AALS Section on Employment Discrimination and Section on Labor Relations and Employment Law 2012 Newsletter

Introduction

This year the AALS Section on Employment Discrimination and the AALS Section on Labor Relations and Employment Law once again combined forces to produce an annual AALS Newsletter. This newsletter begins with an update regarding relevant AALS presentations, including hot topics panels. It continues with a list of hires, promotions, moves, administrative appointments, visits, honors and awards, and passings, followed by a list of publications from the two sections' members and a list of announcements. The newsletter concludes with a Supreme Court round-up as well as an analysis of a recent NLRB decision and a recent First Circuit decision.

By Angela Onwuachi-Willig and Rebecca Lee

Section Presentations

SECTIONS ON COMPARATIVE LAW AND LABOR RELATIONS AND EMPLOYMENT LAW JOINT PROGRAM
Friday, January 4, 2013, 2:00 - 5:00 PM (Half-Day Program)

Workers After the Ascendancy of Global Financial Capital
(Papers to be published in the Employee Rights & Employment Policy Journal)

The ascendancy of the financial sector in the world economy – up to more than 50% of GDP in the United States – has led to increasingly speculative risk-taking investments. This trend culminated in the credit crash of 2008 and the Great Recession still plaguing the global economy. The increase in financial products investments contributed to decreasing investment in production, as well as job shifting and exportation that has restructured the United States and world labor markets. These panels explore the domestic, international, and comparative aspects of this restructuring.

Part I
Moderator:

- Jeffrey M. Hirsch, University of North Carolina School of Law

Speakers:

- Kenneth M. Casebeer, University of Miami School of Law

- Ann C. McGinley, University of Nevada, Las Vegas, William S. Boyd School of Law
- Gary Minda, Brooklyn Law School
- Marley Weiss, University of Maryland, Francis King Carey School of Law

One or more presenters to be selected from Call for Papers.

The first panel will focus on the impact of global financial capital on American labor markets, and consider the role of international organizations and transnational norms in addressing these dynamics. Topics will include community syndicalism and global supply chains, the effects on workers of restructuring within international financing, and the issues raised by international labor standards and multilateral trade agreements.

Part II
Moderator:

- Julie C. Suk, Benjamin N. Cardozo School of Law

Speakers:

- Cynthia L. Estlund, New York University School of Law
- Michel Lallement, Professor of Sociology, Centre National des Arts des Metiers, Paris, France
- Cesar Rosado, Illinois Institute of Technology Chicago-Kent College of Law
- Peer Zumbansen, Professor, Osgoode Hall Law School York University, Toronto, Ontario, Canada

The second panel will bring a comparative perspective to the evolutions of labor and employment law following the rise of financial capital and the financial crisis. How have different legal orders facilitated and/or responded to the rise of "precarious" or "contingent" work, the decline of the standard employment contracts, and the burdens of the crisis on the most vulnerable workers, such as migrant workers? How might we evaluate the broader developments in law and public policy in fields such as corporate governance, as they affect the status of workers? How does comparison across national and supranational legal orders illuminate the varieties of capitalism? How has the global financial crisis affected workers in China and the developing world?

Business Meeting of Section on Comparative Law at Program Conclusion.
Business Meeting of Section on Labor Relations and Employment Law at Program Conclusion.

SECTION ON EMPLOYMENT DISCRIMINATION LAW
Saturday, January 5, 2013, 3:00-5:15 P.M.

The Future of Frameworks

(Proceedings to be published in the Employee Rights & Employment Policy Journal)

Moderator:

- Sandra Sperino, University of Cincinnati College of Law

Speakers:

- Ian Ayres, Yale Law School
- Suzanne B. Goldberg, Columbia University School of Law
- Tristin K. Green, University of San Francisco School of Law
- The Honorable David Hamilton, Judge, Seventh Circuit Court of Appeals, Indianapolis, Indiana
- Suja A. Thomas, University of Illinois College of Law

Employment discrimination law is increasingly driven by a complex set of frameworks that define what plaintiffs must allege and prove to win a discrimination case. One central framework in employment discrimination law is the *McDonnell-Douglas* test, a three-part burden-shifting test created by the Supreme Court in 1973. The year 2013 marks the 40th anniversary of the *McDonnell-Douglas* test. This panel explores the future of employment discrimination frameworks, including the *McDonnell-Douglas* test, from various theoretical, doctrinal, and practical perspectives. It also considers whether these tests are founded on factually realistic models of discrimination and whether they are facing increasing skepticism from the judiciary.

SECTION ON WOMEN IN LEGAL EDUCATION, CO-SPONSORED BY SECTIONS ON EMPLOYMENT DISCRIMINATION LAW, AND TORTS AND COMPENSATION SYSTEMS INSTITUTIONAL RESPONSIBILITY FOR SEX AND GENDER EXPLOITATION

Monday, January 7, 2013, 9:00 - 10:45 AM

Institutional Responsibility for Sex and Gender Exploitation

(Papers to be published in the Iowa Journal of Gender, Race & Justice)

Moderator:

- Cheryl L. Wade, St. John's University School of Law

Speakers:

- Ellen Michelle Bublick, The University of Arizona James E. Rogers College of Law
- Francis J. Mootz, III, Dean, McGeorge, University of the Pacific School of Law
- Barbara Stark, Hofstra University School of Law,

Speakers from Call for Papers:

- Deleso A. Alford Washington Florida A&M University College of Law
- Joan C. Williams, University of California, Hastings College of the Law

The speakers on this panel will focus on the concept of litigating toward gender justice by making institutional actors responsible for various forms of sex and gender discrimination. The current system of atomized tort or employment discrimination actions or individual criminal prosecutions leaves extreme gaps in the legal system's ability to prevent exploitation on the basis of gender or sex. The speakers will address different dimensions of creating institutional responsibility, such as protection for children in schools and sporting activities, employer

liability for family responsibilities discrimination, and theories to hold insurance companies liable for third-party exploitation.

