense, the employer submitted a letter which stated, among other things, that Hernandez's application "was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." *Id*. at 517. In the subsequent lawsuit, however, the individual who had rejected Hernandez's application testified that she did not know he was a former drug addict and saw nothing in his file that would constitute a "record of" addiction.

In his lawsuit, Hernandez initially had claimed discrimination based on the company's "disparate treatment" of him, meaning it had rejected his application because he had a "record of" drug addiction or because he was "regarded as" being a drug addict, both of which can violate the ADA. However, after the employer's motion for summary judgment in the case, Hernandez argued a different theory for the first time. He argued that even if the company did apply a neutral no-rehire policy in his case, it still violated the ADA because such a policy has a "disparate impact"; in other words, the policy has a discriminatory impact on former drug abusers who had been rehabilitated and who are protected as disabled under the ADA.

The District Court ultimately granted the employer's motion for summary judgment on the disparate treatment claim. However, the court refused to consider the subsequent disparate impact claim because Hernandez had failed to raise it within the time limits for doing so. When Hernandez appealed to the U. S. Court of Appeals for the Ninth Circuit, that Court agreed that the disparate impact claim had been untimely filed. However, the Ninth Circuit also reversed the summary judgment in favor of the employer and said Hernandez could proceed with his disparate treatment claim. The court found that the company may have violated the ADA by applying the neutral no-rehire policy to former drug addicts whose only work-related offense was testing positive. The Ninth Circuit found there were genuine issues of fact regarding whether Hernandez was qualified for the position for which he sought to be rehired, and whether the reason for employer's refusal to rehire him was his past record of drug addiction.

In ruling that the Appeals Court erred in its reasoning and must consider the case again, the U. S. Supreme Court emphasized that there is a distinction between disparate impact claims and disparate treatment claims, and they must be analyzed and judged according to different legal standards. Under the ADA, a disparate impact claim may properly be raised in a timely manner. However, a disparate treatment claim, such as the only one raised in a timely manner by Hernandez, must be evaluated according to its own legal framework, and not one used for evaluating disparate impact claims.

Here, the Ninth Circuit had erred by using a disparate impact analysis when it rejected Raytheon's reason for refusing to re-hire Hernandez, the Court said. Instead, by applying the correct disparate treatment framework, the Court said it was obligated to conclude that Raytheon's neutral no-rehire policy was, by definition, a legitimate,

nondiscriminatory reason for refusing to rehire Hernandez. While Hernandez might be able to show that the no-rehire policy was used as a "pretext" to unlawfully discriminate against him, the Court concluded that issue will need to be resolved by the lower court.

The Supreme Court's opinion in the *Hernandez* decision has clarified several important points. First, the potentially broader "disparate impact" claim may be brought under the ADA, but such a claim must be analyzed distinctly and differently from the more individualized "disparate treatment" claim. Second, the ruling reinforces the importance of proof when a decision-maker lacks the knowledge that an applicant may be protected by the ADA because of his or her disability status. If it can be proven a decision-maker truly lacks such knowledge, there can be no viable claim of disparate treatment.

3. *General Dynamics Land Systems, Inc. v. Cline*: Age Discrimination in Employment Act does not protect younger individuals within the protected age category who are given less preferable treatment than older individuals also in the protected age category.

In *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 124 S.Ct. 1236 (2004), in a six to three ruling, the U. S. Supreme Court ruled that the Age Discrimination in Employment Act does not shield individuals from discriminatory action within the protected age category who are given less preferable treatment than similarly situated older individuals.

The Court rejected the claim of employees who were between the ages of 40 and under 50 when they were excluded from future retiree health benefits under a newly negotiated collective bargaining agreement. The future retiree health benefits were granted only to those current workers who were 50 years and older at the time of the contract. The relatively younger employees who were under 50 years of age claimed a violation of their ADEA rights. Disagreeing with the U. S. Court of Appeals for the Sixth Circuit, the Supreme Court found the ADEA was not intended to protect relatively younger employees from being passed over for more preferable treatment accorded to relatively older employees.

The decision settled a conflict among the federal appeals courts about the concept dubbed "reverse age discrimination." While the ADEA talks broadly in terms of "age" without any qualifying language, the *General Dynamics Land Systems* Court held that the "text, structure, purpose, history and relationship to other federal statutes show that the statute does not mean to stop an employer from favoring an older employee over a younger one." *Id*. at 1248 – 1249. Acknowledging that none of the Court's prior cases specifically addressed this question, "all of them show the Court's consistent understanding" concerning the ADEA as a remedy for those treated less favorably based on relatively older age, "leaving complaints of the relatively young outside the statutory concern." *Id*. at 1244.

Beyond the stated intent and purpose of the ADEA, the Court found support for its conclusion that the term "age" implied older age when determining who is protected from discriminatory treatment. Citing examples within the statute where the term "age" has various meanings, the Court rejected the arguments of the claimants and the amicus brief of the Equal Employment Opportunity Commission, which ignored the "variation in the connection in which the words are used." *Id*. at 1245. When used in connection with the concept of "discrimination," the Court noted the social and legislative histories revealed an understanding of old age, in contrast with its use in the context of a *bona fide* occupational qualification of age, where the meaning is of comparative youth. Even the authority of the EEOC is not entitled to deference in this situation, the Court concluded, where "the word 'age' takes on a definite meaning from being in the phrase 'discriminat[ion] because of such individual's age,' occurring as that phrase does in a statute structured and manifestly intended to protect the older from arbitrary favor for the younger." *Id*. at 1248.

4. *Jones v. R.R. Donnelley & Sons Company*: Four year limitations period applies to violations of the Civil Rights Act of 1991.

In *Jones v. R. R. Donnelley & Sons Company*, 124 S.Ct. 1836 (2004), a unanimous U. S. Supreme Court has ruled a four-year statute of limitations applies to a class action lawsuit alleging wrongful termination, racially hostile work environment, and failure to transfer in violation of the Civil Rights Act of 1991. The "catchall 4-year statute of limitations," 28 U.S.C. § 1658, was enacted by Congress to apply to causes of action "arising under an Act of Congress enacted after December 1, 1990." *Id*. at 1839. Given that the 1991 Civil Rights Act enlarged the category of conduct for which employers could be liable, the 1991 Act qualified as "an Act of Congress enacted after December 1, 1990" subject to the "catchall 4-year statute of limitations," the Court concluded. *Id*.

The plaintiffs in the case were African-American former employees of the employer's Chicago manufacturing division. In 1994, they filed a class action alleging violations of their rights under Section 1981 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991. Specifically, the plaintiffs alleged they were subjected to a racially hostile work environment, were given inferior employee status, and were either wrongfully terminated of denied transfers in connection with the closing of the Chicago plant.

While the federal trial court determined the timeliness of the class action was governed by the catchall federal four-year limitations statute, the U. S. Court of Appeals for the Seventh Circuit disagreed. Agreeing with two other federal appeals courts (Third and Eighth Circuits), the Seventh Circuit found the amendments of 1991 attached to the original statute of 1866, obviously beyond the reach of the federal limitations period statute specifying December 1, 1990. Accordingly, it would be necessary to apply a state statute of limitations, and not the federal one, in determining whether the class action was timely filed.

In reversing that decision, the Supreme Court emphasized that one of the reasons for the enactment of the federal statute creating the four-year limitations period was to avoid the uncertainty for litigants and federal judges of determining which state statutes of limitations to apply. The Court concluded that a cause of action "arises under an Act of Congress enacted" after December 1, 1990 and is subject to the federal four-year limitations period, "if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." *Id*. at 1845. In this case, the hostile work environment, wrongful termination, and failure-to-transfer claims "arose under" the 1991 Civil Rights Act "in the sense that petitioners' causes of action were made possible by the Act." *Id*.

The timeliness of lawsuits alleging employer actions that were made unlawful by the Civil Rights Act of 1991 will be governed by the federal "catchall 4-year statute of limitations" which specifically applies to "actions arising under federal statutes enacted after December 1, 1990." *Jones,* 124 S.Ct. at 1839.

5. *Scarborough v. Principi*: Pursuant to the Equal Access to Justice Act, a timely filed attorneys' fees application may be amended after the 30 day deadline.

In *Scarborough v. Principi*, 124 S. Ct. 1856 (2004), the Supreme Court held that a timely filed attorneys' fees application may be amended after the 30 day filing period has run to allege that the government's position lacked substantial justification, reversing the Appeals Court. The Appeals Court had decided that the Equal Access to Justice Act required not only that an application for attorney's fees be filed within the 30-day deadline, but also that it must contain averments addressing each of the four other requirements enumerated in the statute, including an allegation that the government's position in the case was not substantially justified.

The EAJA provides, in pertinent part, that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application" showing that the applicant is a prevailing party and eligible to receive an award, itemizing the amount sought, and alleging that the government's position in the case was not substantially justified. 28 U.S.C. § 2412(d)(1)(B). The Supreme Court stated that the required allegation that the government's position was not substantially justified was merely a pleading burden to discourage irresponsible litigation, rather than an essential notice of the government's well established burden of proving substantial justification for their position in a case. This case is important for employment practitioners because EAJA applications can also be filed by prevailing parties who were sued by the EEOC, DOL, or the National Labor Relations Board.

B. Employee Benefits

1. *Aetna Health Inc. v. Davila* and *CIGNA Healthcare of Texas, Inc. v. Calad*: ERISA solely governs suits and remedies relating to HMO coverage decisions based on terms of an ERISA-governed plan.

In *Aetna Health Inc. v. Davila,* and *CIGNA Healthcare of Texas, Inc. v. Calad*, 124 S.Ct. 2488 (2004), the U. S. Supreme Court decided that the Employee Retirement Income Security Act solely governs suits and remedies relating to an HMO's coverage decisions based on the terms of an ERISA-governed plan. These cases affirm the Court's view that an HMO's administrative decision that a treatment is not covered under the terms of a plan governed by ERISA is subject solely to the remedies provided by ERISA.

In cases consolidated for review, two individuals sued their respective HMOs for coverage decisions that allegedly aggravated the health problems for which they had sought medical care. Both cases claimed violations of the Texas Health Care Liability Act, a state law that establishes an HMO's duty "to exercise ordinary care" in the provision of medical services. *Id*. at 2493. Both HMOs defended the claims by removing the actions to federal court and asserting that ERISA provided the only recourse for the individuals' grievances (the relief available under ERISA is much narrower than what is typically available under state laws). The District Courts agreed. However, the U.S. Court of Appeals for the Fifth Circuit reversed on the grounds that the state law claims did not "precisely duplicate" the causes of action prescribed under ERISA and therefore ERISA did not completely preempt the state law claims. *Id*. at 2499.

Rejecting the reasoning of the Fifth Circuit, the Supreme Court found that the lawsuits could only be pursued in federal court under ERISA. The Court distinguished its decision from a previous case in which it permitted an HMO to be sued for medical malpractice. The Supreme Court in *Pegram v. Herdrich*, 530 U.S. 211 (2000) held that state tort-type laws may have application to aspects of a "mixed eligibility" decision. *Id*. at 2494. A mixed eligibility decision arises where the employee-physician of an HMO effectively make decisions that implicate *both* whether the benefit is covered under the terms of the plan *and* what should be the treatment for the medical condition.

Under *Pegram*, the decision as to what the treatment should be was not an ERISA administrative decision and, therefore, state law was not preempted. Thus, the HMO was held vicariously liable for the treatment decisions of its employee physician. The mixed eligibility analysis of *Pegram* had proven extremely difficult for the courts to understand and apply. *Aetna Health, Inc*. and *CIGNA Healthcare of Texas, Inc*. made clear that, where the physician was not an employee or owner of the HMO, the coverage and treatment decisions were independent. Therefore, the HMO's coverage decision was solely governed by ERISA and subject to ERISA's remedies.

The aspect of the decision that has potentially broad application is the Court's explicit affirmance of its prior view that ERISA provides the sole actions and remedies

for issues concerning plan administration and covered benefits. Thus, even where ERISA does not provide a remedy for a participant's or beneficiary's harm, the Court has directed the lower federal courts not to create new remedies or to incorporate state remedies to fill that vacuum.

2. *Yates v. Hendon*: Working owner of business may qualify as a "participant" under ERISA plan.

In *Yates v. Hendon*, 124 S. Ct. 1330 (2004), the Supreme Court considered whether the sole shareholder and president of a professional corporation who repaid a loan from a profit-sharing plan shortly before creditors filed an involuntary bankruptcy petition against the owner could utilize ERISA to block a bankruptcy trustee from taking the repaid money from the plan. The Court ruled that the sole shareholder may qualify as a "participant" and, therefore, qualify for the protections that ERISA provides to covered plans.

Dr. Yates, sole owner/shareholder of a corporation, borrowed money from the profit sharing pension plan maintained by the corporation that was tax-qualified under §401 of the Internal Revenue Code. The plan contained a "spendthrift clause," as required by ERISA, which barred assignment or alienation of plan funds, either voluntarily or involuntarily. About seven years later, and at a time he was presumed insolvent, Yates repaid the loan with interest. The bankruptcy trustee commenced a proceeding against the plan ordering that the amount of the loan plus interest be paid over to the bankruptcy trustee.

The Sixth Circuit decided that Yates could not exclude the profit-sharing money from the bankruptcy estate. As the self-employed owner of the professional corporation sponsoring the plan, Yates was not an employee as defined by ERISA. He was not eligible to participate in the plan, and he could not enforce the spendthrift provisions.

The Supreme Court concluded that Congress intended working owners to qualify as plan participants. Although the definitions of "employee" and "participant" were uninformative, the Court found guidance elsewhere in the Act. Title I of ERISA and related IRC provisions expressly contemplate the participation of working owners in covered benefit plans. For example, Title I frees certain plans in which working owners likely participate from all of ERISA's fiduciary responsibility requirements. Title I also provides more limited exemptions from the fiduciary responsibility requirements for plans that ordinarily include working owners as participants. The Court said exemptions of this order would be unnecessary if working owners could not qualify as participants in ERISA plans. Title VI of ERISA was corrobative in that it does not apply to plans "established and maintained exclusively for substantial owners," a category that includes sole proprietors and shareholders. *Id*. at 1340. The Court also observed the working employer's opportunity to personally participate and gain ERISA coverage serves as an incentive to the creation of plans that will benefit employer and employee. The Court concluded that its interpretation best advances Congressional intent.

3. *Central Laborers Pension Fund v. Heinz*: Changing fund rules to expand types of work that could lead to benefit suspensions violates ERISA.

In *Central Laborers Pension Fund v. Heinz*, 124 S.Ct. 2230 (2004), the Supreme Court ruled that the pension fund violated ERISA by changing the fund's rules to expand the types of post retirement work that could result in benefit suspensions. The question was whether ERISA's anti-cutback rule prohibited an amendment expanding the categories of post retirement employment that triggered suspension of payment of early retirement benefits already accrued. In the case, the expanded definition of disqualifying employment effectively eliminated or reduced the retirees' early retirement benefit because of time the retirees worked and accrued retirement benefits under the plan, the definition of disqualifying employment did not include supervisory work. Thus, the definition changed or essentially undercut the retirees' reasonable reliance on plan terms that allowed them to work in a supervisory capacity in planning their retirement.

C. Other

1. *Doe v. Chao*: Individuals must prove actual damages to recover even the $1000 minimum under the Privacy Act of 1974.

In *Doe v. Chao*, 540 U.S. 614 (2004), the Supreme Court ruled that individuals suing under the Privacy Act of 1974 must prove some actual damages to qualify for even the $1000 minimum award available under the Act.

Several individuals sought recovery for emotional distress against the Secretary of Labor under the Privacy Act of 1974 and the U.S. Constitution for the disclosure of their Social Security numbers beyond the limits set in the Privacy Act in conjunction with the adjudication of their black lung compensation claims. Allegedly, the numbers were disclosed in violation of the Privacy Act on multi-captioned hearing notices sent to numerous miners and their attorneys and in published decisions by administrative law judges and the Benefits Review Board.

The district court granted one Plaintiff, Buck Doe, summary judgment and granted summary judgment in favor of the government as to the remaining Plaintiffs. The Fourth Circuit reversed the district court's grant of summary judgment in favor of Buck Doe and directed on remand that summary judgment be entered in the government's favor. The Circuit Court held that a Privacy Act plaintiff may only recover money damages upon a showing of actual damages. The Circuit Court further stated that an award of compensatory emotional distress damages requires evidence establishing that the plaintiff suffered demonstrable emotional distress. Neither conclusory statements that a person suffered emotional distress nor the mere fact that a violation occurred supported an award.

The Privacy Act provides a catchall category for an individual who suffers an "adverse effect" from a failure not otherwise specified in the remedial section of the Act. *Id*. at 1208. If a court determines that the agency acted in an "intentional or willful"

manner, the government is liable for “actual damages sustained by the individual…but in no case shall a person entitled to recovery receive less than…$1,000.” *Id.* The Court said that a straight textual analysis supported the government’s position that the minimum guarantee applied only to victims who proved actual damages. The statute confined victims of adverse effects caused by intentional or willful actions to “actual damages sustained” of at least $1,000. *Id.*

2. *McConnell v. FEC*: Bipartisan Campaign Reform Act upheld.

In *McConnell v. FEC*, 124 S.Ct. 619 (2003), the U.S. Supreme Court upheld the Bipartisan Campaign Reform Act and as a result set a new, broader standard for the types of political activities which the First Amendment can regulate. One result of the decision is confirmation that corporations, unions and certain others can no longer make soft money contributions to national political parties. Contributions to state parties will similarly be restricted. Also, candidate-centered issue ads running within 60 days of a general election or 30 days of a primary may not be funded with corporate or union money and will have to be funded only through fully disclosed individual contributions.