SECTION ON LABOR RELATIONS AND EMPLOYMENT LAW LUNCHEON
Saturday, January 5, 2013, 12:00 - 1:30 PM

Other AALS Section Programs of Interest

SECTION ON SOCIO-ECONOMICS
Friday, January 4, 2013, 3:30-4:20 P.M.

Concurrent Session: The End of Men? A Socio-Economic Examination of Women's Advances in Education, Employment and Family

Moderator:

- John M. Kang, St. Thomas University School of Law

Speakers:

- David S. Cohen, Drexel University, Earle Mack School of Law
- Nancy E. Dowd, University of Florida Fredric G. Levin College of Law
- Nancy Levit, University of Missouri-Kansas City School of Law
- Ann C. McGinley, University of Nevada, Las Vegas, William S. Boyd School of Law

CROSSCUTTING PROGRAM *(A program selected after a competitive process by the AALS Committee on Special Programs for the Annual Meeting)*
Sunday, January 6, 2013, 4:00 - 5:45 PM

Deconstruct and Reconstruct: Reexamining Bias in the Legal System; Searching for New Approaches
(Program to be published in the UC Davis Law Review)

Moderator:

- Rex R. Perschbacher, University of California, Davis, School of Law

Speakers:

- Debra Lyn Bassett, Southwestern Law School
- Montre Denise Carodine, The University of Alabama School of Law
- Bryan Keith Fair, The University of Alabama School of Law
- Catherine M. Grosso, Michigan State University College of Law
- Kevin R. Johnson, University of California, Davis, School of Law
- Barbara O'Brien, Michigan State University College of Law

In the law, we tend to think of bias in the straightforward context of claims of employment or housing discrimination. However, the potential for bias reaches more fundamentally across every participant category within the legal system. The goal of this panel

presentation is to attempt to deal systemically with bias in the law. Law is a distinctively human activity, involving a series of human actors – clients, lawyers, judges, jurors, witnesses, and experts. The potential for bias, whether express or implicit, touches everyone involved in the legal drama and reaches across every area of the law through its human actors within the legal arena. There has been little attempt to discuss the full range of ramifications across the legal system. Instead, discussions typically take aim at one specific issue, such as mistaken eyewitness identifications, or judicial bias, without examining the broader context. Remedies for bias have tended to be area-specific – such as laws against employment discrimination, ethical rules for lawyers and judges, and restrictions on the use of peremptory juror challenges. The goals of this panel presentation are (1) to encourage a broader discussion, and recognition, of the potential role of bias in judicial proceedings; and (2) to identify commonalities in recognizing and remedying bias.

SECTION ON SCHOLARSHIP
January 6, 2013, 4:00 - 5:45 PM

How Can Legal Scholarship Be More Policy Relevant?

Moderator:

- Orde F. Kittrie, Arizona State University Sandra Day O'Connor College of Law

Speakers:

- Michael S. Barr, The University of Michigan Law School
- Mariano-Florentino Cuellar, Stanford Law School
- Chai R. Feldblum, Georgetown University Law Center
- Spencer Overton, The George Washington University Law School
- Peter P. Swire, The Ohio State University, Michael E. Moritz College of Law

Eminent policymakers, judges, practitioners, and others have in recent years attacked the value of current legal scholarship. Rather than rehash the debate over the value of current legal scholarship, our program will focus on what specifically legal scholars can, if they wish, do to maximize their work's policy relevance. In order to address that question, our panel features several leading legal scholars who have served as senior policy practitioners.

Professor Michael Barr served as the Assistant Secretary of the Treasury for Financial Institutions during the Obama Administration, and was a key architect of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Professor Tino Cuellar served as Special Assistant to the President for Justice and Regulatory Policy during the Obama Administration and Senior Advisor to the Under Secretary of the Treasury for Enforcement during the Clinton Administration.

Professor Chai Feldblum currently serves as Commissioner of the Equal Employment Opportunity Commission.

Professor Spencer Overton served as the Principal Deputy Assistant Attorney General for Legal Policy during the Obama Administration, where he focused on issues related to the Voting Rights Act and the Administration's response to the *Citizens United* decision lifting restrictions on corporate spending in federal elections.

Professor Peter Swire served as Special Assistant to the President for Economic Policy during the Obama Administration and Chief Counselor for Privacy during the Clinton Administration. We hope that this program will both assist professors and others to craft scholarship with greater policy impact and encourage them to do so.

Faculty Employment Updates

New Hires

- Bradley Areheart was hired as an Associate Professor of Law at the University of Tennessee College of Law.
- Anastasia Boles was hired as an Assistant Professor of Law at the University of Arkansas-Little Rock School of Law.
- Katie Eyer was hired as an Assistant Professor of Law at Rutgers University School of Law-Camden
- Christopher Griffin was hired as an Assistant Professor of Law at William & Mary Law and School.
- Stacy Hawkins was hired as an Assistant Professor of Law at Rutgers University School of Law-Camden.
- Naomi Schoenbaum was hired as an Associate Professor of Law at George Washington Law School.
- Annie Smith was hired as an Assistant Professor of Law at the University of Arkansas-Fayetteville School of Law

Tenure and Promotion Decisions

- Jeannette Cox (University of Dayton School of Law) was awarded tenure and promoted to Full Professor.
- Michael Duff (University of Wyoming College of Law) was awarded tenure and promoted to Full Professor.
- Wendy Greene (Cumberland School of Law, Samford University) was awarded tenure and promoted to Associate Professor.
- Wendy Hensel (Georgia State University College of Law) was promoted to Full Professor.
- Jeff Jones (Lewis & Clark Law School) was awarded tenure and promoted to Associate Professor.
- Rebecca Lee (Thomas Jefferson School of Law) was promoted to Associate Professor of Law.
- Alex Long (University of Tennessee College of Law) was promoted to Full Professor.
- Richard Moberly (University of Nebraska Law School) was promoted to Full Professor.
- Nancy Modesitt (University of Baltimore School of Law) was awarded tenure and promoted to Associate Professor.
- Amy Monahan (University of Minnesota Law School) was promoted to Full Professor.