III. UPCOMING SUPREME COURT CASES

The United States Supreme Court began its 2004-2005 term on October 4, 2004. There are a few cases on their docket that will be of particular interest to employment and law practitioners.

A. *Smith v. City of Jackson, Mississippi.*

In *Smith v. City of Jackson, Mississippi*, U.S., No. 03-1160, *cert. granted* 3/29/04, a "disparate impact" case, a group of plaintiff police officers sought to establish liability by showing that an employer's neutral employment practice policy, an allegedly age discriminatory performance pay plan, had a disparate (disproportionately negative) impact on a group of workers. In this type of case, the employee does not have to prove discriminatory intent.

While Courts have allowed disparate impact claims based on race or sex, Courts are split on whether such claims can be brought under the Age Discrimination in Employment Act ("ADEA"). The First, Third, Fifth, Seventh, Tenth and Eleventh circuits have refused to recognize ADEA disparate impact claims, while the Second, Eighth and Ninth circuits have found the ADEA permits such claims. In December 2001, the Supreme Court agreed to decide the issue, but after oral argument in March 2002, the Court dismissed the appeal as "improvidently granted." On March 29, 2004, the U.S. Supreme Court once again agreed to consider whether disparate impact claims may be brought under the ADEA.

In *Smith,* thirty police officers and dispatchers for the Jackson, Mississippi police department (all age 40 or older), alleged they suffered an injury when the department implemented a new compensation plan that granted substantially larger salary increases to employees who had five years or less of tenure, all of whom tended to be younger employees.

The Fifth Circuit affirmed the dismissal of the case holding that that "the ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age." *Smith v. City of Jackson*, 351 F.3d 183, 187 (5th Cir. 2003). The Appeals Court relied on the statutory language of the ADEA that specifically allows different treatment of employees "based on reasonable factors other than age" and found that the rationale for recognizing Title VII disparate impact claims does not apply in the ADEA context. *Id*.

In their petition for Supreme Court review, the employees argued that "disparate impact claims are particularly appropriate to target these sorts of subtle employment biases." They contended that the ADEA's exemption for differentiation "based on reasonable factors other than age" should be interpreted as "a defense to liability, much like a showing of 'business necessity' can negate a prima facie claim of disparate impact in a Title VII case."

The police department responded that the Fifth Circuit correctly held that disparate impact claims are not permitted under the ADEA, because the statute prohibits only discrimination motivated by age and not conduct based on reasonable factors other than age. However, the department did not oppose Supreme Court review.

B. *Jackson v. Birmingham Board of Education*

In *Jackson v. Birmingham Board of Education,* U.S., No. 02-1672, *cert. granted* 6/14/04, the U.S. Supreme Court granted *certiorari* to consider whether a male coach may bring a retaliation claim under Title IX of the 1972 Education Amendments for being removed from his position because he complained about his girls' high school basketball team being denied equal funding and equal access to facilities and equipment.

IV. THIRD CIRCUIT DEVELOPMENTS

A. Employment Discrimination/Civil Rights

1. *Williams v. Philadelphia Housing Authority Police Department*

In *Williams v. Philadelphia Housing Authority Police Department,* 380 F.3d 751, 2004 U.S. App. LEXIS 18151 (3d Cir. 2004), the Third Circuit ruled, on an issue of first impression, that employees meeting the ADA’s definition of disabled are generally entitled to reasonable accommodation.

Edward Williams was employed as a police officer with the Philadelphia Housing Authority for 24 years until his termination. After being confronted by a superior officer about his interactions with other employees, Williams made profane and threatening remarks. Later that evening, he called a counselor and discussed “going postal” and “smoking people.” Williams then started calling in sick on a daily basis. Williams was diagnosed as having “major depression.” Williams then went on two successive medical leaves. The PHA’s psychologist said that Williams should not carry a firearm as a result of his condition. The PHA denied Williams’s request for a temporary reassignment

based in part on the psychologist’s recommendation that Williams should not carry a weapon. After failing to reply to a request that Williams file for a third medical leave, he was discharged.

Williams filed a lawsuit in District Court, alleging disability discrimination among other things. After ruling on PHA’s motion to dismiss and judgment on the pleadings, only Williams’s discrimination claims under the ADA and PHRA remained. The District Court then granted PHA’s motion for summary judgment on these remaining claims. After Williams’s motion for reconsideration was denied, he filed a timely appeal.

Williams alleged that the PHA discriminated against him by both failing to provide for the reasonable accommodations which he requested and breaching its duty to engage in the interactive process by not responding in good faith to his requests for accommodation. The District Court held that Williams was not disabled within the meaning of the ADA and therefore could not make a prima facie showing of disability discrimination. The Court of Appeals reversed, holding that Williams created triable issues as to whether he was actually disabled under the ADA and whether the Housing Authority regarded him as disabled.

Williams asserted that he met the criteria for actual disability and regarded as disabled. He argued that his inability to carry a firearm substantially limited him in the major life activity of “working.” Summarizing these regulations, the Supreme Court has held that

> [t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

The District Court concluded that such limitations (his depression and the Housing Authority’s perceptions) would not make Williams significantly restricted in the major life activity of working because the limitations did not prevent him from performing work in a broad range of jobs in various classes. The Appeals Court agreed that Williams’s testimony established that he was not precluded from a “broad range of jobs.”

The Appeals Court stated, "The District Court did not address whether Williams was significantly restricted in his ability to perform a class of jobs because of his depression and the resulting inability to carry a firearm. A critical question was thus left unanswered." Although the record was not fully developed on the question, it supported Williams's argument that he was disqualified from most law enforcement jobs in his

geographical area. The PHA failed to explain why law enforcement positions were not a "class of jobs" under EEOC regulations, and Williams did not have to show that his depression-related inability to carry a firearm was permanent to establish that he was actually disabled under the ADA.

Given the history of Williams's disorder, the lack of assurance that treatment would improve Williams's condition in the future, and the conclusions of Williams's treating clinicians that his major depression was severe and recurrent, the Third Circuit found that a reasonable jury could conclude that Williams's problem was not a temporary one, and would not be precluded from reaching a finding of actual disability.

Under the "regarded as" theory, the court noted that the record was clear that PHA perceived Williams as being unable to have access to firearms and to be around others carrying firearms. These limitations perceived by PHA only serve to further restrict the jobs Williams could perform in law enforcement, said the court. An inability to have access to or be around others carrying firearms would prevent him from serving in virtually all law enforcement jobs. Therefore, Williams has sufficiently demonstrated that a trier of fact could determine that PHA regarded him as being substantially limited in the major life activity of working because of its perception that he could not hold any law enforcement job.

Regarding the duty of reasonable accommodation, Williams did not need to make an additional showing that the Housing Authority viewed him as capable of performing an available vacant job. The Court said, "while we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results,' we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text." *Id*. at *53 - *54.

2. *Fiscus v. Wal-Mart Stores, Inc.*

In *Fiscus v. Wal-Mart Stores, Inc.*, No. 03-2513, 2004 U.S. App. LEXIS 20776 (3d Cir. Oct. 5, 2004), the Third Circuit held that an employee's kidney failure, which limited her ability to cleanse and eliminate body waste, constituted a physical impairment that impaired a major life activity under the ADA.

From October 1986 through March 2000, Cathy Fiscus was an employee of Wal-Mart Stores, Inc., working at the company's Sam's Warehouse Club Store in Pittsburgh, Pennsylvania. Throughout her employment at the store, she performed in a variety of positions in a number of departments. In November 1995, Fiscus was diagnosed with renal (kidney) failure. Over the next few years, her condition deteriorated. Then, in July 1998, she was diagnosed as having end-stage renal disease, the condition of total or near-total permanent kidney failure.

Fiscus had dialysis treatment from July 1998 through September 1999. Initially, she underwent hemodialysis, a process by which the blood is cleansed mechanically. Then, because of complications associated with hemodialysis, Fiscus changed her

treatment to peritoneal dialysis. This procedure required Fiscus to administer the forty-five minute dialysis process to herself every four to six hours each day. At the start of her treatment, Fiscus was allowed to perform the dialysis on work premises.

Around the time she started peritoneal dialysis, Fiscus suffered a fall at work and was absent from work for a short period of time. In January 1999, Fiscus returned to work and was removed from her position as a baker/wrapper after she indicated in a company form that she was not able to perform functions without reasonable accommodation. When the store manager proposed that Fiscus take a day shift position, such as a "Greeter," Fiscus requested that she be able to perform dialysis on Wal-Mart's premises. This request for accommodation was denied, and Fiscus was informed that there were no available positions for her. Instead, the store manager advised her to take disability leave, which she did.

In September of 1999, Fiscus underwent a kidney transplant and was unable to work for five and a half months, until March 30, 2000. On March 15, 2000, Wal-Mart fired Fiscus because she had been unable to return to work within a year.

Fiscus filed a charge with the EEOC claiming disability discrimination. She subsequently filed suit in District Court. Fiscus alleged in her complaint that she suffered from renal disease and that "renal disease is a disability within the ADA as it is [a] physical impairment that substantially limits major life activities." Fiscus also alleged that Wal-Mart removed her from her baker/wrapper position because of disability, failed to accommodate her disability, and terminated her because of her disability.

Wal-Mart filed a motion for summary judgment, arguing that Fiscus was not "significantly limited in a major life activity." Fiscus responded by arguing that she was substantially limited in the major life activity of "processing body waste and cleaning her blood" and that "complete failure of [her] kidneys substantially limits her ability to perform the major life activities of eliminating body waste; of cleaning her blood; and of caring for herself."

Because the District Court concluded that "the activities of processing bodily waste and cleansing blood do not comport with the definition of 'major life activity' under the ADA" and that these activities were "kidney function[s]," which are not a major life activity under the ADA, the District Court granted summary judgment for Wal-Mart.

The Third Circuit reversed, stating that:

> [T]he District Court erred in its point of departure. Fiscus does not allege that her disease limited her in the life activity of "kidney function." She contends that she was limited in the major life activities of cleansing her blood and processing waste. . . . By re-characterizing Fiscus's claim as an allegation "that she is substantially limited in the major life activity of kidney function," the District Court

> simply assumed away her argument. Fiscus's position is clear: Absence of kidney function was the impairment; the consequence was the impact on the activity of blood cleansing and body waste processing. Thus, it was incorrect for the District Court to conflate the two. . .

In examining the question of whether cleansing and eliminating waste from the blood is a major life activity, the Appeals Court found guidance in *Bragdon v. Abbott*, 524 U.S. 624 (1998). There, the Supreme Court concluded that a major life activity need not constitute volitional or public behavior; it need not be an activity that is performed regularly or frequently; but it does have to have importance to human life comparable to that of activities listed in the regulatory examples.

The Appeals Court disagreed with the District Court's conclusion that impaired elimination of waste and blood cleansing are nothing more than characteristics of kidney failure. "Rather, they are the *effect* of kidney failure in the same way that impaired thinking is the effect of organic brain disease. And the fact that the effect of kidney failure is felt on an internal autonomous organic activity is, under *Bragdon*, not incompatible with a finding of substantial limitation of a major life activity," said the Court.

Under *Bragdon*, the touchstone of a major life activity is its importance or significance. An activity which is "central to the life process" meets that test. The Appeals Court explained, "By that standard, processing and eliminating waste from the blood qualifies as a major life activity because, in their absence, death results. In this respect, waste elimination is comparable to other life-sustaining activities such as breathing, eating, or drinking, all of which have been held to be major life activities within the statute." As a result, the Third Circuit held that the District Court erred in deciding that elimination of waste from the blood was not a major life activity.

3. *Thomas v. Town of Hammonton*

In *Thomas v. Town of Hammonton*, 351 F.3d 108 (3d Cir. 2003), the Third Circuit held that a jury could reasonably conclude that a trainer's sexual hi-jinks and comments during a training session constituted sexual harassment under the New Jersey Law Against Discrimination.

Theresa Thomas began working as a 911 Call Center Dispatcher for the town of Hammonton Police Department on April 2, 2000. As a new dispatcher, Thomas was required to take a week-long training course. Thomas alleged that the trainer, Michael Howard, engaged in sexually harassing behavior during the program. The alleged conduct included frequent and sexually explicit offensive language and gestures. The trainer also played a 911 emergency calls training video and fast forwarded to extremely graphic and sexually explicit parts, skipping the non-explicit parts. She complained to a dispatcher, lieutenant and deputy chief. As a result, she was subsequently excused from

attending the training. After Thomas was out sick for a number of days, she was terminated.

Thomas filed suit in federal court asserting various claims including sexual harassment under New Jersey's antidiscrimination law. Since a male was also in attendance at the training, the District Court concluded that the harassment was not based on sex since it was equally crude to both males and females and granted summary judgment to the employer. The Third Circuit disagreed, stating that a jury could find that the environment was "qualitatively different" for a female than for a male. *Id.* at 117. There was evidence in the record that Howard directed some of his conduct at Thomas. Also, Howard used terms that could be viewed as indicative of sex-based hostility. Therefore, the Appeals Court concluded that based on the evidence, a trier of fact could infer that the hostile environment experienced by Thomas would not have existed if she had been a man.

4. *Detz v. Greiner Industries, Inc.*

In *Detz v. Greiner Industries, Inc.*, 346 F.3d 109 (3d Cir. 2003), the Third Circuit ruled that the positions a former employee advanced in his ADEA claim were patently inconsistent with the statements he made to the Social Security Administration in relation to an application for disability benefits, and his explanation did not meet the standards articulated in *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795 (1999).

When Ralph Detz was laid off by Greiner Industries, Inc., he applied for Social Security Disability benefits. After attesting to the SSA that he was "disabled and unable to work," the SSA granted him disability benefits. Detz then filed an administrative complaint with federal and state agencies alleging age discrimination by Greiner. He later filed suit in district court.

Greiner filed a motion for summary judgment, arguing that Detz was judicially estopped from establishing a *prima facie* case of age discrimination. Specifically, Detz was precluded from showing that he was "qualified" for the position from which he was discharged, because such an assertion was irreconcilably inconsistent with his earlier statement to the SSA that he was "disabled and unable to work."

Detz responded by arguing that he became "disabled" for disability benefit purposes by virtue of his discharge by Greiner. Before that, he was not "disabled," as he had a job in the tool room and could perform that job. After that, he was "disabled," because he was no longer allowed to continue performing that job, and he would not be able to find another job tailored to his physical limitations. Stated another way, there was only one job that he was capable of performing: the job in the tool room. Therefore, the loss of that job rendered him "disabled" for disability benefit purposes. He argued that he did remain qualified for that one job for the purposes of his ADEA claim.

The Third Circuit generally applies a multi-factor analysis to determine whether a party is judicially estopped from making assertions that are contrary to assertions he

previously made. The analysis considers whether a party's positions are inconsistent, whether the party acted in bad faith, and whether judicial estoppel is an appropriate remedy that is tailored to address the harm caused to the integrity of the court.

The Third Circuit adopted the method the Supreme Court utilized in *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795 (1999). In *Cleveland*, the Supreme Court said judicial estoppel principles apply in deciding whether the plaintiff's previous claim of total disability precluded him from subsequently claiming to be a "qualified" individual under the ADA. The Supreme Court said that "pursuit, and receipt of SSDI does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA." However, the *Cleveland* Court said that when a defendant claims a bar based on previous inconsistent assertions, a plaintiff "cannot simply ignore" her previous statements to the SSA. Instead, in order to establish the *prima facie* case, the plaintiff must explain why the SSDI contention is consistent with the subsequent assertion and connection with the ADA claim.

Therefore, the first issue for the Third Circuit was whether the positions taken by Detz in his SSDI application and his ADEA claim genuinely conflicted. The Court said the answer to this question must be made on a case by case basis, in other words, by examining the unique facts presented by Detz's claim. The Court concluded that the two positions taken by Detz were truly inconsistent with one another. In order to be "disabled" for SSDI purposes, an applicant must be incapable of performing his "past relevant work," and must be unable to perform any other job existing in significant numbers in the nation's economy.

On the other hand, in order to establish a *prima facie* case under the ADEA, a complainant must show that he was "qualified" for the position he held with his employer. To be "qualified" a complainant must have been "performing his job at a level that met his employer's legitimate expectations" at the time of his discharge. The court observed that considering these requirements, a person who made assertions in support of both claims would often appear to be making facially incompatible assertions, as the second assertion seems to disavow the first.

In the instant case, Detz informed the SSA in a statement that his disability prevented him from working; in other words, that he was physically incapable of performing his job. Then, in the ADEA claim, he sought to advance a position before the court that rested on the assertion that he was discharged from a position that he was physically capable of performing. The second position "crashe[d] face first" with the prior claim, and the court concluded that the two assertions were "patently inconsistent." Detz, 346 F.3d at 120.

5. *Potence v. Hazleton Area School District*

In *Potence v. Hazleton Area School District*, 357 F.3d 366 (3d Cir. 2004), the Third Circuit ruled that the ADEA authorized liquidated damages against municipalities for willful violations.

Michael Potence applied to fill a vacant position of plumbing/heating, ventilation and air conditioning (HVAC) instructor with the Hazleton Area School District, but a younger applicant was hired instead. The school district contended that Potence was not qualified for the job because he lacked a refrigerant recapturing certification. Potence, claiming that the reason was pretext for discrimination, filed a claim for age discrimination under the ADEA with the District Court. The jury found for Potence and awarded him $254,000 in damages, which was reduced by $81,750 due to income Potence made in other employment. The Court then doubled the award as liquidated damages, pursuant to the authority given in the ADEA for the court to do so for "willful" violations. The school district contended that it could not be compelled to pay liquidated damages due to its status as a municipality and because liquidated damages are punitive in nature.

The Third Circuit had not previously considered this issue in the context of the ADEA. The Appeals Court began its analysis by citing a "historical tension between municipal liability and damages imposed as punishment." *Id*. at 372. As such, the general rule today is that no punitive damages are allowed against municipalities unless expressly authorized by statute. In assessing whether liquidated damages under the ADEA may be imposed against a municipality, a court must address whether liquidated damages under the ADEA are punitive and, if so, whether the imposition of punitive damages against a municipality is expressly authorized by the ADEA.

In the past, both the United States Supreme Court and the Third Circuit have held that the liquidated damages provision of the ADEA was intended to be punitive in nature. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Starceski v. Westinghouse Electric Corporation*, 54 F.3d 1089 (3d Cir. 1995).

The Appeals Court said it was necessary to examine the language of the ADEA to make certain that it applied to municipalities. The ADEA makes it unlawful for an employer to "fill or refuse to hire or to discharge" an individual because of his or her age. 29 U.S.C. §623(a)(1). Included in the ADEA's definition of employer is "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. §630(b). Due to the statute's unambiguous language, the court said the ADEA could not be more explicit in imposing liability for age discrimination against municipalities. The ADEA's contemplation of the imposition of liquidated damages is equally explicit, as it states in relevant part "that liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. §626(b).

The Third Circuit also drew a comparison with a Supreme Court decision under the False Claims Act. In *Cook County v. United States Ex Rel. Chandler*, 538 U.S. 119

(2003), the Supreme Court held that under the False Claims Act treble damages could be imposed against municipalities, because ever since the statutes' creation its definition of "person" was intended to cover local governments, and Congress did not manifest an intent to limit the scope of the definition when it raised the cap on damages in 1986. Therefore, in contrast to the False Claims Act, which does not explicitly identify a municipality as a "person," the ADEA does explicitly include state and local governments in the definition of "employer." Thus, the Third Circuit felt it was unnecessary to move or look beyond the plain language of the statute. The court concluded the language of the ADEA itself makes it clear that Congress intended to subject municipalities to the liquidated damages provision of the ADEA.

6. *Nesbit v. Gears Unlimited, Inc.*

In *Nesbit v. Gears Unlimited, Inc*., 347 F.3d 72 (3d Cir. 2003), the U.S. Court of Appeals for the Third Circuit adopted a three-factor test to determine whether a company and its affiliates should be consolidated to satisfy Title VII's 15-employee coverage threshold.

At issue was the common family ownership and control of three companies occupying separate facilities in Pennsylvania about one mile apart. In all respects except hiring, the two entities involved in the case operated independently. Regarding hiring, however, the two assisted each other in soliciting and interviewing candidates for open positions.

An individual who had applied for a machine operator position at one company was referred to the other company, which hired her. After leaving work early to visit a chiropractor for injuries sustained at work, she was terminated for insubordination. Subsequently, the individual filed suit in District Court alleging gender discrimination under Title VII. Seeking to clear the 15-employee hurdle, she argued that the two entities were a single employer. However, the District Court disagreed and dismissed the complaint.

Agreeing with the District Court, the U. S. Court of Appeals for the Third Circuit in Philadelphia found it was improper to consolidate the two entities for Title VII purposes. However, the Appeals Court concluded the 15-employee threshold was a matter for substantive determination in an action under Title VII. As such, the court said whether an "employer" as defined by the statute exists is not simply a matter of the court's "jurisdiction" or authority to hear the case.

For determining when distinct entities should be considered as one "employer" under Title VII, the Third Circuit adopted a three-part test: 1) when a company has split itself into two entities with less than 15 employees intending to evade Title VII; 2) when a parent company has directed the subsidiary's discriminatory act; or, 3) when the entities' affairs are so interconnected that they collectively cause the alleged discriminatory employment practice.

As to the first factor, the court found no evidence that the two entities split themselves to evade Title VII. Because the two entities did not have a parent and subsidiary relationship, the second factor did not apply. Thirdly, the fact that the two entities coordinated efforts to recruit job applicants alone was insufficient to make them a single entity under Title VII.

B. FMLA

1. *Conoshenti v. Public Service Electric & Gas Company*

In *Conoshenti v. Public Service Electric & Gas Company,* 364 F.3d 135 (3d Cir. 2004), the U.S. Court of Appeals for the Third Circuit held that an employee whose employer failed to advise him about his rights under the FMLA stated a triable claim of interference with his FMLA rights, and that the lower court had erred in granting summary judgment for the employer on this FMLA theory. The Court of Appeals sustained the lower court's grant of summary judgment in favor of the employer on the employee's alternate theory that his employer discriminated against him in violation of the FMLA by discharging him.

Conoshenti held a job as a mechanic for Public Service Electric and Gas Company (hereinafter "PSE&G"). He and his employer entered into a Last Chance Agreement (hereinafter "LCA") after PSE&G made a decision to discharge him on accusations of keeping inaccurate time records and leaving his shift early. Conoshenti denied the allegations but entered into the agreement on the advice of his union because he was willing to accept blame to keep his job. Among other obligations, the LCA required Conoshenti to report to work every day and on time or he would be immediately discharged. Conoshenti complied with the terms of the LCA for almost four months. However, on December 4, outside the scope of his employment, Conoshenti was struck by an automobile and sustained serious injuries requiring hospitalization. Initially, Conoshenti provided a medical excuse to his employer indicating that he would be off work for about two weeks. While off work in this initial period, Conoshenti consulted an orthopedic surgeon who advised immediate surgery to repair torn rotator cuffs. This surgery, and the resultant period of recuperation, resulted in a projected absence into April 2000, and Conoshenti provided his employer with a form completed by this doctor to this effect on December 17, 1999.

Thereafter, on about December 20, Conoshenti's employer began administrative steps to end his employment for violation of the LCA. The termination recommendation was approved by several PSE&G officers, and a termination letter dated December 20, 1999 was prepared but not sent, listing the reason for termination as Conoshenti's unavailability for work starting December 6, in violation of the LCA.

Meanwhile, Conoshenti had become concerned about his job security. He contacted his union, and was advised to ask that his leave be counted as FMLA leave. Following this advice, Conoshenti sent a letter to his supervisor on December 27, 1999, asking that his leave be counted as FMLA leave. Notes in the supervisor's file on that date indicated that Conoshenti had called and asked for family medical leave, and that his

supervisor, after consultation, had been advised that the company had to hold off on the discharge and that the discharge would occur upon his return.

Conoshenti underwent surgery for his rotator cuffs in January. Thereafter, his doctors periodically updated the company as to his condition. He stated that during his recovery, he was advised by several people, including his direct supervisor, to take his time in recovery and not to hurry back until he was 100%. He also claimed that he was assured that light duty would be available for him when he returned to work.

Conoshenti sought to return to work to "desk duty" on April 3, 2000, in accordance with his doctor's permission. He was told that his facility could not accommodate desk duty and that his return should be delayed until he could perform full active manual labor. On April 12, Conoshenti took and passed his PSE&G physical. On the same date, the company reinstituted its administrative steps to terminate his employment. Conoshenti returned to work on April 17, 2000, and after being back at work for one hour, Conoshenti was terminated. The termination letter noted that his 92 day absence was a violation of his LCA.

Conoshenti's union arbitrated his discharge under the collective bargaining agreement and the arbitrator upheld the discharge based on Conoshenti's violation of the LCA. Conoshenti also brought an action in Federal District Court, alleging violation of the FMLA and various claims under New Jersey law. The District Court granted summary judgment for the employer on all claims, and the appeal followed. The Appeals Court's disposition of Conoshenti's two FMLA theories, interference with his FMLA rights under 29 U.S.C. § 2615(a)(1), and discrimination in violation of Section 825.220(c) of the FMLA regulations, is discussed here.

It was undisputed that Conoshenti had exceeded 12 weeks of leave, whether the leave was counted from his first date of absence or from the date of his request that his leave be under the FMLA. It was also stipulated for purposes of summary judgment that Conoshenti had not received any notice from his employer concerning his FMLA rights.

On appeal, Conoshenti argued that PSE&G's failure to advise him of his right to take 12 weeks of FMLA leave constituted an interference with that right. He argued that had he received the notice required by the FMLA regulations, he would have been able to make an informed decision about structuring his leave to preserve the job protection afforded by the FMLA. The Third Circuit agreed and reversed the trial court's grant of summary judgment to PSE&G.

The Appeals Court stated "Conoshenti will show an interference with his right to leave under the FMLA, within the meaning of 29 U.S.C. § 2615(a)(1), if he is able to establish that this failure to advise rendered him unable to exercise that right in a meaningful way, thereby causing harm." 364 F.3d at 143.

The Court of Appeals found support for this position in *Ragsdale v. Wolverine Worldwide Inc.*, 535 U.S. 81 (2002). In *Ragsdale,* the U.S. Supreme Court struck down the FMLA regulation which had required that FMLA leave did not begin until required

notices were provided from the employer. The *Ragsdale* Court's reasoning suggested that failure to give mandated notice could constitute illegal interference with FMLA rights if it prevented an employee from making effective choices about how to use FMLA leave.

On the record before it, the Circuit Court concluded that summary judgment for the employer was inappropriate. PSE&G, as the moving party, had not satisfied its initial burden of pointing to an absence of evidence as to whether Conoshenti had been prejudiced by the company's failure to provide the required notice. Thus, Conoshenti was not required to respond with specific facts establishing a genuine issue of fact with respect to the prejudice requirement.

The Court of Appeals upheld the District Court's grant of summary judgment for the employer on the discharge claim. The elements of the claim were that Conoshenti had taken FMLA leave, that he suffered an adverse employment decision, and that the adverse decision was causally related to his leave. The first two elements were undisputed, and the Appeals Court's discussion focused on the third element, causation.

The Appeals Court endorsed the District Court's reasoning that the record established that Conoshenti's FMLA leave had been a factor in the discharge decision. This mandated a *Price Waterhouse* analysis, with the burden of persuasion shifting to the employer that it would have made the same decision even if it had not considered the FMLA leave. The employer had met this burden, since any violation of the LCA would have established just cause for discharge. Thus, even without considering the 12 weeks of FMLA leave, the discharge would have occurred anyway.

C. Arbitration of Individual Claims

1. *Parilla v. IAP Worldwide Services VI, Inc.*

In *Parilla v. IAP Worldwide Services VI, Inc.,* 368 F.3d 269 (3d Cir. 2004), the Third Circuit ruled that provisions in an agreement to arbitrate giving employees 30 days to present a claim and requiring each party to pay their own attorney's fees and costs were unconscionable and therefore unenforceable.

Virgen Parilla's employment agreement included an arbitration agreement. Numerous procedures governing the arbitration proceedings were set forth, including: a 30-day notice provision in order for an employee to bring a claim, a requirement that an arbitrator not reside in the U.S. Virgin Islands or Puerto Rico and a costs provision which made each party responsible for its owns costs and expenses, including attorney's fees.

In July 2002, Parilla's employment was terminated. She subsequently commenced litigation against IAP alleging violations of Title VII and Titles 10 and 24 of the Virgin Islands Code, wrongful discharge, breach of contract, misrepresentation, negligent and/or intentional infliction of emotional distress. Invoking the arbitration provisions of the employment agreement, IAP filed a motion to compel arbitration pursuant to the FAA. Parilla opposed the motion. The District Court, adopting the reasoning in its previous decision in *Plaskett v. Bechtel International, Inc.*, 243 F.Supp. 2d 334 (D.Vi. 2003),

denied the motion to compel, holding the following arbitration provision terms unconscionable: (1) the 30-day notice requirement; (2) the agreement by the parties to bear their own costs, expenses and attorney's fees as applied to Title VII; and (3) Rules 17, 18 and 34 of the AAA Rules regarding confidentiality, which had been incorporated by reference into the Agreement. The District Court further held that the unconscionable terms permeated the entire arbitration agreement and, accordingly, those terms could not be severed and the agreement could not be enforced.

IAP appealed, alleging that the District Court erred in finding the provisions of the agreement unconscionable. It also argued that, alternatively, the District Court erred in refusing to sever the terms it found unconscionable from the remainder of the arbitration provisions. For her part, Parilla argued that, in addition to the three provisions held unenforceable by the court below, an additional three provisions were equally unconscionable, including: (4) the agreement that all covered claims are to be resolved through arbitration rather than before an administrative agency; (5) the residency restriction on the arbitrator; and (6) the agreement that Parilla lost the arbitration, she would have to reimburse the employer for the arbitrator's fees and expenses if ordered to so by the arbitrator.

Ultimately, the appeal concerned the issue of whether the record on appeal supported the conclusion that the various arbitration provisions were conscionable and therefore enforceable or substantively unconscionable and against public policy and therefore unenforceable. Citing its previous holding in *Alexander v. Anthony Int'l L.P.*, 341 F.3d 256 (3d Cir. 2003), the court confirmed that although the FAA establishes a "strong federal policy in favor of the resolution of disputes through arbitration" and that under the FAA "such agreements are enforceable to the same extent as other contracts", the courts could not enforce unconscionable arbitration provisions.

The Court found the thirty-day notice provision, requiring that employees present their claims in written form to the company within 30 days of the event which formed the basis of the claim to be unconscionable as it provided insufficient time to bring a well-supported claim and prevented an employee from invoking the continuing violation and tolling doctrines.

The Court found that the provision which required each party to "bear its own costs and expenses, including attorney's fees" to be substantively unconscionable. The Court noted the employer's substantially stronger bargaining position and viewed the provision as a detriment to an employee in need of legal assistance.

The Court reversed the District Court's refusal to enforce the confidentiality provision, holding that since each side has the same rights and restraints under the provision and that maintaining confidentiality would not hamper Parilla's ability to obtain relief, the confidentiality provision was not unconscionable nor violative of public policy and was therefore enforceable.

The Court agreed with the District Court's ruling that the provision which mandated that controversies arising from the arbitration agreement and/or employee's

employment with employer must be resolved by arbitration and not in a court or before an administrative agency, was conscionable and enforceable. Since neither the EEOC nor the Virgin Islands Department of Labor had the power to enter judgments to resolve disputes between employers and employees, an agreement to waive such administrative forums was no more unconscionable than a waiver of a judicial forum.

Further agreeing with the District Court, the Third Circuit upheld the Agreement's arbitrator residency requirement provision. The Court found that since the provision permitted each side to play an equal role in selected an impartial arbitrator, the mere fact that arbitrators from the Virgin Islands were precluded did not impede the parties' ability to "retain competent, conscientious, and impartial arbitrators."

Finally, the Court analyzed the arbitration agreement's provision under which the loser could be required to pay the arbitration costs. In doing so, the Court found that the loser pays provision could not be held unconscionable based on the record before it. Parilla had submitted no evidence of the potential costs of an arbitration or of her inability to pay those costs since the District Court had deemed this evidence unnecessary because it had held the loser pays provision to be unconscionable. The Court of Appeals remanded the matter back to the District Court to permit Parilla limited discovery to provide her with the means to show her inability to pay the anticipated costs of arbitration. The Court of Appeals directed development of a record on, and a determination of, whether the reasonably anticipatable fees and expenses of the arbitrator and Parilla's financial circumstances were such that the prospect of her having to pay them in the event she lost unduly burdened her right to seek relief. The Court of Appeals rejected the employer's argument that the enforceability of the provision should not be addressed until there had been an award imposing arbitral costs on the employee. It was unnecessary, for the unconscionability analysis, to have the question arise following loss by the employee and an arbitral order to pay. An arbitration provision which made the arbitral forum prohibitively expensive for a weaker party was unconscionable. The prospect that the employee could have to pay the entire amount of arbitrator's fees and expenses could chill her willingness to bring a claim.

In addition to remanding the "loser pays" provision, the Court also remanded to the District Court the issue of whether to sever the unenforceable provisions from the remainder of the agreement to arbitrate or to wholly invalidate the entire agreement. As guidance on this issue, the Court stated: "The existence of multiple unconscionable provisions will not always evidence 'serious moral turpitude' or serious misconduct, precluding enforcement of the agreement to arbitrate. That will depend on whether the number of such provisions and the degree of unfairness support the inference that the employer was not seeking a bona fide mechanism for dispute resolution, but rather sought to impose a scheme that it knew or should have known would provide it with an impermissible advantage. *Parilla,* 398 F.3d at 289.

2. *Lloyd v. Hovensa, LLC*

In *Lloyd v. Hovensa, LLC*, 369 F.3d 263 (3d Cir. 2004), the Third Circuit ruled that a stay of court proceedings was required under § 3 of the Federal Arbitration Act

(hereinafter "FAA"), upon enforcement of the obligation to arbitrate. It also held that a former applicant failed to show that an employer's use of an arbitration agreement was in any way discriminatory.

Bruno Lloyd worked as a boiler maker and pipe fitter for various contractors at the Hovensa refinery in the Virgin Islands. The contractors for maintenance and repairs at the facility changed over the years. In November, 2001, Lloyd was working for Jacobs/IMC, one of the contractors at the refinery. At that time, Hovensa awarded a contract to Wyatt, for services that Jacobs/IMC had been performing. Lloyd was subsequently informed by Jacobs/IMC that he would be laid off when Jacobs/IMC's contract expired at the end of 2001.

In January 2002, Wyatt began to hire between 300 and 400 people. At that time, Wyatt began requiring all applicants to sign an arbitration agreement as a condition of having their applications considered. In January 2002, Lloyd applied for employment with Wyatt and signed the arbitration agreement; however, he was not hired.

Thereafter, Lloyd filed a federal and state civil rights claim. He also claimed wrongful discharge by Hovensa, breach of an implied contract of good faith and fair dealing, and negligent or intentional infliction of emotional distress. Wyatt filed a motion to compel arbitration and to stay proceedings pending arbitration. Lloyd opposed the motion, arguing that the agreement to arbitrate was unenforceable because it had unconscionable provisions and violated public policy.