Administrative Appointments

- Jarod Gonzalez (Texas Tech University School of Law) was appointed Associate Dean for Academic Affairs.

- Wendy Greene (Cumberland School of Law, Samford University) was appointed Director of Faculty Development.
- Wendy Hensel (Georgia State University College of Law) was appointed Associate Dean for Research and Faculty Development
- Cesar Rosado (Chicago-Kent College of Law) was appointed Research Fellow at New York University (NYU) Center for Labor and Employment Law.

Visits

- Matt Bodie (St. Louis University School of Law) is a Visiting Professor at Stockholm University Law School and Notre Dame Law School during the fall of 2012.
- Michael Duff (University of Wyoming College of Law) will be a Visiting Professor at University of Denver Sturm College of Law during the spring of 2013.
- Michael Green (Texas Wesleyan University School of Law) will be a Visiting Professor at University of Georgia School of Law during the spring of 2013.
- Michael Hayes (University of Baltimore School of Law) will be a Visiting Professor at Thomas Jefferson School of Law during the spring of 2013.
- Wilma Liebman (former National Labor Relations Board (NLRB) Chair) will be a Visiting Professor at the University of Illinois College of Law for 2012-2013 school year.
- Nicole Porter (University of Toledo College of Law) is a Visiting Professor at University of Denver Sturm College of Law for 2012-2013 school year.
- Cesar Rosado (Chicago-Kent College of Law) is a Visiting Professor at Stockholm University Law School for the summer and fall of 2012.

Visiting Appointments

- Paul Secunda (Marquette University Law School) served as Visiting Professor of Law, Part-Time LL.M. Comparative Law Program in April of 2012. He taught Comparative Labour Law: The Wagner Model.
- Paul Secunda (Marquette University Law School) served as Visiting Scholar, Osgoode Hall Law School in April of 2012. He researched the Ontario Occupational Pension System.
- Juliet Stumpf (Lewis & Clark Law School) will be a Visiting Professor at the University of Leiden during part of spring of 2013.

Lateral Moves

- Aditi Bagchi, Associate Professor of Law moved from the University of Pennsylvania Law School to Fordham Law School.
- Courtney Cahill moved from Roger Williams University School of Law to Florida State University College of Law as the Donald Hinkle Professor of Law.

Honors and Awards

- Matt Bodie (St. Louis University School of Law) was appointed to the American Law Institute (ALI).
- Ken Dau-Schmidt (University of Indiana-Bloomington School of Law) was appointed to the American Law Institute (ALI).

- Sharona Hoffman (Case Western Reserve University School of Law) was named Edgar A. Hahn Professor of Jurisprudence.
- Orly Lobel (University of San Diego Law School) was appointed to the American Law Institute (ALI).
- Orly Lobel (University of San Diego Law School) was named University Professor for 2012-2013.
- Martin Malin (Chicago-Kent College of Law), Sara Slinn (Osgoode Hall Law School, York University), and Jon Werner (University of Wisconsin-Whitewater Department of Management) have been awarded a grant of $25,000 by the National Academy of Arbitrators Research and Education Foundation. The grant will support their project to compare the handling of statutory human rights claims in labour arbitration in Ontario and before the Ontario Human Rights Tribunal. They expect the results to be of interest in both countries. In Canada, there is an on-going discussion of the appropriate forum for adjudicating statutory human rights claims. The researchers also expect that the results will also be of interest in the United States in light of the Supreme Court's decision in *14 Penn Plaza, LLC v. Pyett*.
- Angela Onwuachi-Willig (University of Iowa College of Law) received the Marion Huit Award, a University-wide award given to a tenured faculty member in recognition of outstanding teaching and assistance to students, exceptional research and writing, and dedicated service to the University and the surrounding community.
- Lawrence Rosenthal (Northern Kentucky University, Salmon P. Chase College of Law) was appointed to the American Law Institute (ALI).
- Paul Secunda (Marquette University School of Law) was named Hicks Morley Visiting Professor in International Labour Law, The University of Western Ontario Faculty of Law, in January 2012. He taught Contemporary Issues with the Wagner Model of Labour Law.
- Peggie Smith (Washington University-St. Louis School of Law) was named the Charles Nagel Professor of Labor and Employment Law.

Passings

Bob Belton (Vanderbilt Law School) passed on February 9, 2012. He served as a law professor at Vanderbilt Law School for 34 years. Vanderbilt News indicated the following about Belton:

> A trailblazer in civil rights as an activist, attorney and scholar throughout his career, Belton served from 1965 to 1970 as an assistant counsel for the NAACP Legal Defense and Educational Fund Inc. At the Legal Defense Fund, he headed a national civil rights litigation campaign to enforce what was then a new federal law prohibiting discrimination in employment because of factors such as race and sex.
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> Belton had a major role in *Griggs v. Duke Power Co*, the landmark Supreme Court civil rights case the Legal Defense Fund litigated. Other landmark Supreme Court civil rights cases in which he was involved included *Albemarle Paper Co. v. Moody*, which addressed damages in civil rights cases, and *Harris v. Forklift Systems*, which addressed sexual harassment.
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> From 1970 to 1975 Belton practiced law as a partner at Chambers Stein Ferguson & Lanning in Charlotte, N.C., one of the first racially integrated firms in

the South. The building owned by the firm was fire-bombed at the height of its involvement in a series of landmark civil rights cases, including *Swann v. Charlotte Mecklenburg Board of Education*, in which the Supreme Court approved busing as a remedy to enforce the *Brown v. Board of Education* decision.

An expert in employment discrimination law, Belton was the author of numerous law review articles and book chapters, and the lead author of a widely adopted casebook on employment discrimination law that was the first to incorporate critical race and feminist theory. He taught Law of Work, Employment Discrimination Law, Constitutional Tort Litigation, and Race and the Law. . . .