The District Court dismissed Lloyd's action with prejudice, finding that all the claims he raised were subject to the arbitration provision. It severed the confidentiality provisions of the American Arbitration Association rules, and compelled arbitration. Lloyd appealed the order dismissing his action.

The Court of Appeals held that the plain language of § 3 of the FAA required the District Court to stay rather than dismiss the court proceedings. The Court observed that it could not look past the plain meaning of a statute's language unless it produced a bizarre result. While courts of appeal have differed in their interpretation of § 3, the U.S. Court of Appeals for the Third Circuit in *Lloyd* sided with other courts of appeal requiring literal application of § 3's language.

The Court noted several advantages from its result. The FAA allows arbitrating parties to return to court for resolution of disputes regarding the appointment of an arbitrator, the filling of an arbitrator vacancy, compelling the attendance of witnesses, punishing witnesses for contempt, or to ask the court to vacate or modify an arbitrator's award. On the one hand, if the case is stayed, then the parties can utilize the same judge for such needs and the proceedings will be expedited. On the other hand, if the case is dismissed, then the parties have to file a new action every time a court's help is needed.

In addition, the effect of a stay is that it allows the party to proceed directly to arbitration without the delay of an appeal of a district court's order to arbitrate.

Accordingly, under § 16 of the FAA, whenever a stay is entered under § 3, the party contesting the arbitration is denied the right to an immediate appeal.

Lloyd also argued on appeal that Wyatt used the arbitration agreement in a discriminatory manner as part of a "purposeful scheme to contravene unambiguous Virgin Islands public policy." *Id.* at 273. Lloyd's support for this claim was his assertion that Wyatt uses "place of residence" as a "proxy" for race, color and national origin in the arbitration agreement. *Id.* Alternatively, Lloyd alleged that the arbitration agreement had a disparate impact upon blacks and Hispanics who predominated in the Virgin Islands workforce. Therefore, he argued that the arbitration agreement was unenforceable because the use of such an agreement contravened public policy.

Lloyd did not allege that any particular provision or term in the agreement was discriminatory. Rather, he claimed that Wyatt used the agreement in a discriminatory manner. The Circuit Court stated that Lloyd's argument failed because he proffered no evidence that Wyatt's use of the agreement was in any way discriminatory.

The burden of proving a generally applicable contract defense, such as Lloyd's public policy argument, lies with the party challenging the contract provision. Here Lloyd failed to present any evidence in attempting to meet that burden. Therefore, the Circuit Court held that the agreement was not unenforceable as violative of public policy as Lloyd argued.

3. *Palcko v. Airborne Express, Inc.*

In *Palcko v. Airborne Express, Inc.,* 372 F.3d 588 (3d Cir. 2004), the Court of Appeals for the Third Circuit interpreted the scope of the exclusion from Section 1 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1, applicable to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." It also considered the pre-emptive effect of the statutory exclusion.

Palcko was an employee of Airborne whose job duties included supervising between thirty and thirty-five drivers who delivered packages from Airborne's facility near the Philadelphia International Airport to customers in the Philadelphia area, and who picked up packages from customers for shipment. She entered into an agreement to arbitrate claims with Airborne, which agreement provided that the FAA would apply to proceedings under the agreement, and to the extent that the FAA was inapplicable, Washington state law would apply. Palcko filed an EEOC charge alleging discrimination in employment, and, after receiving her right to sue, commenced an action in District Court. The District Court held Palcko's employment contract to be excluded from the FAA, and found that the exclusion from the FAA pre-empted applicability of Washington state law.

The Court of Appeals agreed with the District Court that Palcko's employment duties exempted her contract of employment from the FAA's coverage. Applying *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001), the Court of Appeals determined Palcko

to be within the transportation worker exclusion from Section 1 of the FAA. It rejected the argument that this exclusion applied only to workers directly involved in the interstate delivery of packages.

Turning to the pre-emptive effect of the exclusion, the Court of Appeals reversed the District Court and remanded so that the District Court could take actions necessary to enforce the agreement to arbitrate under Washington law. The Appeals Court reasoned that the FAA contained no express pre-emptive provision, and did not reflect a congressional intent to occupy the entire field of arbitration. The FAA pre-empted state law to the extent that it conflicted with federal law. The effect of Section 1's exclusion from the FAA was to leave the arbitrability of disputes in the excluded categories as if the FAA had never been enacted, which meant the agreement would be enforceable under Washington law.

4. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*

In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004), the Third Circuit ruled that the Federal Arbitration Act does not authorize an arbitrator to issue to non-parties a prehearing discovery subpoena to turn over documents.

David Hoffrichter left Hay Group's employment pursuant to a separation agreement. The agreement contained a clause that prohibited him from soliciting any of Hay's employees or clients for one year. It also contained a clause providing for arbitration to resolve any dispute arising under the agreement. In February 2000, Hay commenced an arbitration proceeding against Hoffrichter alleging that he had violated the non-solicitation clause in the agreement.

In an attempt to obtain information for the arbitration, Hay served subpoenas on two non-parties, PriceWaterhouseCoopers and E.B.S., to produce documents prior to the hearing. The non-parties objected to the subpoenas and Hay asked the district court to enforce the subpoenas. The non-parties argued that the Federal Arbitration Act did not authorize arbitration panels to issue subpoenas on non-parties for prehearing document production. The district court disagreed and issued a decision enforcing the subpoenas. The non-parties appealed the decision.

The Third Circuit agreed with the non-parties' argument that, under § 7 of the FAA, a non-party witness may be compelled to bring documents to an arbitration proceeding but may not be subpoenaed to produce documents. An arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to the authority granted by the FAA. Therefore, a court can only look to the FAA to determine whether an arbitrator may issue a subpoena requiring prehearing document production by a person or entity that is not bound by the arbitration agreement.

The language of the FAA unambiguously speaks to the issue. The only power given to arbitrators regarding the production of documents by a non-party is the power to compel a non-party "to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be

deemed material as evidence in the case." 9 U.S.C. § 7. The authority to require a non-party "to bring" documents "with him" only applies to situations in which the nonparty physically brings the items with him to the arbitration hearing, not to situations in which the items are simply sent or brought by a courier. This language unambiguously restricts an arbitrator's subpoena authority to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time. Therefore, the FAA does not authorize an arbitration panel to issue a prehearing discovery subpoena to non-parties. If Hay required access to the documents, the arbitration panel had to subpoena the non-parties to physically appear before it and physically bring the documents with them.

D. Employee Benefits

1. *Barber v. UNUM Life Insurance Company of America.*

In *Barber v. UNUM Life Insurance Company of America*, No. 03-4363, 2004 U.S. App. LEXIS 18827 (3d Cir. Sept. 7, 2004), the Third Circuit ruled that, due to ERISA's preemption clause, participants in an employer sponsored benefit plan are barred from bringing claims under Pennsylvania's bad faith statute for insurance claims.

After becoming disabled, James Barber applied for and received long-term disability benefits under his employer's group long-term disability plan. The plan subsequently terminated the benefits after determining Barber was no longer disabled under the plan's terms.

Barber brought suit for breach of contract and for bad faith under 42 Pa. C.S. § 8371 for the plan's alleged bad faith in denying benefits. Title 42 Pa. C.S. § 8371 provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith towards the insured, the court may take all the following actions: (1) award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus three; (2) award punitive damages against the insurer; (3) assess court costs and attorneys fees against the insurer.

UNUM moved to dismiss the bad faith claim under Fed. R. Civ. P. 12(b)(6), citing ERISA's preemption clause. UNUM contended conflict preemption applied because the bad faith statute's remedial scheme conflicted with Congress's intent in enacting ERISA's exclusive civil enforcement provision in § 502(a). The District Court denied the insurer's motion to dismiss on grounds of ERISA preemption and the insurer appealed.

The Third Circuit noted that under the doctrine of conflict preemption, a state law may be preempted to the extent that it conflicts with federal law, that is, where it acts as an obstacle to the accomplishment and execution of the objectives of Congress. The

court then found guidance in *Aetna Health Inc. v. Davila,* and *CIGNA Healthcare of Texas, Inc. v. Calad*, 124 S.Ct. 2488 (2004), a recent consolidated Supreme Court decision. In the *Aetna* matter, the Supreme Court, observing that ERISA's enforcement mechanism was essential to accomplish Congress's intent of creating a comprehensive statute for the regulation of employee benefit plans, held that any state law cause of action that "duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear Congressional intent to make the ERISA remedy exclusive and is therefore preempted." *Id*. at *15. Pennsylvania's bad faith statute was such a statute because it provided a state remedy that allowed an ERISA plan participant to recover punitive damages for bad faith conduct by insurers, supplementing the scope of relief granted by ERISA. Therefore, the Appeals Court held that the statute was subject to conflict preemption. Also, the Court concluded that the state statute was not saved from preemption by ERISA's savings clause. The court based this conclusion on its determination that the state statute did not affect the risk pooling arrangement between the insurer and insured.

2. *Difelice v. Aetna U.S. Healthcare*

In *Difelice v. Aetna U.S. Healthcare,* 346 F.3d 442 (3d Cir. 2003), the Third Circuit ruled that ERISA preempted an HMO subscriber's claim that the HMO negligently interfered with his medical care by classifying a special tracheostomy tube as "medically unnecessary".

E. Employment Contracts

1. *Fields v. Thompson Printing Co.*

In *Fields v. Thompson Printing Co.*, 363 F.3d 259 (3d Cir. 2004), the Third Circuit ruled a former executive who was denied retirement benefits after being terminated following a sexual harassment allegation was entitled to the monies because his employment contract with his employer contained a non-forfeiture clause.

Gerald Fields entered into an employment contract with his employer, Thompson Printing Company. The employment contract detailed compensation and other benefits to which Fields would be entitled in exchange for his services. The agreement contained a broad non-forfeiture clause in favor of Fields. The clause read:

> This Contract shall be non terminable by Thompson [Printing Company]. In the event Thompson [Printing Company] shall terminate the employment of Gerry [Fields], all of the benefits as contained herein shall continue in accordance with the terms and provisions of this Agreement.

The contract did not differentiate between termination with or without cause, providing for a continuation of the benefits simply if Thompson "shall terminate" Fields.

In August 1997, a number of female employees made allegations to Thompson that Fields had sexually harassed them by creating a hostile work environment. Subsequent to these allegations, Thompson fired Fields. Thompson refused to pay Fields any further compensation under the employment contract after the termination date. The female employees filed a lawsuit in New Jersey state court against Thompson, Fields and another supervisor. No findings were made because the claims were settled without any admission of wrongdoing by the parties.

While this lawsuit was still pending, Fields commenced a civil action against Thompson in District Court. He asserted a federal claim under ERISA contending that the retirement benefits specified in his employment contract were protected by ERISA and that Thompson's failure to pay those benefits violated the statute. In addition, he asserted a number of state law claims arising out of his contract and failure to compensate him, and a minority shareholder claim. The parties filed cross motions for summary judgment and the District Court granted Fields' summary judgment motion with regard to his ERISA claim and his state law claims relating to failure to pay under his contract, but denied summary judgment as to his shareholder claim. Thompson appealed the District Court's order granting summary judgment.

On appeal, the defendants argued that, considering Fields alleged acts of sexual harassment, it would violate public policy to enforce the employment agreement. The Third Circuit noted that the employment contract did not include any conduct-related exception to its non-forfeiture clause. Employers could legitimately offer compensation and benefits that could be taken away only for specific reasons, or that could not be taken away at all, in order to reward employees. The absence of a forfeiture clause in Fields' employment contract suggested that the latter was inferred.

As long as the enforcement of the promise itself was not violative of public policy, a court could not deny the parties their bargain. The fact that enforcing the agreement could be said to have public policy implications was insufficient. Thus, the Appeals Court concluded that the payment of the bargained for compensation did not violate public policy. It noted that even if it was inclined to look with disfavor on the rights of a harassing employee to continue to receive compensation, in this case there has been no finding that Fields was in fact guilty of the alleged harassment. Any consideration of TPC's claim that it was entitled not to compensate Fields because of the alleged conduct would have to be based on a finding his behavior did rise to a level that had policy and contract implications.

The employer also argued on appeal that Fields' alleged actions breached his agreement, thereby terminating TPC's obligation to pay him. More specifically, the employer argued that Fields had breached the implied covenant of good faith and fair dealing, and his duty of loyalty, through his actions. The Appeals Court recognized that implied covenants could be effective components of an agreement. In Fields' case, however, the employment contract specifically provided that it was non-terminable by the company, and that if Fields' employment was terminated, his contractual benefits would continue. Given the specific provisions of the agreement, the Appeals Court stated that it

would not read the implied covenant of good faith and fair dealing to alter terms of the contract, enabling the employer to discontinue benefits if Fields was terminated for cause.

F. Employee Privacy

1. *Fraser v. Nationwide Mutual Insurance Co.*

In *Fraser v. Nationwide Mutual Insurance Co.*, 352 F.3d 107 (3d Cir. 2003), the Third Circuit ruled that an employer did not violate the Electronics Communications Privacy Act and the parallel Pennsylvania law when it retrieved an employee's stored email which was stored on the employer's computer system.

Fraser sold insurance policies as an independent contractor for Nationwide Mutual Insurance Company. Their relationship was terminable at will by either party. Nationwide terminated Fraser on September 2, 1998. As a result, Fraser brought claims for wrongful termination under PA law and damages under ECPA and parallel PA law.

Nationwide argued that it terminated Fraser after it learned he drafted two letters to two competitors regarding acquiring policyholders which would violate Nationwide and Fraser's "exclusive representation" agreement. Due to these letters, Nationwide searched its main file server for any email to or from Fraser that showed similar improper behavior. This searched confirmed Fraser's disloyalty. Nationwide argued that it terminated Fraser due to the two letters and the results of the email search. This search is the basis for Fraser's ECPA and parallel PA law claims.

Fraser argued that by accessing his email on the file server without his consent, Nationwide violated Title I of the ECPA, which prohibits "intercepts" of email. The Third Circuit disagreed, stating that under the ECPA an "intercept" must occur contemporaneous with transmission. Since the emails Nationwide examined were stored, meaning transmission has already occurred and been completed, the Third Circuit found no "intercept" in violation of the ECPA.

Fraser also argued that Nationwide's search of his email violated Title II of the ECPA, which prohibits accessing electronic communications while they are in electronic storage. Although the court determined that this provision did apply to Nationwide's conduct, it did not find liability. This was so because the ECPA excepts from Title II seizures of email authorized "by the person or entity providing a wire or electronic communications service." 18 U.S.C. § 270(c)(1). Since Fraser's email was stored on Nationwide's system, which Nationwide administered, its search fell within the exception to Title II.

G. Traditional Labor Law

1. *Carino v. Stefan*

In *Carino v. Stefan*, 376 F.3d 156 (3d Cir. 2004), the Third Circuit held that the Labor Management Relations Act preempts a legal malpractice claim against an attorney retained by a union to represent a union member in connection with a grievance.

Gisela Carino was employed by Prudential Insurance Company as an insurance agent. After she was terminated for alleged misconduct, the union, of which Carino was a member, filed a grievance on her behalf contesting the termination. The grievance proceeded to arbitration where Mark Stefan, a lawyer, was retained to represent Carino.

A few days prior to the arbitration hearing, Carino told Stefan that she hoped the arbitration would clear her employment record, have her pension reinstated and result in a promise that Prudential would not sue her for attorneys fees. Approximately an hour later, Stefan informed her that the parties had reached a "mutual agreement" in which Prudential agreed to Carino's request in exchange for her withdrawal and release of the grievance. Stefan presented Carino with a "grievance release" and various forms but did not explain the forms or why she had to sign them. Thereafter, Carino realized that the documents she had signed made no reference to Carino's requests in exchange for the release.

Carino filed a lawsuit in New Jersey state court claiming that Stefan committed legal malpractice among other things. The district court dismissed the action for failure to state a claim upon which relief could be granted.

The Third Circuit observed that the appeal presented a question of first impression in the Third Circuit: whether an attorney hired by a union to perform services on behalf of a union member in connection with an arbitration hearing conducted pursuant to a collective bargaining agreement is immune from suit for malpractice by that member. Section 301(b) of the LMRA provides, in part, that "any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." Viewed narrowly, this language could be interpreted to only exempt union members from personal liability for judgments against the union. However, in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the Supreme Court has given the statute a more expansive reading stating that Section 301(b) "evidences a congressional intention that the union as an entity, like a corporation, should in the absence of an agreement be the sole recovery for injury inflicted by it." *Id.* at 159.

The various Courts of Appeals that have considered the specific question presented in the case, where attorneys acted on behalf of a union, have uniformly concluded that *Atkinson* prohibits claims made by a union member against attorneys employed by or retained by the union to represent the member in a labor dispute. *Waterman v. Transport Workers Union Local 100*, 176 F.3d 150 (2d Cir. 1999); *Arnold v. Air Midwest, Inc.*, 100 F.3d 857 (10th Cir. 1996); *Breda v. Scott*, 1 F.3d 908 (9th Cir. 1993).

Guided by the Supreme Court and other appeals courts, the Third Circuit held that Section 301 of the LMRA immunizes attorneys, employed by or hired by unions to perform services related to a collective bargaining agreement, from suit for legal malpractice.

2. *Asplundh Tree Expert Co. v. NLRB*

In *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168 (3d Cir. 2004), the Third Circuit held that the NLRA does not apply to employees working temporarily outside the United States for United States employers.

Asplundh Tree Expert Co., a United States employer, threatened to layoff an employee and discharge two others in response to their concerted complaint about working conditions while on temporary work assignment in Ottawa, Canada. As a result, the employees filed unfair labor practice charges against Asplundh. The Board ruled that Asplundh did violate the NLRA by making threats in response to the employees' complaints, which constituted protected concerted activity. The Board rejected the company's argument that the NLRB did not have jurisdiction because the conduct occurred outside the United States.