Over the course of his career, Belton was a visiting professor at Harvard Law School and the University of North Carolina, and the first Distinguished Charles Hamilton Houston Visiting Professor of Law at North Carolina Central School of Law. Among other honors, he received the American Association of Law Schools' Minority Section's Clyde C. Ferguson Award in 2003 and the National Bar Association's Presidential Award in 2006.

Robert Belton, Trailblazing Scholar of Employment Law, Dies, VANDERBILT NEWS, Feb. 10, 2012—2:58 P.M., at http://news.vanderbilt.edu/2012/02/robert-belton-obituary/.

Publications

Books

- SUSAN BISOM-RAPP, THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW – CASES AND MATERIALS (with Roger Blanpain, William R. Corbett, Hilary K. Josephs, and Michael J. Zimmer) (Aspen/KLI, 2d ed., 2012). NOTE: The order of the authors is Blanpain, Bisom-Rapp, Corbett, Josephs, Zimmer.

- MARTIN MALIN, EMPLOYMENT DISCRIMINATION LAW: CASES AND NOTES (with Mack Player) (West 2012).

- ANN MCGINLEY, MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (edited with Frank Rudy Cooper) (New York University Press) (2012).

- PAUL SECUNDA & JEFFREY HIRSCH, LABOR LAW: A PROBLEM-BASED APPROACH (Lexis-Nexis) (2012).

- STEVEN WILLBORN, STEWART SCHWAB, JOHN BURTON & GILLIAN LESTER, EMPLOYMENT LAW: CASES AND MATERIALS, 5th edition (LexisNexis 2012). New editions of the statutory supplement and teachers' manual were also published.

- RAMONA PAETZOLD & STEVEN WILLBORN, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES, 2012-2013 edition (West, 2012).

- MARK C. WEBER, UNDERSTANDING DISABILITY LAW (New Providence, N.J.: LexisNexis 2d ed. 2012).

Articles, Essays, and Book Chapters

- Rachel Arnow-Richman, *From Just Cause to Just Notice in Reforming Employment Termination Law*, in THE RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, (ed. Michael L. Wachter and Cynthia L. Estlund) (Edward Elgar Publishing 2012).

- Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NORTHWESTERN UNIVERSITY LAW REVIEW 951 (2012).

- Sharona Hoffman, *The Drugs Stop Here: A Public Health Framework to Address the Drug Shortage Crisis*, 67 FOOD & DRUG LAW JOURNAL 1 (2012).

- Sharona Hoffman, *Drug-Drug Interaction Alerts: Emphasizing the Evidence*, 5 ST. LOUIS UNIVERSITY JOURNAL OF HEALTH LAW & POLICY 297 (invited piece 2012) (with Andy Podgurski).

- Sharona Hoffman, *Balancing Privacy, Autonomy, and Scientific Needs in Electronic Health Records Research*, 65 SOUTHERN METHODIST UNIVERSITY LAW REVIEW 85 (2012) (with Andy Podgurski).

- Rebecca K. Lee, *Justice for All?*, 65 VANDERBILT LAW REVIEW EN BANC 217 (2012) (reviewing JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011)).

- Rebecca K. Lee, *Implementing Grutter's Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE JOURNAL OF GENDER LAW AND POLICY 133 (2011) (actually published in 2012). This work was cited by the State of California in its amicus brief submitted in support of the University of Texas in *Fisher v. University of Texas*, __U.S. __ (No. 11-345).

- Ariana R. Levinson, *Toward a Cohesive Interpretation of the Electronic Communications Privacy Act for the Electronic Monitoring of Employees*, 114 WEST VIRGINIA LAW REVIEW 461 (2012).

- Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK LAW REVIEW 463 (2012).

- Nancy Levit, *The Limits on Lawsuits by Lawyers Against Law Firms and the Prospects for Creating Happy Lawyers*, 73 UNIVERSITY OF PITTSBURGH LAW REVIEW 65 (2011).

- Nancy Levit & Linda Jellum, *Reflections of Women in Legal Education: Stories from Four Decades of Section Chairs*, 80 UNIVERSITY OF MISSOURI, KANSAS CITY LAW REVIEW 659 (2012).

- On Amir and Orly Lobel, *Liberalism and Lifestyle: Informing Regulatory Governance with Behavioral Research*, EUROPEAN JOURNAL OF RISK REGULATION (2012).

- Orly Lobel and Anne Lofaso, *Non-Union Employment Representation Systems: The United States from a Comparative Perspective, in* EMPLOYMENT REPRESENTATION SYSTEMS AROUND THE WORLD (Kluwer 2012).

- Yuval Feldman, Orly Lobel, and Lilach Luria, *Employment and Labor Law and Economics (with), in* LAW AND ECONOMICS (Uriel Procaccia ed. in Hebrew 2012).

- Orly Lobel, *New Governance as School of Thought and Policy Approach,* OXFORD HANDBOOK ON GOVERNANCE (2012).

- Martin Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 INDIANA LAW JOURNAL 289 (2012)

- Martin Malin, *The Upheaval in Public Sector Labor Law: A Search for Common Elements*, 27 ABA JOURNAL OF LABOR AND EMPLOYMENT LAW 149 (2012).

- Ann McGinley, *Masculinities, Multidimensionality, and Law: Why They Need One Another, in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper and Ann C. McGinley, eds., New York University Press) (2012) (with Frank Rudy Cooper).

- Ann McGinley, *Feminist Legal Theory Meets Masculinities Theory, in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper and Ann C. McGinley, eds., New York University Press) (2012) (with Nancy E. Dowd and Nancy Levit).

- Ann McGinley, *Masculinities and Disparate Impacts, in* MASCULINITIES AND FEMINISMS: CRITICAL PERSPECTIVES **(**Martha Fineman and M.O Thompson, eds., Ashgate) (2012).

- Ann McGinley, *Meritor Savings Bank v. Vinson, in* LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD (Wolters Kluwer Law and Business) (2012).

- Ann McGinley, *Trouble in Sin City: Protecting Sexy Workers' Civil Rights*, 23 STANFORD LAW & POLICY REVIEW 253 (2012) (symposium).

- Ann McGinley, Ricci v. DeStefano: *Diluting Disparate Impact and Redefining Disparate Treatment,* 12 NEVADA LAW JOURNAL 626 (2012) (symposium).

- Angela Onwuachi-Willig, *The Obama Effect: Specialized Meanings in Anti-Discrimination Law*, 87 INDIANA LAW JOURNAL 325 (2012) (with Mario Barnes).

- Angela Onwuachi-Willig, *Class, Classes, and Classic Race Baiting: What's in a Definition?*, 88 DENVER UNIVERSITY LAW REVIEW. 807 (2011) (actually published in 2012) (with Amber Fricke) (invited response to Richard Sander of UCLA Law School in symposium issue) (cited in Brief of Empirical Scholars as *Amici Curiae* in Support of Respondents in the *Fisher v. University of Texas* case).

- Sachin Pandya, *Unpacking the Employee-Misconduct Defense*, 14 UNIVERSITY OF PENNSYLVANIA JOURNAL OF BUSINESS LAW 867 (2012).

- Sachin Pandya, *Tax Liability for Wage Theft*, 3 COLUMBIA JOURNAL OF TAX LAW 115 (2012).

- Gowri Ramachandran, *Pay Transparency*, 116 PENNSYLVANIA STATE LAW REVIEW 1043 (2012).

- Mitchell Rubinstein, *Employees, Employers and Quasi-Employers: An Analysis Of Employees & Employers Who Operate In The Boarderland Of An Employer-Employee Relationship*, 14 UNIVERSITY OF PENNSYLVANIA JOURNAL OF BUSINESS LAW 605 (2012) (lead article).

- Robin Runge, *Redefining Leave from Work*, 19 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 445 (2012).

- Robin Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & LAW 871 (2012).

- Paul Secunda, Pickering v. Bd. of Education*: Unconstitutional Conditions and Public Employment*, *in* FIRST AMENDMENT LAW STORIES 265-291 (Foundation Press) (Richard Garnett and Andrew Koppelman eds.) (2012).

- Paul Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME LAW REVIEW (2012).

- Paul Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO LAW REVIEW 373 (2012).

- Paul Secunda, *The Wisconsin Public Sector Labor Dispute of 2011*, 27 ABA JOURNAL OF LABOR & EMPLOYMENT LAW 293 (2012).

- Paul Secunda, *The Future of Board Doctrine on Captive Audience Speeches*, 87 INDIANA LAW JOURNAL 123 (2012).

- Paul Secunda, *Le droit des Etats-Unis et la crise*, *en* LES REACTIONS DU DROIT DU TRAVAIL A LA CRISE, LE DROIT OUVRIER 147 (Feb. 2012), *available at* http://www.cgt.fr/IMG/ pdf/ 2012_fev_couv_int.pdf.

- Sandra Sperino, *Direct Employer Liability for Punitive Damages*, A Response to Joseph Seiner's Article, *Punitive Damages, Due Process and Employment Discrimination*, 97 IOWA LAW REVIEW BULLETIN 24 (2012).

- Gary Spitko, *Don't Ask, Don't Tell: Employment Discrimination as a Means for Social Cleansing*, 16 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 179-209 (2012).

- Juliet Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (And Why They Should)*, 2 U.C. IRVINE LAW REVIEW 381 (2012).

- Michelle A. *Travis, Impairment as Protected Status: A New Universality for Disability Rights*, 46 GEORGIA LAW REVIEW 937 (2012).

- Michelle A. Travis, *Toward Positive Equality: Taking the Disparate Impact Out of Disparate Impact Theory*, 16 LEWIS & CLARK LAW REVIEW 527 (2012).

- Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEXAS REVIEW OF LAW & POLITICS 295 (2012), http://www.trolp.org/main_pgs/issues/v16n2/Volokh.pdf (detailing private employees' protections for speech or political activity in the workplace, with analysis of jurisdictions that generally protect employee speech; those that protect from employer retaliation; those that protect only employee speech on political topics; those that protect only particular electoral activities such as endorsing or campaigning for a party, signing an initiative or referendum petition, or giving a political contribution, and of federal law's seeming protection of private employees who speak out in favor of a federal candidate).

- Mark C. Weber, *The Common Law of Disability Discrimination*, 2012 UTAH LAW REVIEW 429.

- Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEXAS LAW REVIEW 859 (2012) (discussing statutory interpretation challenges posed by "related" statutes, focusing on ADEA case *Gross v. FBL Financial Services* and its aftermath).

- Deborah A. Widiss, *Divided Interests: Union Representation of Individual Employment Discrimination Claims*, 87 INDIANA LAW JOURNAL 421 (2012) (symposium).

Forthcoming 2012 Publications

- Susan Bisom-Rapp, *North American Border Wars: The Role of Canadian and American Scholarship in U.S. Labor Law Reform Debates*, 30 HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL (forthcoming 2012) (with Michael J. Zimmer) (also forthcoming in Italian *in* RULES, POLICIES AND METHOD: THE LEGACY OF MARCO BIAGI IN LABOUR RELATIONS TODAY(Alberto Russo & Iacopo Senatori, eds., Giappichelli 2012).

- Ann McGinley, *Reasonable Men*, CONNECTICUT LAW REVIEW (forthcoming 2012).

- Ann McGinley, *Cognitive Illiberalism, Summary Judgment and Title VII*, NEW YORK LAW SCHOOL LAW REVIEW (forthcoming 2012) (symposium).