As an initial matter, the Third Circuit observed that there exists a presumption against extraterritorial application of Congressional legislation. Although Congress does indeed have the authority to enforce its laws beyond the boundaries of the United States, whether Congress has in fact exercised that authority is a matter of statutory construction. It is a long standing principle of American law that legislation of Congress is meant to apply only within the territorial jurisdiction of the United States unless a contrary intent is clear.

Section 10 of the NLRA provides that the Board is authorized to prevent any person from engaging in specified unfair labor practices "affecting commerce." The statute defines "commerce" to include "trade, traffic, commerce, transportation, or communication among the several states, . . . or between any foreign country and any state, territory, or the District of Columbia . . . ." A literal reading of these provisions could support extraterritorial exercises of the NLRB's jurisdiction.

However, the Third Circuit was guided by the Supreme Court's interpretation of similar jurisdictional language in Title VII of the 1964 Civil Rights Act. In *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), the Supreme Court held that Title VII did not cover U.S. citizens working abroad for U.S. employers. (In the wake of the holding, Congress amended Title VII to protect U.S. citizens employed abroad by U.S. employers.) Even though Title VII had somewhat similar language defining "commerce" as did the NLRA, the Court in *Arabian American Oil,* said that such broad jurisdictional language was nothing more than "boilerplate language" that Congress had used in a number of other laws. This "boilerplate language" was simply not enough to defeat the presumption against extraterritorial application.

The Third Circuit observed that the NLRA, like Title VII, does not include any mechanism for extraterritorial enforcement. "Given the obvious potential for conflict where United States companies employ workers overseas, this omission strikes us as more than mere oversight," the Third Circuit stated. *Id*. at 175 – 176. Therefore, the Third Circuit concluded that it could not find any clearly expressly Congressional intent

that the Act applied to employees working temporarily outside the U.S. for U.S. employers.

3. *White v. Communication Workers of America*

In *White v. Communication Workers of America*, 370 F.3d 346 (3d Cir. 2004), the Third Circuit ruled that the NLRA's recognition that parties to a collective bargaining agreement may legally negotiate an agency shop does not constitute state action necessary for triggering First Amendment protection.

The Communication Workers of America (hereinafter "CWA") and Bell Atlantic were parties to a collective bargaining agreement which covered Corey White, an employee of Bell Atlantic. The collective bargaining agreement contained an agency shop provision, which required all employees in a workplace, as a condition of employment, to pay dues to the union. The union adopted an opt-out procedure, under which employees could notify the union during May of a given year that they intended to refrain from paying the portion of their compulsory dues that the CWA did not intend to use for labor negotiations. The procedure was adopted to comply with the Supreme Court's decision in *Communication Workers of America v. Beck*, 487 U.S. 735 (1988). The union informed employees of the opt-out procedure by placing an annual notice in an issue of its newsletter. Since White did not read the newsletter, he did not take advantage of the opt-out procedure. Therefore, he was charged both the bargaining related and non-bargaining related portions of his dues between 1988 and 1998.

After White learned of the opt-out procedure by word of mouth, he filed a complaint with the NLRB. He contended the union had violated the NLRA by failing to adequately notify him of his *Beck* rights. After the NLRB complaint was dismissed, White filed a pro se complaint against the CWA in District Court. He claimed that the union breached its duty of fair representation and that the opt-out procedure infringed his First Amendment rights not to associate and his § 7 rights not to support non-collective bargaining activity. The District Court granted the union's motion for summary judgment. The Court held that it lacked jurisdiction over White's § 7 claim because the NLRB had exclusive jurisdiction over such a claim. Also, the Court held that the statute of limitations barred White's duty of fair representation claim. As to White's First Amendment claim, the District Court stated that the opt-out procedure did not amount to state action and was therefore not subject to constitutional limitations. White filed a timely appeal.

The Third Circuit started its analysis noting that the courts of appeal are divided on the question of whether actions taken by unions pursuant to an agency shop provision in a collective bargaining agreement constitute state action. To establish the challenged conduct constitutes state action, a plaintiff must demonstrate two things. First, the challenged conduct must either be mandated by the state or must represent the exercise of a state created right or privilege. Second, the party who engaged in the conduct at issue must be a person or entity that can fairly be said to be a state actor.

The Third Circuit did not address the issue of whether or not White satisfied the first prong, because they held that White failed the second prong required to establish state action. In determining whether a person or entity can be described as a state actor, a court examines the following: the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury is aggravated in a unique way by the incidents of governmental authority.

White relied only on the first of the three factors, arguing that the NLRA's authorization of the agency shop clauses provides the union with sufficient "governmental assistance" to make the union's implementation of an opt-out procedure amount to state action. The Third Circuit disagreed with White's analysis. Agency shop clauses result from agreements between employers and unions. If the fact that the government enforces contracts between private parties makes any act taken pursuant to the contract constitute state action, the state action doctrine would have little meaning.

In addition, in Supreme Court precedent had rejected the argument that a legislature's express permission of a practice is sufficient to make the act of engaging in that practice state action. Thus, the Appeals Court held that the CWA's implementation of the opt-out procedure did not constitute state action.

4. *Trimm Associates, Inc. v. NLRB*

In *Trimm Associates, Inc. v. NLRB*, 351 F.3d 99 (3d Cir. 2003), the Third Circuit found the National Labor Relations Board abused its discretion by not holding an evidentiary hearing on whether two former employees engaged in improper electioneering during a representation election.

A union filed a representation petition at Trimm Associates, Inc. At the election, three former employees, who were contesting their discharges, voted along with the current employees. Trimm eventually filed objections to the election alleging that two of the former employees who voted were agents of the union and improperly engaged in pro-union conversations with employees who were waiting to vote. Trimm stated that the two former employees were union organizers and met with union representatives in the parking lot on the day of the election. Trimm also stated that the former employees told waiting voters about jobs they obtained through the union.

Trimm filed objections to the election, claiming that the two employees were agents of the union and improperly engaged in pro-union conversations with employees who were waiting to vote. An NLRB regional director recommended that the objections be overruled and that the election results be certified. The Board then rejected Trimm's request for an evidentiary hearing and certified the union. Trimm refused to bargain and had an unfair labor practice charge filed against it as a result.

Under Third Circuit case law, "in order to obtain an evidentiary hearing a party must make a proffer of evidence that raises a substantial and material issue of fact that if that, if resolved in the party's favor, would warrant setting aside the election." *Id*. at 103.

If the two former employees were agents of the union, the election would have to be set aside. This was so because the Board held in *Milchem, Inc.*, 170 NLRB 362 (1968) that union or employer agents may not engage in prolonged conversations with employees waiting to vote in an election.

The court decided that the conversations that the former employees had were indisputably prolonged. Trimm submitted affidavits that described the content and duration of the four employees' comments, identified the other employees involved, and presented significant evidence probative of the former employees' status as union agents. The court agreed with the District of Columbia Circuit's statement in *AOTOPLLC v. NLRB*, 331 F.3d 100 (D.C. Cir. 2003), that "an evidentiary hearing ordinarily will be required in order to resolve a dispute about the relationship between a person alleged to have interfered with a Board supervised election and one of the parties to that election."

5. *Major League Umpires Association v. American League of Professional Baseball Clubs*

In *Major League Umpires Association v. American League of Professional Baseball Clubs*, 357 F.3d 272 (3d Cir. 2004), the Third Circuit upheld an arbitration award ordering reinstatement of some, but not all, of the umpires who had not been rehired after they tried to rescind resignations which had been made in protest of management actions in the 1999 baseball season.

The lawsuits arose from disputes between the Major League Umpires Association (hereinafter "MLUA") (the former exclusive bargaining agent of major league baseball umpires) and top baseball officials during the 1999 season. Specifically, the MLUA believed that the Baseball Commissioner implemented new policies that violated the existing collective bargaining agreements between the MLUA and the American and National Leagues.

In July 1999, and notwithstanding the no-strike clause in the umpires' collective bargaining agreement (also, herein, the "agreement" or the "CBA"), the MLUA organized the submission of resignation letters by 57 of the 68 umpires to their respective league presidents. The MLUA hoped that this maneuver would force the leagues to negotiate with the umpires regarding the new policies. The Commissioner and the league presidents responded by offering umpire positions to minor league umpires as replacements for those umpires who had tendered their resignations.

Many MLUA members quickly rescinded their resignations. By July 26, the American League had filled its regular complement of 32 umpires through a combination of rescissions and minor league hires. The Commissioner then sent letters to the nine remaining American League umpires accepting their resignations.

By contrast, the National League fell short of its full staff of umpires when the resignation withdrawals were made. Thirteen replacements had already been hired when 32 umpires asked to get their jobs back. On July 27, the league president wrote to 19

umpires to accept them back, but 13 umpires were informed that their resignations had been accepted.

Therefore, a total of 22 umpires (nine from the AL and 13 from the NL) were left without jobs. The MLUA responded by demanding arbitration for the 22 umpires, claiming that management had violated its agreement.

In May 2001, the arbitrator ordered the reinstatement of two AL and seven NL umpires with back pay and benefits, but he declined to do so for seven umpires in the AL and six in the NL. Both sides sought to vacate aspects of the arbitration award unfavorable to them, and the employer also argued the dispute was not arbitrable. The District Court affirmed the arbitrator, and both parties appealed to the Circuit Court.

The Appeals Court began its analysis by noting its limited standard of review under the essence test. It first considered the Leagues' argument that the dispute was not arbitrable.

Because the employer had conceded that the issue of the dispute's arbitrability was properly submitted to the arbitrator, the Appeals Court reviewed the arbitration finding that the dispute was arbitrable under the essence test. Applying this standard, the Appeals Court asked whether the arbitrator's determination "ignored the plain language of the CBA," and found that it had not. *Major League Umpires*, 357 F.3d at 281.

The employer argued that the collective bargaining agreement gave the League Presidents final and binding authority with respect to discharges. However, the Agreement also required that umpires be selected or retained on the basis of merit and skill to perform to major league standards, and that there be no discrimination or recrimination on the part of any party to the Agreement. The arbitrator had determined the issue before him to be one involving a determination of relative merit and skill as well as possible abuse of discretion or the exercise of discriminatory animus regarding the termination or acceptance of the resignations of the twenty-two umpires. This issue expanded beyond the final and binding authority of the League Presidents under the CBA. The arbitrator had therefore rationally determined that his consideration of whether the agreement had been violated extended beyond review of the reasons for discharge of an umpire by the League President. Whether a court, if faced with the initial determination, would have come to the same decision was immaterial, and the arbitrator's arbitrability finding could logically be derived from the Agreement.

The Court of Appeals rejected the union's attack on the arbitrator's conclusion that the umpires had resigned rather than notified the employer of a future intent to resign. The arbitrator's conclusions that the umpires had actually resigned and that the Leagues were justified in hiring replacements were well supported by the record and there was no basis for reversal of the determination.

The union also challenged the arbitrator's application of the CBA's merit and skill criteria. It argued that the arbitrator should have compared the merit and skill of the umpires who rescinded their resignations not only among those umpires but also as to the

new hires and umpires who had not resigned. The arbitrator had rejected this argument, finding that the 1999 work stoppage had involved a severing of the employment relationship through resignation, the hiring of permanent replacements, and no decision by the League Presidents to increase the umpire staffs. There was no basis for disturbing that aspect of the award.

The next issue before the Court of Appeals was the arbitrator's treatment of the individual umpires' grievances. These grievances pertained to those National League umpires who sought to rescind their resignations after nineteen of twenty-two vacant positions had been filled. The arbitrator found that these thirteen umpires' grievances broke into three groups. One group comprised three umpires who did not have more than five years of experience. He denied reinstatement for this group because they did not have enough service to receive the protections of the merit and skill selection standard in the CBA. The second group comprised three umpires as to whom the League had articulated a merit or skill based reason for refusal to allow rescission of the resignation. The arbitrator denied reinstatement to this group on the basis that the League President had substantive discretion in applying merit and skill criteria.

The third group was comprised of seven umpires as to whom the League had articulated no reason for refusing to allow rescission of the resignations beyond the number of unfilled positions. The arbitrator awarded reinstatement to this group. He reasoned that the League Presidents' discretion to select was not limitless, and that such decisions had to be ones that could be reasonably articulated and related to issues of merit and skill and not arbitrary or capricious. The Appeals Court upheld the award.

6. *Allegheny Health, Education and Research Foundation, et al. v. National Union of Hospitals and Health Care Employees*

In *Allegheny Health, Education and Research Foundation, et al. v. National Union of Hospitals and Health Care Employees*, No. 03-2085, 2004 U.S. App. LEXIS 19524 (3d Cir. Sept. 20, 2004), a case involving the intersection of bankruptcy and labor law, the Third Circuit ruled that Tenet Health Systems' agreement to purchase hospitals where employees were covered by collective bargaining agreements did not obligate the hospital to honor sick leave that the employees had accrued prior to the purchase.

After Allegheny Health, Education and Research Foundation and related entities (hereinafter "Allegheny") filed Chapter 11 bankruptcy, Tenet and Allegheny entered into an agreement for Tenet to purchase Allegheny's assets. Under the Asset Purchase Agreement, Tenet assumed some liabilities of Allegheny and disclaimed other liabilities. The Asset Purchase Agreement contained a list of "assumed contracts" and a list of "excluded liabilities." One excluded term was "liabilities or obligations arising from any assumed contract before the closing date resulting from any breach or default prior to the closing date of any assumed contracts or other assumed liabilities . . ." After the sale closed, Tenet and the union, which covered the employees at four Allegheny hospitals, took opposing positions about whether Tenet would credit union members with sick leave that employees had accrued while employed at Allegheny. The dispute proceeded to arbitration under the collective bargaining agreements, wherein the arbitrator ordered

Tenet to pay sick leave that had accumulated before the date the sale closed. Following the arbitration, Tenet sought, before the Bankruptcy Court, vacation of the arbitration award and indemnity from the bankruptcy estate for the cost of complying with the award. The union counterclaimed for enforcement of the arbitration award.

The Bankruptcy Court found that Tenet was not liable for the accrued sick leave obligation, but it was liable for the prospective sick leave obligation since Tenet assumed the collective bargaining agreements. The District Court affirmed the Bankruptcy Court's decision and both parties appealed.

On appeal, the union argued that Tenet was bound by the collective bargaining agreements in their entirety because Tenet assumed them in the Asset Purchase Agreement with Allegheny, notwithstanding Tenet's attempt to limit its liabilities under that agreement. On the other hand, Tenet said the Asset Purchase Agreement excluded liability for the accrued sick leave and also allowed Tenet to set the initial terms of employment and to bargain with the union for a new collective bargaining agreement.

The Third Circuit began its analysis noting that the Asset Purchase Agreement excluded from Tenet's obligations any liability for "liabilities or obligations arising from any assumed contract before the closing date." On the other hand, Tenet assumed Allegheny's obligations "arising on or after the closing date with respect to any period commencing on the closing date under the assumed contracts." The collective bargaining agreements provided for the accrual of leave upon completion of specified periods of employment. The leave accumulated and was then available for employees to use in case of illness or injury. Most of the collective bargaining agreements provided that the employees who retired would be paid for some accumulated sick leave.

The union argued that the Asset Purchase Agreement's exclusion of "liabilities of obligations arising from any assumed contract before the closing date" did not exclude accrued sick leave claims because the employees did not have a claim for the accrued sick leave until they became sick or retired and tried to use the leave. The Appeals Court said that the collective bargaining agreement showed that once the employees had accumulated sick leave, they had a right to the leave, although a right contingent on future illness, injury or retirement. Therefore, the accrued sick leave obligation was an obligation arising before the closing date. The Court therefore interpreted the Asset Purchase Agreement to exclude from Tenet's liabilities the obligation to pay for sick leave that accrued before the closing date.

7. *Morris v. Hoffa*

In *Morris v. Hoffa*, 361 F.3d 177 (3rd Cir. 2004), the Third Circuit ruled that the International Brotherhood of Teamsters' Trusteeship over a local was not an attempt to quash free speech or punish members opposed to the presidency of James Hoffa.

John Morris was elected Secretary Treasurer and Principle Officer of Local 115 of the Teamsters. Elmore Mack and Harrold Fisher were elected Trustees of the local. The Teamsters' Constitution governs the relationship between the International and

subordinate local unions such as Local 115. After receiving numerous complaints about Local 115's leadership, including complaints of violence, threats of violence, intimidation, extortionate gifts, and financial impropriety, Hoffa initiated an investigation of the local. The investigation led Hoffa to the conclusion that it was necessary to impose an emergency trusteeship over Local 115. Accordingly, Hoffa appointed Edward Keyser, Jr., as temporary trustee over Local 115. Subsequently, an internal hearing was conducted and the internal hearing panel found overwhelming evidence to support imposition and continuation of the trusteeship.

Morris, Mack and Fisher challenged the trusteeship before the District Court and ultimately, the Court of Appeals. The Court of Appeals dismissed the plaintiffs' arguments that the internal hearing was not a "fair hearing" as required by Article III of the LMRDA. The Appeals Court also held that the plaintiffs had not established a violation of their free speech rights under Title I of the LMRDA.

8. *Board of Trustees of Trucking Employees of North Jersey Welfare Fund Inc.-Pension Fund v. Kero Leasing Corp.*

In *Board of Trustees of Trucking Employees of North Jersey Welfare Fund Inc.-Pension Fund v. Kero Leasing Corp.,* 377 F.3d 288 (3d Cir. 2004), the Third Circuit ruled that plaintiff's election to accelerate the liability by demanding payment in full caused the statutory period to run, making the plaintiff's lawsuit, seeking withdrawal liability payments from the owner of a company that withdrew from the fund, over six years later untimely.