Announcements

Call for Course Materials:

Rachel Arnow-Richman (University of Denver, Sturm College of Law) is pleased to announce the launch of a new webpage, supported by her law school, that is designed to facilitate experiential learning and other creative forms of instruction in the workplace law curriculum. The "Workplace Law Prof Exercise Exchange" will be a platform for faculty to post and access problems, exercises, simulations, and other materials they have created for use in workplace law courses. All teaching materials will be password protected. A fledging version of the site can be found here:

http://www.law.du.edu/index.php/workplace-prof-class-exercise-exchange

Individuals may use the following credentials to log in:

username: workplaceprof
password: wpl-2012

The success of the webpage hinges on the willingness of faculty to post and share their materials. Faculty are encouraged to send anything and everything that they are willing to exchange to Rachel Arnow-Richman at rarnow@law.du.edu, along with the following information:

1. A name for the exercise,
2. A one-sentence description of the exercise,
3. The legal issues raised in the exercise (e.g., sex discrimination, Section 8 concerted activity, etc.), and
4. The types of skills/deliverables that the exercise entails (e.g., drafting a complaint, interviewing a witness, etc.).

A sample is posted to the beta site.

(Please note that this solicitation is limited to materials that support experiential learning through simulations, class exercises, and related pedagogies. Please do not send syllabi or lecture notes used for traditional textbook instruction.)

Opportunities for Junior Scholars

New Voices in Labor and Employment Law

The Southeastern Association of Law Schools (SEALS) is pleased to host the first annual "New Voices in Labor and Employment Law" program during the August 2013 SEALS Annual Meeting in Palm Beach, Florida. The purpose of this works-in-progress program is to bring

together junior and senior labor and employment law scholars to help the junior scholars ready papers for the upcoming law review submission cycle.

For this program, we are seeking submissions from labor and employment law scholars with five or fewer years of full-time teaching experience (not counting the 2012-13 academic year). Submissions should be drafts of papers relating to labor and employment law that will be near completion by the time of the SEALS meeting in August 2013.

To be considered for participation in the program, please send an email to Professor Michael Green, Texas Wesleyan University School of Law, at mgreen@law.txwes.edu and to Professor Paul Secunda, Marquette University Law School at paul.secunda@marquette.edu by 5:00 p.m. Eastern Time, Monday, January 7, 2013. In your email, please include the title of your paper, a short description of the context (e.g., "Employee Privacy in the Digital Age"), and a full abstract. Full-time faculty members of SEALS member or affiliate member schools, who have been teaching labor and employment law courses for five or fewer years as of July 1, 2012, will be given a preference in the selection of those contacted to submit final papers.

To ensure an atmosphere conducive to feedback, space will be limited to 15 participants; any additional registrants will be placed on a waiting list and invited to participate on a space available basis only. Those individuals accepted into the program must submit a complete draft by 5:00 p.m. Eastern Time, Friday, May 31, 2013. Please submit your drafts electronically to the email addresses above. The draft should be accompanied by a cover letter with the author's name, contact information, and confirmation that the submission meets the criteria identified in this call of papers. Submissions are limited to a maximum 40,000 word limit (including footnotes). Submitted in-progress papers can be committed for publication prior to their submission, as long as they are not actually scheduled to be printed prior to August 1, 2013. Each professor may submit only one paper for consideration. No papers will be accepted after the deadline, and no one may participate without submitting a draft by the deadline above.

Paper commentators may include Professors Tony Baldwin, Mercer University Law School, Rick Bales, Northern Kentucky Salmon P. Chase College of Law, Matthew Bodie, St. Louis University School of Law, Susan Carle, American University Washington College of Law, Richard Carlson, South Texas College of Law, Miriam Cherry, St. Louis University School of Law, Michael Green, Texas Wesleyan University School of Law, Wendy Greene, Samford University, Cumberland School of Law, Jeff Hirsch, University of North Carolina School of Law, Nancy Levit, University of Missouri-Kansas City School of Law, Anne Lofaso, West Virginia College of Law, Alex Long, University of Tennessee College of Law, Marcia McCormick, St. Louis University School of Law, Elizabeth Pendo, St. Louis University School of Law, Paul Secunda, Marquette University Law School, and others still to be determined.

Please be aware that selected participants and commentators are responsible for their own travel and lodging expenses related to attending the SEALS Annual Meeting, including the SEALS registration fee. Any inquiries about the SEALS New Voices in Labor and Employment Law Program should be submitted to Professor Michael Green, mgreen@law.txwes.edu or Professor Paul Secunda, paul.secunda@marquette.edu.

Lectures

The University of San Francisco School of Law will host its Ninth Annual Jack Pemberton Lecture on Workplace Justice on April 4th, 2013, at the United States Court of Appeals for the Ninth Circuit in San Francisco, California. Professor William B. Gould IV will present the

keynote address: "Bargaining, Race and Globalization: How Baseball and Other Sports Mirror Collective Bargaining, Law and Life." Professor Jeremi Duru will provide commentary. The event is free and open to the public. For more information, please contact Michelle Travis (matravis@usfca.edu), Tristin Green (tgreen4@usfca.edu), or Maria Ontiveros (ontiveros@usfca.edu).

Conference and Program Updates

- The XXth World Congress of the International Society for Labor and Social Security Law was held in Santiago, Chile from September 25-28, 2012. Papers submitted for the conference and other information can be found at http://www.congresomundialtrabajo2012.com. If you are interested in learning more about the ISLSSL and how to become a member, please contact Steve Willborn, the Secretary-Treasurer of the US Branch (willborn@unl.edu).
- The *30th Annual Carl A. Warns Labor and Employment Law Institute* will be held at the Seelbach Hotel in Louisville, Kentucky on June 13 - 14, 2013. Please contact Margaret Bratcher, 852-1669, p.bratcher@louisville.edu, to register or for information.

Conference Announcements

- The next Western Hemisphere Congress of the International Society for Labor and Social Security Law will be held in Quayaquil, Equador in September, 2013. We do not have a lot of information about the Congress yet, but these Congresses do have national reporters on selected topics. If you're interested in going, you should contact Steve Befort at the University of Minnesota (befor001@umn.edu). He is the Chair of the US Branch of the International Society. He will be making assignments for the US reporter positions and can keep you informed as plans for the conference develop.

Student Writing Competitions

The Louis Jackson Memorial National Law Student Writing Competition in Employment and Labor Law is again being sponsored by Jackson Lewis and Chicago-Kent College of Law's Institute for Law and the Workplace. Entries are due January 22, 2012. First prize is $3,000 and there are two second prizes of $1,000 each. Entries are blind judged by a national panel of labor and employment law professors. More information is available at http://www.kentlaw.iit.edu/Documents/Institutes%20and%20Centers/ILW/Jackson%20Louis%20Writing%20Competition/Info/Flyer_2012-13.pdf

Supreme Court Round-Up

***Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012)**

Held that the petitioners – pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases – qualify as outside salesmen under the most reasonable interpretation of the Department of Labor's regulations.

***Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012)**
Held that suits against the states under the self-care provision of the Family and Medical Leave Act are barred by sovereign immunity.

***Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126 (2012)**
Held that the Civil Service Reform Act provides the exclusive avenue to judicial review when a qualifying federal employee challenges an adverse employment action by arguing that a federal statute is unconstitutional.

***Filarsky v. Delia*, 132 S. Ct. 1657 (2012)**
Held that a private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under 42 U. S. C. § 1983.

***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012)**
Held that the Establishment and Free Exercise Clauses of the First Amendment bar suits brought on behalf of ministers against their churches, claiming termination in violation of employment discrimination laws. Also held that, because the respondent in this case was a minister within the meaning of the ministerial exception, the First Amendment requires dismissal of her employment discrimination suit against her religious employer.

***Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012)**
Held that the case is not moot and that the First Amendment does not permit a public-sector union to impose a special assessment without the affirmative consent of a member upon whom it is imposed.

***Pacific Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680 (2012)**
Held that the Outer Continental Shelf Lands Act extends coverage for injury occurring as the result of operations conducted on the outer continental shelf to an employee who can establish a substantial nexus between his injury and his employer's extractive operations on the shelf.

***Roberts v. Sea-Land Services*, 132 S. Ct. 1350 (2012)**
Held that an employee is "newly awarded compensation" for purposes of the Longshore and Harbor Workers' Compensation Act when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf.

Pending Cases

***Comcast Corp. v. Behrend* (No. 11-864)**
Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

***Fisher v. University of Texas at Austin* (No. 11-345)**
Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, permit the University of Texas at Austin's use of

race in undergraduate admissions decisions in light of the diversity produced by its application of the Texas Ten Percent Plan.

***Genesis HealthCare Corp. v. Symczyk* (No. 11-1059)**
Whether an employer's offer of judgment that fully satisfies a sole named plaintiff's Fair Labor Standards Act (FLSA) claim moots a collective action under the statute.

***Kloeckner v. Solis* (No. 11-184)**
Whether the U.S. Court of Appeals for the Federal Circuit or, alternatively, a district court has jurisdiction when the Merit Systems Protection Board for federal employees decides a mixed case — that is, one containing both disputed termination and unlawful discrimination claims — without determining the merits of the discrimination claim?

***Levin v. US* (No. 11-1351)**
Whether suit may be brought against the United States for battery committed to a civilian by military medical personnel acting within the scope of employment.

***Millbrook v. US* (No. 11-10362)**
Whether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of Federal law."

***US Airways v. McCutchen* (No. 11-1285)**
Whether the Third Circuit correctly held — in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits — that Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA) authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits paid, even where the plan's terms give it an absolute right to full reimbursement.

***Vance v. Ball State University* (No. 11-556)**
Whether the "supervisor" liability rule established by *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.

Sources: SCOTUSblog and BNA's Daily Labor Report

Analysis of Recent Cases

***D.R. Horton*, 357 NLRB No. 184 (2012)**

Can the NLRB Revive Employment Class Actions?

The once clearly defined boundaries between labor law and employment law are eroding, and it is becoming more difficult to practice in one area without knowing the other. The NLRB

further diminished the boundary with its January 2012 decision in *D.R. Horton*, 357 NLRB No. 184, stepping into the quagmire of class actions and employment arbitration.

Class claims frequently offer the only means for consumers or employees to challenge unlawful actions that cause limited damages to each individual. In these cases, for each person injured, the cost of litigating a claim outweighs the potential benefit. Without class actions, these claims often go unremedied. At the same time, class actions are costly and time consuming for businesses. In arbitration, businesses have discovered a vehicle to reduce these claims. Using unilaterally imposed agreements, businesses require legal claims to be submitted to individual arbitration and thus bar access to a judicial forum for resolution. In recent years, the Supreme Court has interpreted the Federal Arbitration Act (FAA) broadly to enforce arbitration agreements, including those imposed as a condition of employment. In *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), the Court enhanced this business tool, finding the FAA preempted a California law that prevented businesses from barring class actions in cases involving small claims brought by less powerful parties bound to arbitrate by contracts of adhesion.

The NLRB's decision in *D.R. Horton* may have limited the effectiveness of this device for employers, however, by invalidating an arbitration agreement that completely banned employee class actions. The case has generated significant controversy, but experienced labor lawyers will recognize the case as an unremarkable application of long-settled legal principles.

Horton involved a claim under the Fair Labor Standards Act, the type of small claim more effectively litigated collectively. Michael Cuda alleged that the employer misclassified its superintendents as exempt from FLSA overtime requirements. When the employer raised the arbitration agreement signed as a condition of employment as a bar to the collective claim, Cuda filed an unfair labor practice charge challenging the agreement as violative of the NLRA.

Section 7 of the NLRA protects the right to engage in concerted activities for "mutual aid or protection." A class or collective action constitutes concerted activity, *i.e.*, employees joining together, for purposes of mutual aid or protection, *i.e.*, to bring a legal claim challenging unlawful working conditions. Accordingly, the Supreme Court has recognized that concerted pursuit of administrative and judicial actions is protected by Section 7. The NLRA similarly protects such concerted claims in the arbitral forum.

By prohibiting the employees from bringing their Fair Labor Standards Act claim collectively in arbitration, while also precluding access to the courts, the arbitration agreement interfered with the employees' Section 7 right to jointly bring their legal claim against their employer, thereby violating the NLRA. Proponents of arbitration, however, suggest that such action constitutes a permissible contractual waiver of Section 7 rights, or alternatively, that the Federal Arbitration Act precludes this interpretation of the statute. Both of these contentions are contradicted by existing law.