H. OSHA

1. *George Harms Construction Co., Inc. v. Chao*

In *George Harms Construction Co., Inc. v. Chao*, 371 F.3d 156 (3d Cir. 2004), the Third Circuit held that the Occupational Safety and Health Review Commission (hereinafter "Commission") has jurisdiction to consider relief under Fed.R.Civ.P. 60(b)(1) for a company's late filing of a notice contesting an OSHA citation.

OSHA conducted an inspection of a Harms Construction worksite and found two infractions. Two days later, OSHA sent citations to Harms Construction's post office address by certified mail. Upon receipt, a Harms employee signed the return receipt for the citations. Harms did not file a notice of contest within fifteen working days of receipt; therefore, the citations became final orders. More than a month after Harms Constructions' notice of contest was due, OSHA issued them a delinquency notice. The president of Harms telephoned the OSHA Assistant Area Director and informed him he had no record of the citations but that he wanted an opportunity to contest and possibly settle the matter. The director responded that a Harms employee signed a return receipt for the citations. The president then sent a letter seeking permission to file a late notice to contest.

After a hearing, an administrative law judge granted the Secretary's request to dismiss the employer's late notice of contest. Harms appealed in order to vacate the

Commission's order. Harms Construction argued that it is entitled to the relief of "excusable neglect" under Fed.R.Civ.P. 60(b)(1). The Secretary argued that under Section 10(a) of the Occupational Safety and Health Act, citations that are not timely contested are "not subject to review by any court or agency." Therefore, a court cannot apply the "excusable neglect" analysis of Fed.R.Civ.P. 60(b)(1) because doing so would be a "review" precluded by § 10(a) of the Act.

The Secretary's argument conflicted with *J.I. Hass Co. v. OSHRC*, 648 F.2d 190 (3d Cir. 1981), in which the Third Circuit set aside a commission order dismissing a late notice of contest and directed the commission to consider whether the employer was entitled to relief under Fed.R.Civ.P. 60(b)(1). In the *J.I. Hass* case, the Third Circuit held Fed.R.Civ.P. 60(b)(1) authorized the commission to reconsider its final orders. Although the Secretary contended that "since the notice of contest was not timely filed, the Commission never had jurisdiction in the first place," the Third Circuit held the Commission must have had jurisdiction at some point or "the citations would be final orders of a commission which never had jurisdiction, and thus would have no effect." *Id.* at 160 – 161.

The Third Circuit refused to change the *Hass* ruling and concluded that the case was still binding. Therefore, the court held Section 10(a) of the Occupational Safety and Health Act was not a bar to Commission review, and the Commission "has jurisdiction to entertain a late notice of contest under 'the excusable neglect' standard of Fed.R.Civ.P. 60(b)(1)." *Id.* at 163.

The Third Circuit held that in determining whether a party's actions constitute "excusable neglect," a court is required to look into *Pioneer* factors, named after the case in which they were created: *Pioneer Investment Services v. Brunswick Assoc.*, 507 U.S. 380 (1993), such as whether the employer exhibited good faith, whether the Secretary will suffer prejudice, the effect on the efficiency of judicial administration, as well as the issue of the employer's control. The court found that the employer sufficiently established "excusable neglect" in that the company had otherwise reliable mail handling procedures and the loss of the OSHA citations was "unforeseeable human error beyond [the employer's] reasonable control." *Id.* at 165.

2. *Avon Contractors Inc. v. Secretary of Labor*

In *Avon Contractors Inc. v. Secretary of Labor*, 372 F.3d 171 (3d Cir. 2004), the Third Circuit held that an employee's acts of mail destruction were not within the employer's control and therefore amounted to "excusable neglect" under Fed.R.Civ.P. 60(b)(1).

After an OSHA inspection in early 2002, an OSHA inspector contacted the company's office manager by telephone and advised her of forthcoming citations. Subsequently, OSHA sent the citations to the company via certified mail. Approximately a month later, the company discovered that it was missing mail and suspected its receptionist. Approximately two months after OSHA sent the citations, the company's office manager contacted OSHA to inquire about the status of the citations. The

company then received a demand letter from OSHA and a copy of the citations with a notice of penalty. As a result, the company submitted a late notice of contest.

The Third Circuit started its analysis noting that in *George Harms Construction Co. v. Chao*, 371 F.3d 156, (3d Cir. 2004), the court held that under *Hass*, Section 10(a) was not a bar to Occupational Safety and Health Commission review and the Commission had jurisdiction to entertain a late notice and contest under the "excusable neglect" standard of Fed.R.Civ.P. 60(b)(1). The Court said that it was important to note that in the "excusable neglect" calculus the "control" factor does not necessarily trump all the other factors, such as the length of the delay and its potential impact on judicial proceedings, the reason for the delay and whether the movant acted in good faith.

Several of these factors weighed in favor of a finding for Avon, the Court said. The Secretary did not suffer prejudice; the delay did not negatively impact the judicial proceeding; and Avon's argument was particularly compelling since Avon initiated contact with OSHA with respect to the whereabouts of the citation. Also, the Court stated that Avon proved that the loss of the citations was not within its reasonable control.

The administrative law judge focused on the fact that Avon did not show "how long the receptionist had been destroying or misplacing the mail or when the company first became aware of the problem." *Avon,* 372 F.3d at 175. The Third Circuit said this is not necessarily indicative of whether the loss of the citations was within Avon's reasonable control. The Court noted it would be difficult to show precisely how long the receptionist's deliberate acts had been going on in part because employees who commit destructive or negligent act generally do not broadcast their conduct. The Court felt there was no reason to assume that a company would have knowledge about whether its mail was being destroyed or misplaced. Also, such a company would act against its own self-interest in choosing to ignore the problem. Although the precise date on which Avon discovered it was missing mail remained unclear, the record did demonstrate that Avon discovered that it was missing mail prior to the receptionist's departure in February or March. There was no evidence that it was within Avon's control to prevent the unforeseeable acts of destruction by its employee. Because the factors of good faith, prejudice, efficient judicial administration, and control all weighed in favor of Avon, the Court concluded that Avon sufficiently showed "excusable neglect" and was entitled to relief under Fed.R.Civ.P. 60(b)(1).

I. Other

1. *Mele v. Federal Reserve Bank of New York*

In *Mele v. Federal Reserve Bank of New York*, 359 F.3d 251 (3d Cir. 2004), the U.S. Court of Appeals held the Federal Reserve Act both precludes enforcement against a Federal Reserve Bank of an employment contract that would compromise its statutory authority to "dismiss at pleasure", and prevents a reasonable expectation of continued employment.

Michael Mele, an employee of the Federal Reserve Bank of New York, reported to his supervisor an incident where he was denied access to a particular area in which he previous enjoyed unhampered access. After Mele requested a written copy of the bank's policy regarding access to the area, the supervisor became verbally and physically abusive and escorted Mele from his office. As a result of these events, Mele was suspended with pay and was subsequently terminated for "misconduct."

Mele filed suit against the bank, claiming breach of contract, wrongful termination, breach of implied covenant of good faith and fair dealing and wrongful interference with perspective economic advantage and continued employment. The bank argued that the language of the Federal Reserve Act defers an indefeasible power to terminate employees at will. The relevant section reads:

> Upon the filing of the organization certificate with the comptroller of the currency, a federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power - - . . . Third. To make contracts. . . . Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and to *dismiss at pleasure* such officers or employees . . . . [Emphasis added].

The District Court agreed, dismissing all the claims and explaining that Mele's claims were based on an alleged employment contract with the bank, a conclusion undermined by the language of the Federal Reserve Act and related case law.

Noting that the court has not previously addressed the Federal Reserve Act, the Third Circuit joined the approach uniformly adopted by other courts. The court held the Federal Reserve Act precludes the enforcement of any employment contract against a federal reserve bank that would compromise the bank's statutory power to "dismiss at pleasure." Such a statutory provision prevents the development of any reasonable expectation of continued employment. Thus, any implied contract based upon the bank's personnel policies and practices would exceed the bank's authority and be unenforceable.

2. *Camphill Soltane v. United States Department of Justice*

In *Camphill Soltane v. United States Department of Justice,* 3d Cir., No. 03-1626, 8/26/04, the U.S. Court of Appeals for the Third Circuit held that Annagret Goetze, a houseparent, music instructor, and religious instructor from Germany working at Camphill Soltane, a spiritual community for mentally disabled youth, should not have been denied a nonimmigrant religious worker visa even though her job had both secular and religious responsibilities. The regulations exclude workers who perform wholly secular functions from obtaining the religious worker visa. However, the regulations suggest that a job can qualify for the special visa as long as there is "some religious significance," said the Court.

V. PENNSYLVANIA STATE COURT DEVELOPMENTS

A. Unemployment Compensation

1. *Behers v. Unemployment Compensation Board of Review*

In *Behers v. Unemployment Compensation Board of Review*, 577 Pa. 55, 842 A.2d 359 (2004), the Supreme Court of Pennsylvania held that under *Miceli v. Unemployment Compensation Board of Review*, 519 Pa. 515, 549 A.2d 113 (1988), a court could not look beyond the terms and conditions of employment, as embodied in the collective bargaining agreement, in determining what conduct constituted a disruption of status quo for purposes of determining whether a strike or lockout existed under Pennsylvania Unemployment Compensation Law.

St. Paul's Manor operated a personal care facility for the elderly in Pittsburgh. The United Food and Commercial Workers of America organized and represented the full-time and part-time non-professional employees of St. Paul's. Upon the expiration of the parties' collective bargaining agreement, the parties began negotiating the terms of a new work agreement. To provide for the interim, between the expiration of the original collective bargaining agreement and the execution of a new agreement, the parties entered into an extension agreement. As negotiations for the new collective bargaining agreement deteriorated, St. Paul's submitted a last, best offer, which the union rejected. The union then notified St. Paul's that it would terminate the extension.

Subsequently the union initiated a work stoppage and set up picket lines at St. Paul's facility. Thereafter, twenty-one union members applied individually for unemployment compensation benefits. The Office of Employment Security denied their claims by notices of termination. Each applicant appealed and the referee issued a decision concluding that the work stoppage was a "strike" rather than a "lockout" and, therefore, affirmed the denial of benefits. The referee reasoned that a work stoppage would constitute a lockout, and thereby qualify the employees for unemployment compensation benefits, only if "the employees offered to continue working for a reasonable time under the preexisting terms and conditions of employment so as to avert a work stoppage [and] . . . the employer refused to . . . extend the expiring contract and maintain the status quo." Finding that St. Paul's had not refused to extend the expiring

contract in order to maintain the status quo, the referee that the work stoppage was a strike rather than a lockout.

The union members appealed, and the Board affirmed the referee's decision. Upon further appeal, the Commonwealth Court reversed the Board's affirmation. The court recognized that the court in *Erie Forge and Steel Corporation v. Unemployment Compensation Board of Review (Appeal of Vrotney)*, 163 A.2d 91 (Pa. 1960), required a determination as to which side first refused to continue operations under the status quo after the collective bargaining agreement had technically expired but while negotiations continued. The court further observed that "status quo" is defined as "the last actual, peaceable and lawful, non-contested status which preceded the controversy." The Commonwealth Court concluded that because it had been the past practice of the employer to allow light duty status employees to maintain the previous shift hours, the change in that policy represented a disruption of the status quo for purposes of determining eligibility for unemployment compensation.

The Supreme Court observed that in unemployment compensation cases involving a work stoppage, the party that takes action to effectuate the stoppage bears the burden to prove that the other party in fact first disrupted the status quo. Here, the union notified St. Paul's of its intent to end the extension agreement, initiate the work stoppage and establish pick up lines. Accordingly, the union bore the burden of proving that St. Paul's had disrupted the status quo.

In *Miceli*, the Supreme Court explained that the terms of the collective bargaining agreements governed what factual situation would be deemed the status quo:

> The Commonwealth Court, in affirming the Board's finding that the claimants altered the status quo by refusing overtime work, concluded that the status quo consisted not only of the terms and conditions of employment under the expired agreements, but also of the previous conduct of the parties. Our opinions in Vrotney and Philco limited the status quo to the pre-existing terms and conditions of employment which, as here, are embodied in the expired agreement. The Commonwealth Court's departure from this relatively clear and simple rule was error.

Behers, 842 A.2d at 366-67 (quoting *Miceli*).

The Supreme Court found that this excerpt from the *Miceli* case made resolution of the instant matter relatively straight forward. The Supreme Court observed that a reading of the entire majority opinion in *Miceli* left no doubt as to the holding of that case: "The status quo consists of the previous terms and conditions of employment, as embodied in the original collective bargaining agreement." *Behers*, 842 A.2d at 367. The Commonwealth Court erred in interpreting *Miceli* to permit the consideration of "past practice" beyond the express terms of the parties' collective bargaining agreement in determining what constitutes the status quo.

Under the express language contained in the agreement, St. Paul's was authorized to: 1) set starting and quitting times for its employees; 2) make individual shift assignments; and 3) establish and change schedules. Despite St. Paul's past practice of allowing light duty employees to choose to retain the regular shift hours, the agreement made clear that it was St. Paul's, not the union members, who reserved the authority to make individual shift assignments and to alter employee scheduling. When St. Paul's, in fact, exercised that right, it did not disrupt the status quo as defined by the bargaining agreement. Accordingly, when the union participated in the subsequent work stoppage and set up picket lines, it disrupted the status quo and not St. Paul's. The Supreme Court held, reaffirming *Miceli*, that the proper inquiry in this type of case was whether the status quo has been disrupted, and if so, by whom. That inquiry turned on a determination of what constituted the status quo, a question answered by focusing on the terms of the collective bargaining agreement.

2. *Burchell v. Unemployment Compensation Board of Review*

In *Burchell v. Unemployment Compensation Board of Review*, 848 A.2d 1082 (Pa. Commw. Ct. 2004), the Commonwealth Court ruled that an employee's clear deviation from a reasonable standard of behavior that the employer had a right to expect, downloading pornography onto the employer's computer, amounted to willful misconduct, and thus affirmed a referee's decision to deny unemployment compensation benefits.

Edward Burchell worked as a Systems Programmer II for the University of Pittsburgh. The University maintained a policy that prohibited employees from using University computers for the "creation, design, manufacture, preparation, display, or distribution of any written or graphic obscene material." Burchell was terminated because the University believed that he had downloaded pornographic material from the internet onto the employer's computer system and because the University discovered a foreign CD containing pornographic movies in the computer that Burchell used.

Burchell applied for and was granted unemployment benefits by the Unemployment Compensation Service Center. Upon appeal, a referee found Burchell lacked credibility and that Burchell downloaded pornographic material onto the University's computer and left a pornographic CD in the computer, all of which amounted to willful misconduct. Burchell appealed the referee's denial of benefits to the Board, which affirmed. He then appealed that decision to the Commonwealth Court.

Burchell claimed that the Board erred in finding that he committed willful misconduct because the University presented no evidence establishing that he downloaded or viewed pornographic material at work. He also argued that such a policy was unreasonable as applied to conduct occurring off the employer's premises and thus could not support a finding of willful misconduct.

The Commonwealth Court reviewed the Pennsylvania Unemployment Compensation law, noting that the term "willful misconduct" is not defined. However, the Supreme Court of Pennsylvania has held that it includes actions constituting a

deliberate violation of the employer's rules or a disregard for the standard of behavior which the employer has a right to expect. To prove willful misconduct for a violation of a work rule, the employer must establish the existence of the rule, its reasonableness, and its violation.

The evidence established that the University had a rule that prohibited the display of pornographic material on the University's computer and that Burchell knew or should have known about the rule. The Court concluded that Burchell indeed downloaded pornographic material because such files and a CD were found in the computer that Burchell used. This conduct was in violation of the University's policy and in disregard of the standard of behavior that an employer has a right to expect. The Court inferred that if the files were downloaded and the CD was in the computer, then Burchell displayed the material. The Court affirmed the Board's denial of benefits.

B. Employment Discrimination

1. *Buynak v. Pennsylvania Department of Transportation*

In *Buynak v. Pennsylvania Department of Transportation*, 833 A.2d 1159 (Pa. Commnw. Ct. 2003), the Pennsylvania Commonwealth Court stated that a number of current and former employees at the Pennsylvania Department of Transportation who claimed they were turned down for promotions because of their age failed to meet the criteria for bringing a class action.

Joseph Buynak was employed as a Transportation Construction Inspector at the Pennsylvania Department of Transportation. He experienced health problems in May 1998 that forced him to miss work.

In early 1999, Buynak filed a complaint with the Pennsylvania Human Relations Commission (hereinafter "PHRC"), seeking to proceed on behalf of a class of present and former employees. He alleged that upon returning to work he was denied the same reasonable accommodations he had been afforded following a previous health problem. He alleged he was forced to take an office position temporarily while a younger employee took over his construction inspection responsibilities. In addition, Buynak also claimed that he was pressured to take disability retirement, subjected to harassment and had been denied promotions to supervisory positions on several occasions.

Because the PHRC did not act on his complaint within a year, Buynak commenced the class action in the Court of Common Pleas. Concluding that Buynak had satisfied the prerequisites for class action, the court certified a statewide class. The Department contended that the trial court failed to consider the requirements for class actions under Pa.R.Civ.P. 1702 and abused its discretion in applying them. Specifically, the Department contended that the trial court failed to properly consider the requirements of commonality, typicality and adequacy of class counsel.

The Commonwealth Court of Pennsylvania held that Buynak failed to meet the commonality requirement because he failed to present evidence to prove that the alleged age discrimination was a Department-wide policy practiced against each member of the

class so that proof as to one claim would be proof as to all. Rather, the record revealed that numerous individual questions of law and fact predominated over the common claim of age discrimination. The evidence proffered in support of certification showed that each employee's position, work locations, terms and conditions and circumstances surrounding promotion were not the same, and that the person making the employment decisions in each of these instances was not the same.

The Commonwealth Court pointed out that "no testimony was offered from any employee outside of Clearfield County, and no evidence was presented from which the claims of the Clearfield County witnesses could be generalized ..." to employees in other counties. *Buynak*, 833 A.2d at 1164.

Regarding typicality, Buynak was not sufficiently aligned with other class members because of the circumstances surrounding his claim. His "blended" claim of age discrimination, harassment and disability discrimination was not typical of a class of all past and present employees of the Department who are 40 years of age or older who suffered one or more adverse employment decisions based on their age. Buynak's pursuit of his own interests would not necessarily advance those of the proposed class members.

Regarding the adequacy of counsel requirement, because Buynak's counsel admitted that he needed additional assistance without introducing any details about the counsel providing assistance, a showing of adequate class counsel was not made.

2. *Velocity Express v. Pennsylvania Human Relations Commission*

In *Velocity Express v. Pennsylvania Human Relations Commission*, 853 A.2d 1182 (Pa. Commw. Ct. 2004), the Commonwealth Court held that the PHRA's definition of "independent contractor" did not encompass independent contractors other than those specifically enumerated in the PHRA's definition of "independent contractor."

David Kardos was employed as an operations manager for Velocity Express. Velocity entered into a written contract with Julie Eileen Sheriff, whereby Sheriff would provide delivery services for Velocity as an independent contractor. Allegedly, Kardos sexually harassed Sheriff. As a result, Sheriff's employment with Velocity was terminated. Thereafter, Sheriff filed discrimination charges with the PHRC against Velocity and Kardos. In response, Velocity and Kardos each filed a motion to dismiss in lieu of an answer. They both argued that, because Sheriff was not an employee or an "independent contractor" as defined in the PHRA, Sheriff was not entitled to any protection or remedy under the PHRA. The PHRC motion's commissioner issued an interlocutory order denying the motions to dismiss. Velocity and Kardos filed an emergency motion to amend the order to permit appeal and the motion was granted.

The Commonwealth Court began its analysis by examining the definition of "independent contractor" in Section 4 of the PHRA. This section states:

> The term 'independent contractor' includes any person to the provisions governing any of the professions and occupations regulated by state

> licensing laws enforced by the Borough of Professional and Occupational Affairs in the Department of State, or is included in the Fair Housing Act.

The PHRC motion's commissioner interpreted the word "includes" to be one of enlargement to encompass independent contractors "other than" those specified in the PHRA's definition of the term. The Commonwealth Court disagreed.

The Court stated that interpreting the word "includes" as one of limitation, rather than enlargement, best fulfilled the general assembly's intent in enacting the PHRA. Citing *McClellan v. Health Maintenance Organization of Pennsylvania,* 546 Pa. 463 (Pa. 1996), the Court stated, "It is widely accepted that general expressions, such as 'including, but not limited to' that precede a specific list of included items should not be construed in their widest context but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples." In the PHRA's definition of "independent contractor," "includes" preceded a specific list, i.e., independent contractors in professions or occupations regulated by the Borough of Professional and Occupational Affairs or those included in the Fair Housing Act.

Because delivery service was not a licensed occupation or profession, it was not of the same general kind or class of those professions or occupations covered by the PHRA's definition of "independent contractor." Similarly, delivery services providers were not of the same general kind or class as those whose professions or occupations were included in the Fair Housing Act. Therefore, Commonwealth Court held that the PHRC motion's commissioner erred in concluding that independent contractors other than those specifically enumerated in Section 4 were covered by the PHRA.

VI. SIGNIFICANT STATUTORY, REGULATORY, AND ADMINISTRATIVE DEVELOPMENTS

A. *Department of Labor FLSA Overtime "White Collar" Exemption Regulations*

In an attempt to clarify and update the half-century old federal regulations defining the Fair Labor Standard Act's "white collar" exemptions, on April 20, 2004, the United States Department of Labor announced and released the final version of the *Fair Pay Overtime Security for the 21st Century Workforce* revised regulations. The final rules modify the definitions of bona fide exempt employees under the executive, administrative, professional, outside sales, and computer employee exemptions (29 C.F.R. Sec. 541). The new regulations took effect on August 23, 2004.

Even as commentary generated by the new rules rolls in, employers and employees should determine the extent of the impact of the final rules on their current compensation practices. At a minimum, employers should analyze the new rules, conduct a compliance review of existing employee classification and pay practices, revise affected policies and practices in light of the new rules, and implement the changes throughout the

workforce, and employees should review the impact of the changes on their compensation reports.

The DOL has revised the tests for determining whether white collar employees are exempt from FLSA minimum wage and overtime requirements. The salary level for exempt employees has been raised to $455. The salary basis test has been rewritten to define situations when an exempt employee's salary status could be lost. The duties tests have been streamlined. In addition, the test for the outside sales exemption was modified to remove the percentage for nonexempt work activity, and the computer employee exemption was given its own section in the regulations.

1. History of the DOL's Overtime Exemption Rules

The white collar exemptions are incorporated into the FLSA, which was enacted in 1938. Over the years, page upon page of federal regulations had been issued to define who would be subject to one of the "white collar" exemptions. The resulting maze of complex and lengthy regulations had remained essentially unchanged since 1949, confounding employers, employees, and the Department of Labor investigators and leading to innumerable court cases.

Many areas of the old white collar regulations were confusing and remarkably outdated. For example, the salary level tests used to determine whether an employee could qualify as a *bona fide* executive, administrative, or professional employee remained at levels barely beyond the federal minimum hourly wage. Like the outdated salary component of the test, the duties tests had not kept pace with the modernization of the workplace. For example, the bright-line tests for distinguishing between production and administrative employees were conceived to address industrial era production line jobs, not service and technology based jobs.

When it announced the proposed revisions, the DOL encouraged the public to submit written comments during a 90-day comment period, which ended on June 30, 2003. The public took the DOL's request seriously and inundated the Department with thousands of responses.

In the months that followed publication of the proposed regulations, the DOL considered the public comments and revised the proposed regulations. At the conclusion of what proved to be a slow and difficult process, the final rules were announced. Significant changes had been made to the final draft, indicating the DOL had weighed carefully the public's reaction and had released leaner, more flexible guidelines intended more closely to approximate the needs and concerns of 21st century employers and employees alike.

2. Summary of the "FairPay" Rules

The FairPay rules do not alter the most basic requirements of the white collar exemptions, but, instead, realign the application of each basic requirement. The final rules redefine the salary level test, the salary basis test, and the duties tests for each exemption. Under the revised salary level test, exempt employees must receive at least

$455 per week. The revised salary basis test clarifies the deductions that can be made from an employee's salary without loss of exempt status. The duties tests were revised to clarify whether duties truly are executive, administrative, or professional in nature.

3. Scope of the Exemptions

The new regulations clearly state that the exemptions do not apply to manual laborers or other "blue collar" workers. Non-management production line employees and non-management employees in maintenance, construction and similar occupations, such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers, are non-exempt under the current regulations and will remain so under the revised regulations.

The new regulations unequivocally state that the exemptions do not apply to "first responders," i.e., police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes and similar work. These clarifying revisions regarding "first responders" are the result of considerable litigation over the exemption status of such employees.

4. The Salary Level Test

Under the prior regulations, an employee earning only $8,060 per year (i.e., at least $155 per week under the "long" test) may be classified as "executive" or "administrative" and denied overtime pay. By comparison, a minimum wage employee earns about $10, 700 per year. The final rule nearly triples the current $155 per week minimum salary level required for exempt status to $455 per week, a $300 per week increase, or $23,660 per year.

The final rule also adds a "highly compensated employee" test. Under this test, employees with "total compensation" of at least $100,000 per year will be considered exempt if, in addition, they: (a) receive at least $455.00 per week; (b) perform "office or non-manual work;" and (c) "customarily and regularly perform" any one or more of the exempt duties of an executive, administrative, or professional employee on a regular and recurring basis. The "highly compensated" test in the final rule includes a $35,000 increase over the $65,000 "super salary test" contained in the proposed revisions.

5. The Salary Basis Test

The salary basis test has been revised to provide much needed guidance regarding the type of deductions that will convert an exempt salaried worker into an overtime eligible employee. Generally, an employee's salary basis will be defeated if deductions from his or her predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses. In other words, if an exempt employee is ready, willing and able to work, deductions may not be made for time when work is not available (if any work was performed in that work week). The final rules

contain seven circumstances for permissible deductions to the salary of otherwise exempt employees:

1. Absence from work for one or more full days for personal reasons, other than sickness or disability;

2. Absence from work for one or more full days due to sickness or disability if the deductions are made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences;

3. Offset for any amounts received as payment for jury fees, witness fees, or military pay;

4. Penalties imposed in good faith for violating safety rules of "major significance;"

5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules;

6. Proportionate rate of full salary for time actually worked in the first and last weeks of employment; and,

7. Unpaid leave taken pursuant to the Family and Medical Leave Act.

The final rules also provide a "safe harbor" that will preserve an employee's exempt status in the event impermissible deductions are made. An exempt employee's salary basis will not be defeated if the employer: (a) has a "clearly communicated" policy prohibiting improper deductions, including a complaint mechanism; (b) reimburses employees for any improper deductions; and (c) makes a good faith commitment to comply in the future. This safe harbor is not available, however, if the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. This test replaces the so-called "window of correction" for improper deductions, which was the subject of conflicting court rulings.

6. The Duties Tests

The complex and outdated duties tests under the existing regulations have generated such confusion that employers and employment lawyers, as well as DOL investigators, had difficulty determining whether an employee qualified for an exemption. While the outdated regulations discuss jobs that no longer commonly exist, such as key punch operators, legmen, straw bosses and gang leaders, the new revisions focus on jobs in today's workplace.

7. Revised Duties Test: Executive Employee Exemption

An exempt executive employee's primary duty must be the management of the enterprise or of a customarily recognized department or subdivision. He or she must customarily and regularly direct the work of two or more other employees *and* have the authority to hire or fire other employees (or his or her suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees must be given particular weight). The final rule retains the "long" duties test requirement that an exempt executive must have authority to "hire or fire" other employees (or must make recommendations as to the "hiring, firing, advancement, promotion or any other change of status" which are "given particular weight"). To clarify the requisite degree of managerial influence, the final rule provides clarification of the term "particular weight." For example, if suggestions are frequently followed, this may suggest they are given particular weight.

8. Administrative Employee Exemption

An employee will meet the revised duties test for the administrative exemption if his or her primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and, the primary duty includes the exercise of "discretion and independent judgment" with respect to matters of significance. The final rule provides a more detailed description of the types of duties that will satisfy this requirement than is present in the old regulations (e.g., Section 541.202, "authority to formulate, affect, interpret, or implement management policies or operating practices … carries out major assignments in conducting operations … performs work that affects business operations to a substantial degree … authority to commit employer in matters that have significant financial impact … waive or deviate from established policies and procedure without prior approval ….").

The final rules identify numerous positions that normally meet the basic requirements for the administrative exemption, subject to the caution that job titles are not dispositive and that actual job duties dictate the result. The illustrative list includes insurance claims adjusters, financial services employees, and human resources professionals, as well as employees performing work in tax, auditing, marketing, quality control, and other fields. The fields of work and types of duties described as potentially exempt help to clarify the applicability of the exemption to positions that previously generated confusion for employers, employees, DOL investigators, and the courts.

9. Professional Employee Exemption

An employee is an exempt learned professional if his or her primary duty involves performance of work requiring advanced knowledge in a field of science or learning, which is customarily acquired by a prolonged course of specialized intellectual instruction. The rule defines "work requiring advance knowledge" as "work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment."

10. The Outside Sales Exemption

The outside sales exemption has been clarified in the final rules, eliminating the 20% test in the prior regulations, which forced employers to compare the work and time of outside sales persons to that of the employer's nonexempt employees. The final rules do not add an exemption for inside sales employees.

11. The Computer Employee Exemption

Computer employees are exempt under the final rules essentially as in the existing regulations. They now are covered in their own section in the regulations.

12. Side-by-Side Comparisons of the Former and Final DOL Overtime Regulations

(a) Minimum Salary Level for Exemption

Former Regulation	Final Regulation
$155 per week $8,060 annual	$455 per week $23,660 annual

Summary of Salary Levels and Duties Tests

Annual Earnings	Former Regulation	Final Regulation
Less than $8,060	Guaranteed Overtime	Guaranteed Overtime
$8,060 to $13,000	Long Duties Test	Guaranteed Overtime
$13,000 to $22,100	Short Duties Test for Higher Salaried Employees	Guaranteed Overtime
$22,100 to $23,660	Short Duties Test for Higher Salaried Employees	Guaranteed Overtime
$23,660 to $65,000	Short Duties Test for Higher Salaried Employees	Standard Duties Test
$65,000 to $100,000	Short Duties Test for Higher Salaried Employees	Standard Duties Test
$100,000 or more	Short Duties Test for Higher Salaried Employees	Highly Compensated Test

(b) Executive Employees Duties Test

Former Regulation (Short Test)	Final Regulation
Whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and Who customarily and regularly directs the work of two or more other employees.	Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; Who customarily and regularly directs the work of two or more other employees; and Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees will be given particular weight.

(c) Administrative Employees Duties Test

Former Regulation (Short Test)	Final Regulation
Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and Which includes work requiring the exercise of discretion and independent judgment.	Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(d) Professional Employees Duties Test

Former Regulation (Short Test)	Final Regulation
Whose primary duty consists of the performance	Whose primary duty is the performance of work

of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; and Which includes work requiring the consistent exercise of discretion and judgment; *or* Whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; *or* Whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

13. Compliance with State Law

Pennsylvania employers must continue to comply with the Pennsylvania Minimum Wage Act, 43 P.S. §333.101 *et. seq*. The Pennsylvania Minimum Wage Act contains exemptions from both the minimum wage and overtime provisions from the act for employment in "a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic, administrative personnel or teacher or elementary or secondary schools) or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary…" 43 P.S. §333.105(5). The relevant regulations are contained at 34 Pa. Code §§231.81 – 231.85, and remain unchanged, notwithstanding the changes in the federal counterpart.

B. *COBRA Notice Regulations*

On May 26, 2004, the Employee Benefits Security Administration (formerly the Pension and Welfare Benefits Administration) of the U.S. Department of Labor issued final regulations regarding the timing and content requirements of various notices that must be furnished by employers, plan administrators, workers and their families in connection with group health continuation coverage - commonly referred to as COBRA coverage.

The final regulations were issued in four parts:

- General COBRA Notice;
- Employer Notice of Qualifying Event;
- Qualified Beneficiary Notices; and

- Plan Administrator Notice Obligations.

Employers that sponsor group health plans subject to COBRA's continuation coverage requirements will need to review and update their current COBRA notice forms and summary plan descriptions, as well as review existing procedures to determine where changes are needed.

The final regulations are effective for any obligation to provide a COBRA notice occurring on and after the first day of the plan year beginning after November 26, 2004 (January 1, 2005 for employers with calendar-year group health plans). The plan year is determined from the group health plan's governing documents. If the plan year is not specified, the annual period for determining deductibles and limits will generally apply.

1. Fundamentals of COBRA Requirements

COBRA generally requires group health plans to give covered employees and certain members of their families ("Qualified Beneficiaries") an opportunity to continue their group health coverage for up to 18 months (36 months in certain situations) upon the occurrence of certain "Qualifying Events" which would otherwise cause coverage to end. Qualified Beneficiaries who elect this continuation coverage may be required to pay for the cost of such coverage, up to a maximum of 102% of the cost to the plan.

Qualifying Events that cause Qualified Beneficiaries to lose group health coverage and therefore would trigger the right to elect continuation coverage under COBRA include:

- termination of employment (except in the case of gross misconduct) or reduction in hours worked;
- death of a covered employee;
- divorce or legal separation from a spouse;
- loss of status as a dependent under a group health plan; and
- the covered employee's entitlement to Medicare.

COBRA requires certain notices be provided at specific times in order to inform covered employees and Qualified Beneficiaries of the rights and obligations they have under COBRA, as well as the rights and obligations of employers and plan administrators. These notices include:

- A general notice given to employees and their spouses when they become covered by a plan;
- A notice of the occurrence of a Qualifying Event to be furnished in some cases by plan administrators and in other cases by employees or beneficiaries; and

- An election notice given by plans to individuals who become eligible to elect continuation coverage under COBRA.

2. Effect of Regulations on General COBRA Notice

The required content of the general notice is essentially unchanged by the final regulations -- it should contain the basic information about COBRA that employees and their families need to know to protect their rights before a Qualifying Event occurs. The final regulations contain a model general notice that will be deemed to be in compliance with the content requirements of the regulations.

The final regulations make two significant changes regarding distribution of the general notice:

- The notice must generally be provided to a covered employee and a covered spouse no later than 90 days after coverage begins. (NOTE: This is the same period during which a summary plan description (SPD) is generally required to be provided to new enrollees).

- The general notice may be included in the SPD, provided the SPD is furnished to the covered employee and any covered spouse within the 90-day time limit.

Plans are required to furnish the general notice to both the covered employee and covered spouse when coverage begins. The general notice will be considered timely furnished if distributed (either as a separate document or within the plan's summary plan description) by first class mail (as well as certified or express mail) no later than the end of the required 90-day time period. When the covered employee and spouse are both enrolled within the same 90-day time period, a single notice may be addressed to both the employee and spouse, if (based on current plan records) they reside at the same location. A spouse who is enrolled more than 90 days after the employee, or who resides at a different address, must be furnished a separate general notice. There is no requirement to provide covered dependent children with a separate general notice when coverage for the child begins.