Even before the passage of the NLRA, the law barred enforcement of contracts that required employees to give up their right to engage in protected activities, including "yellow-dog contracts" agreeing not to join a labor union. Since the enactment of the statute, the NLRB and the Supreme Court have continued to invalidate contracts that force employees to give up their statutory rights to engage in protected activities.

While the FAA, along with the NLRA, encourages and validates arbitration agreements, it does not conflict with the result reached by the NLRB in *D.R. Horton*. The FAA makes arbitration agreements enforceable, except on "such grounds as exist at law or in equity for the revocation of any contract." As noted, contracts that force employees to give up their rights to engage in union and protected concerted activity have long been unlawful. Thus, refusing to enforce arbitration agreements that require such waivers is consistent with the FAA. Further, as the NLRB noted, *AT&T Mobility* was a preemption decision while *Horton* involves a federal substantive right. Thus, the two statutes must be accommodated. Additionally, in first upholding agreements to arbitrate statutory employment claims in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), the Court stated that arbitration agreements involve nothing more than a choice of forum and cannot be used to deprive employees of substantive statutory rights. The agreement in *Horton* eliminated the employees' statutory right to engage in concerted activity.

Although the decision bars enforcement of some arbitration agreements, there are limits to the impact of *Horton*. It applies only to employees covered by the NLRA, nonsupervisory, non-managerial employees of private employers. It does not cover railroads, airlines or agricultural employees, many of whom are already exempt from the FAA as transportation employees. Further, the decision only invalidates agreements that bar both arbitral and judicial class actions. Accordingly, there remain large numbers of employees unaffected by *Horton* that may still be contractually precluded from bringing class claims against their employers.

Horton has been appealed to the Fifth Circuit. The employer argues that the case is inconsistent with *AT&T Mobility's* support of waivers of class procedures and further asserts that Section 7 contains no right to particular procedures to adjudicate legal claims. The case has also been challenged on the basis that the NLRB lacked a quorum at the time of the decision. Both employer and union groups have weighed in with amicus briefs.

Since January, a number of federal district courts have considered the question of whether *Horton* bars enforcement of arbitration agreements that ban class claims. Most have concluded that it does not, relying on *AT&T Mobility* and refusing to defer to the NLRB's interpretation of the FAA. A few courts, however, have ruled that such agreements are unenforceable. Several cases have already been appealed. Additionally, the Supreme Court just granted cert in another class action/arbitration case, *Italian Colors Restaurant v. American Express Travel Related Servs. Co.*, 667 F.3d 204 (2d Cir. 2012). In that case, the Second Circuit ruled that because of the cost of the experts required to litigate an antitrust claim, the plaintiffs could not effectively vindicate their statutory rights in individual arbitration. Accordingly, the arbitration agreement, which banned class claims, was unenforceable.

Stay tuned. This saga is far from over and more decisions will be forthcoming. The effectiveness of class and collective claims to enforce employment laws is at stake. Employers, employees, and their lawyers have much to lose and much to gain in this long-running battle. As a result, it is unlikely to end any time soon.

-- Ann C. Hodges, Professor of Law, University of Richmond

***Gove v. Career Systems Development Corporation*, 689 F.3d 1 (1st Cir. 2012)**

Can Employers Enforce Arbitration Agreements in Applications Against Employees Who Never Worked for Them?

Arbitration provisions in employment agreements are generally enforceable against the employees who sign them. But what about when the arbitration agreement is in a job application—and the potential plaintiff is an applicant who never got the job?

The U.S. Court of Appeals for the First Circuit held in a recent case that a job applicant was not required to arbitrate her gender-discrimination claim against the company to which she applied, despite the fact that her employment application contained an arbitration provision.

The case, *Gove v. Career Systems Development Corporation*, 689 F.3d 1 (1st Cir. July 17, 2012), involved a plaintiff, Ann Gove, who applied for a job at career Systems Development Corporation (CSD). Gove, who was pregnant when she applied, did not get the job. She filed suit in the U.S. District Court for the District of Maine, alleging gender and pregnancy discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Maine human-rights statute.

CSD moved to compel arbitration in the case, arguing that Gove was bound by the arbitration clause contained in the application. The arbitration clause stated in relevant part:

> CSD also believes that if there is any dispute between you and CSD with respect to any issue prior to your employment, which arises out of the employment process, that it should be resolved in accord with the Dispute Resolution Policy and Arbitration Agreement ("Arbitration Agreement") adopted by CSD for its employees. Therefore, your submission of this Employment Application constitutes your agreement that the procedure set forth in the Arbitration Agreement will also be used to resolve all pre-employment disputes.

The district court held that there was no valid agreement between the parties to arbitrate Gove's claims. The appeals court affirmed the district court on different grounds, concluding that it was not the validity of the agreement that was in question, but its scope.

CSD urged the First Circuit to interpret "pre-employment disputes" broadly, as applying to any disputes that arose between the time of application and hiring, whether or not the hiring ever occurred. Gove argued that the court should instead adopt a literal meaning of pre-employment, *i.e.*, if there is no employment, there can be no pre-employment period.

The court held that because the application's arbitration language was ambiguous, and because Gove had no meaningful opportunity to question or bargain over the terms of the application, the application must be construed, pursuant to Maine contract law, against its drafter, CSD. The decision also noted that while, under normal circumstances, the circuit court would give weight to the federal presumption in favor of arbitrability, in this case it could not do so because CSD had failed to argue this particular point on appeal.

Although the specific facts of this case – the narrow wording of the arbitration provision and the defendant's waiver of its federal presumption argument – may have worked in the plaintiff's favor, the decision sends a message to both employers and job applicants about the need for careful consideration of arbitration language in any employment contract, including the ones that do not result in employment at all.

-- Shira Forman, Attorney, Dornbush Schaeffer Strongin & Venaglia, LLP, New York, NY