If an obligation to furnish a COBRA qualifying event notice to an employee or spouse occurs within 90 days from when coverage begins, plan administrators may dispense with furnishing a general COBRA notice, and instead furnish only a COBRA qualifying event notice within the normal notice time limits applicable to Qualifying Events. Note, however, that the plan administrator would still be required to provide an SPD (which must include a description of COBRA rights) to the participant within 90 days of enrollment.

3. Notice of Qualifying Event: Employers and Plan Administrators

In general, the time frames within which (i) employers must notify plan administrators of Qualifying Events, and (ii) plan administrators must notify Qualified Beneficiaries of Qualifying Events remain unchanged, but have been clarified as follows:

- Employers have 30 days to notify plan administrators of a covered employee's termination of employment, reduction of hours, or death that is a Qualifying Event.

- Plan administrators have 14 days following receipt of the notice of the Qualifying Event from the employer to notify Qualified Beneficiaries.

- Where the employer is also the plan administrator, and the Qualifying Event is a termination of employment, reduction of hours, or death, the notice must be provided to Qualified Beneficiaries no later than 44 days after the Qualifying Event.

- If the Qualifying Event requires a Qualified Beneficiary to provide notice to the Plan Administrator (such as divorce or legal separation, or a loss of dependent status), the 14-day notice period applies from the date the notice of the Qualifying Event is received from the Qualified Beneficiary. The final regulations clarify that the combined 44-day notice period (30 days plus 14 days) described above does not apply to these types of Qualifying Events.

Many employers are increasingly relying on third party service providers to assist with certain aspects of COBRA administration. In most cases third parties do not assume "plan administrator" functions and act only as "nondiscretionary" service providers. In that case, the use of a service provider will not change the maximum time periods for providing COBRA notices.

Plans which measure the 18 or 36 month continuation coverage period starting on the date that coverage is lost should use that date, rather than the date of the Qualifying Event, to determine when to provide the notice. For example, some health plans do not terminate coverage until the end of the month in which the employee terminates employment, and they measure the maximum COBRA period from the date coverage terminates. This practice is permitted by COBRA, however, it should be documented in the group health plan and SPD and conform to applicable insurance policies.

4. Notice of Qualifying Event: Qualified Beneficiaries

Under COBRA, Qualified Beneficiaries must timely notify plan administrators of certain Qualifying Events -- divorce or legal separation and loss of dependent status under the plan. They must also provide a timely notice of a social security disability

determination in order to extend continuation coverage (up to an additional 11 months beyond the original 18-month coverage period, making the total continuation coverage period 29 months) due to a qualifying disability.

The final regulations provide that where Qualified Beneficiaries are required to provide notice to the plan administrator of a Qualifying Event (as described above) or notice of a social security disability determination, plans must establish reasonable procedures for providing the notice. The procedures will be deemed reasonable under the regulations if they:

- are included in the plan's SPD; and

- specify (i) who has been designated to receive the notice, (ii) the means for giving the notice, and (iii) the required content of the notice in order for the plan to provide continuation coverage rights.

These procedures may require Qualified Beneficiaries to provide the notice in writing and include other minimum necessary information. Use of a specific notice form may be required if the form is easily available without cost. A plan may not reject a notice that meets certain minimum content requirements, unless the plan requests and the Qualified Beneficiary subsequently fails to provide necessary supplemental information.

Note that in the absence of established reasonable procedures, a default rule permits a Qualified Beneficiary (or representative) to satisfy the notice requirement by providing oral or written notices to any person customarily handling employee benefit matters, and if the benefits are administered by a regulated insurance organization, notice to any unit of the insurance organization that handles benefit claims. Notice to any officer of that insurance organization is also acceptable under the default rule. Adopting and maintaining reasonable procedures is important to control risks, particularly as employers rely on insurance companies and their insurance brokers to assist with COBRA administration of their medical plans. These procedures also will assist with implementing the new "notice of unavailability of coverage," discussed in the "Additional Notices" section below.

Qualified Beneficiaries must be permitted to provide notice of a Qualifying Event to the plan administrator within a minimum period that ends no earlier than 60 days after the latest of:

- The date of the Qualifying Event;

- The date the Qualified Beneficiary would lose coverage due to the Qualifying Event (even if the maximum COBRA continuation period runs from the date of the Qualifying Event);

- The date the Qualified Beneficiary is provided with a general COBRA Notice of both the responsibility to provide the notice

and the plan's procedures for providing such notice to the plan administrator; and

- The date of the disability determination by the Social Security Administration.

Plans may permit longer notice time periods for Qualified Beneficiaries, but any longer time period should be included in the plan's governing documents and coordinated with the insurer, if applicable.

5. Notice for Election of COBRA Continuation

The final regulations contain extensive provisions describing the required content for a COBRA election notice. The election notice should contain all of the information individuals need to decide whether to elect COBRA coverage. For example, the election notice must describe:

- the particular Qualifying Event and the name or status of Qualified Beneficiaries eligible to elect COBRA coverage;
- the date coverage will terminate (or has terminated) in the absence of an election;
- premium payment requirements, including the due dates for payments and the consequences of non-payment;
- the procedures for electing COBRA and the consequences of failing to elect COBRA;
- how COBRA coverage could be extended due to disability or a second qualifying event; and
- the name of the plan and contact information for the person responsible for COBRA administration.

The final regulations include both a model election notice and a model election form that will be deemed to comply with the content requirements of the regulation. The model notices are generic forms that may not be appropriate or desirable for use with all plans. Employers and their advisors should carefully review both the content of their plan documents and that of the model forms before implementing use of the model forms.

6. Additional Required Notices

The final regulations add the following required notices:

- **Notice of Unavailability of Coverage.** If the plan administrator receives notice of a Qualifying Event, second Qualifying Event, or social security disability determination

from any individual and determines that the individual is not entitled to continuation coverage, the plan administrator must, within 14 days from receipt of the notice, provide the individual with a written notice of unavailability, explaining the reasons why the individual is not entitled to elect continuation coverage. For example, if the plan administrator denies COBRA coverage after receiving a late notice of divorce, the plan administrator must provide the individual with a written notice of unavailability.

- **Notice of Early Termination of COBRA Coverage.** If a Qualified Beneficiary's COBRA coverage is terminated earlier than the maximum time period for which COBRA must be made available (e.g., the employee fails to timely pay the COBRA monthly cost), the plan must notify each affected Qualified Beneficiary in writing of the early termination date, the reason for the termination, and the availability of any alternative group or individual coverage under the plan, such as conversion rights. The early termination notice must be provided "as soon as reasonably practicable."

C. *Department of Labor's Final Rule Requiring Posting of Beck Rights*

The Department of Labor has issued final regulations requiring federal contractors to post notices detailing employees' rights under the U.S. Supreme Court's 1988 decision in *Communication Workers v. Beck*. In brief, *Beck* allows employees paying union dues to "opt out" of paying the portion of dues used towards political contributions or other activity not related to administration of the collective bargaining agreement. The rule, which went into effect on April 28, 2004, requires non-exempt contractors to post notices where workplace postings are located and in other "conspicuous places." The rule also specifies the language to be used on the notice. Contractors also must include a provision requiring compliance with the *Beck* posting obligations in all covered contracts, subcontracts, and purchase orders.

The rule is enforced by the Office of Federal Contractor Compliance Programs (OFCCP) and violations of the rule may result in sanctions, including the suspension or termination of a current contract and debarment from future contracts. Contractor facilities where a union has not been formally recognized or certified -- or are located in a state where union security agreements cannot be enforced ("right to work" states) **--** are not covered by the rule.

D. *The Fair and Accurate Credit Transactions Act*

On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act, the "FACT Act," providing some relief to employers using third parties to conduct workplace investigations. Under the FACT Act, an employer who uses

a third party to conduct a workplace investigation need no longer follow the consent and disclosure requirements of the Fair Credit Reporting Act if the investigation involves suspected misconduct, a violation of law or regulations, or a violation of any pre-existing written policies of the employer. In effect, this means the element of surprise again may be useful as an effective technique in conducting a workplace investigation. The FTC has provided notice of rulemaking that would make March 31, 2004 the effective date for these changes.

Since April, 1999, the Federal Trade Commission, which oversees the implementation of the FCRA, had taken the position that the FCRA consent and disclosure requirements were triggered when a third party, such as a law firm or outside human resources consultant regularly assisting employers with investigations, undertakes a workplace sexual harassment investigation on behalf of an employer. For example, under the FTC's interpretation, an employer was required to obtain the consent of an employee under investigation for alleged harassment *prior to* the third party conducting the investigation. Under those circumstances, the employer also was required to disclose to the employee the nature and scope of the investigation. An equally troubling aspect of the FTC interpretation required the employer provide the employee being investigated with a copy of the resulting report at the "pre-adverse action" stage of the proceeding, with the names of sources removed from the report.

The FACT Act requires that, to be excluded from the disclosure requirement at the pre-adverse action stage, communication of the report resulting from the third party investigation must be limited to the employer or an agent of the employer. As a practical matter, the report should not be disclosed to the complaining party; doing so may bring it within the scope of an investigative "consumer report" otherwise triggering the disclosure requirements.

In the event "adverse action" is taken against the employee based on the results of the investigation, the FACT Act still requires the employer to provide the employee a summary of the report. "Adverse action" has been broadly defined as *any* employment decision that adversely affects an employee. Employers using outside consultants to conduct internal investigations must therefore remember to provide this summary whenever an adverse action is taken, even if a written warning results. However, the summary does *not* have to identify the individuals interviewed or other sources of information.

In a separate provision, the FACT Act requires employers requesting medical information about a "consumer" applicant or employee to obtain a *specific* written consent describing in "clear and conspicuous language" the use for which the information will be furnished. The medical-related information sought by the employer must be, in effect, job-related. For example, a consumer reporting agency would be prohibited from disclosing any medical-related information inadvertently disclosed while conducting a background investigation, unless the employer had a *specific* consent form from an applicant or employee.

In this regard, the legislation adds a further layer of privacy, by specifically reminding employers that medical information should not be disclosed, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by law. This does not necessarily mean that drug testing or medical examination results received about applicants are subject to FCRA.

Reports prepared by health care providers and laboratories are generally not considered consumer reports because such communications fall within the "transactions and experiences" exception, as, for example, a drug counselor reporting the results of a test done by a laboratory is not creating a "consumer report." In contrast, an entity that retains copies of drug tests and regularly sells this information to a third party for a fee is considered a "consumer reporting agency" preparing a "consumer report."

In any event, employers will need to be cognizant of the authorization requirements of the Health Insurance Portability and Accountability Act before obtaining a copy of such reports. HIPAA's rules require covered health care providers who prepare these reports to obtain specific authorization when an employer requests a copy of employee medical information.

Certain entities subject to the HIPAA privacy regulations may have further compliance obligations. For example, a hospital that is a covered health care provider under HIPAA may conduct a workplace investigation with respect to an employee that involves certain health information of some of the hospital's patients. Although the HIPAA privacy regulations may permit disclosures of this kind as part of the hospital's health care operations (a defined term under HIPAA) without the patient's authorization, the hospital should review the privacy regulations and applicable state law to determine their obligations in this regard.

E. Sarbanes Oxley*: Welch v. Cardinal Bankshares Corp.*

In *Welch v. Cardinal Bankshares Corp*., DOL ALJ, No. 2003-SOX-15, 1/28/04, reportedly the first successful whistleblower claim under the Corporate and Criminal Fraud Accountability Act, or Sarbanes-Oxley Act, an administrative law judge has ruled that a former bank chief financial officer was unlawfully terminated after protesting suspected insider trading and other financial practices. The law judge ordered the former CFO be reinstated with back pay and interest, reimbursed for litigation costs and expenses, including expert witness fees and reasonable attorneys' fees, and that "all references to the protected activity and the discipline emanating therefrom" be purged from his personnel file.

The employer's stated reasons for terminating the CFO's employment did "not ring true," said administrative law judge Stephen J. Purcell. The petitioner "has carried his burden of proving by a preponderance of the evidence that his conduct was a contributing factor in his suspension and subsequent discharge," the ALJ concluded.

The case originated when the former CFO expressed concerns internally about certain stock transactions that he believed had the appearance of impropriety and when he

refused to certify a company financial statement in accord with the requirements of the then new SOX Act. Following criticism of the CFO's job performance and his deteriorating relationship with the company by the president, his employment was terminated.

Following the administrative procedure set out by the SOX Act regulations, the CFO's complaint was first made and subsequently denied by the Occupational Safety and Health Administration. The CFO then appealed the denial to the DOL Office of Administrative Law Judges. At the hearing, the company's outside auditor testified that the questioned stock trades did not constitute insider trading, and there was no basis for the CFO to question the internal controls over the accuracy of the financial statements. The company also argued that even if the CFO's allegations were protected activities under the Act, they did not lead to his termination.

Examining the timing of the events, the ALJ considered the proximity of the protected activity and the termination. In August 2002, the CFO had refused to sign off on the quarterly financial statement and had notified a state bank examiner about his concerns. In mid-August, he advised the company president he would not certify the financial statement. Six weeks later, his employment was terminated. According to the ALJ, the "proximity in time between [the CFO's] protected activity and the adverse action is itself sufficient to create an inference of unlawful discrimination."

Additionally, the ALJ found the company's stated reasons for the termination were pretextual. Specifically, the ALJ pointed to the company's "arbitrary" refusal to permit the CFO to have his attorney attend a meeting with the company attorney and outside auditor where the CFO would be questioned about his concerns. Also, the company conceded that the CFO was not terminated for poor performance.

F. *Weingarten* Rights for Non-Union Employees: *IBM Corp.*

In *IBM Corp*., 341 NLRB No. 148 (2004), the National Labor Relations Board has ruled that nonunion employees do not have the right to have a representative present during an interview that might reasonably lead to disciplinary action. In a 3-2 decision, the Board found that the so-called *Weingarten* rights of unionized employees *do not apply* to employees not represented by a union. The *IBM Corp*. decision overrules the Labor Board's 2000 decision in *Epilepsy Foundation of Northeast Ohio* 331 NLRB 676, which extended *Weingarten* rights to nonunionized employees. The *IBM Corp.* ruling marks the fourth time in the past 23 years the Board has changed its position on this issue.

In 1975, the United States Supreme Court upheld a decision by the Board that unionized employees have a right, protected by Section 7 of the National Labor Relations Act, to insist upon union representation during an investigatory interview conducted by their employer, provided the employee "reasonably believes" the interview "might result in disciplinary action." *NLRB v. J. Weingarten Inc*., 420 U.S. 251 (1975). The Supreme Court explained that this right arises from the Act's "guarantee of the right of employees to act in concert for mutual aid and protection." The right to representation is limited to

situations in which an employee specifically requests representation. An employer is not required to advise the employee of this right in advance, and this right is triggered only in the case of investigatory meetings which may result in disciplinary action and not to meetings when, for example, the employer communicates a decision regarding a disciplinary matter.

Since the Supreme Court's 1975 decision, the Board has changed directions on whether *Weingarten* rights apply to employees who are not unionized. In 1982, the Board decided *Materials Research Corporation* 262 NLRB 1010, and held that *Weingarten* rights applied to nonunion employees. Two years later, in *Sears Roebuck & Co*. 274 NLRB 230, the Board reversed its position and held nonunion employees were not entitled to *Weingarten* rights. In its *Epilepsy Foundation* decision in 2000, the Labor Board concluded that its earlier rulings were inconsistent with the Supreme Court's rationale in *Weingarten* and reasoned that *Weingarten* rights should be granted to all employees regardless of whether they are represented by a union.

IBM Corp. involved three nonunion employees who alleged they requested and were denied co-worker representation during investigatory interviews which stemmed from a complaint regarding harassment in the workplace. The employees were subsequently terminated from employment. The employees filed unfair labor practice charges against IBM alleging that the denial of representation during the investigatory interviews was unlawful. The administrative law judge who heard their case ruled that IBM violated the Act in denying the requested coworker representation.

In reversing *Epilepsy Foundation*, the Board found the employees did not have a right to have a co-worker present at an investigatory interview that might lead to discipline. The Board's decision largely was based on policy issues underlying an employer's need to conduct confidential and discreet investigatory interviews in the workplace. The Board noted: "some employers, faced with security concerns that are an out-growth of the troubled times in which we live, may seek to question employees on a private basis." The Board specifically recognized that employers must be able to conduct fact finding interviews in "sensitive situations" and that the confidentiality of such interviews cannot be compromised. The Board concluded: "[o]ur consideration of these features of the contemporary workplace leads us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner. This can best be accomplished by permitting an employer in a non-union setting to investigate an employee without the presence of a co-worker."

In addition to policy considerations regarding the contemporary workplace, the Board held that the extension of *Weingarten* rights to nonunion employees is inappropriate due to the dissimilarities between unionized and nonunionized workforces. For example, in *Weingarten*, the Court held that the presence of a union representative at an investigatory interview is essential to the protection of the interests of the bargaining unit as a whole, and the presence of a union representative and such interviews helps redress the imbalance of power between employers and employees. In *IBM Corp*., the Board indicated the same rationale does not hold true for a nonunion workforce, where co-workers do not have an obligation to represent the interests of the entire workforce.

Moreover, co-workers in a nonunion setting are less able to redress an "imbalance of power" due to the fact that that he or she has no collective bargaining agreement or bargaining unit from which to derive authority. Furthermore, the Board found that nonunion co-workers lack the same level of skill that experienced union representatives have to elicit facts and facilitate investigatory interviews, and thus are unlikely to achieve the purpose and goals of a representative as contemplated in *Weingarten*.

The Board clarified that nonunion employees do have the right to request the presence of a co-worker at an investigatory interview, and that an employee cannot be disciplined for making such a request. The Board's holding is that where employees are not represented by a union, employers have no obligation to accede to the request for a co-worker representative to be present during at an investigatory interview which might result in disciplinary action.