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LABOR ARBITRATION:

Practical Ways to Cut Costs without Sacrificing Quality

By Rick Bales

The main advantages for choosing arbitration over litigation to resolve labor disputes are speed, party control over the process, the possibility of preserving an amicable relationship between the parties, and cost. This essay focuses on cost—what does labor arbitration cost, and what can the parties do to keep costs down while maintaining the integrity of the process and ensuring accurate outcomes?

According to the Federal Mediation and Conciliation Service ("FMCS"), the average labor arbitration case in 2014–15 cost just over $4,800 for the arbitrator's fee and expenses. Arbitrators' fees ranged from $375 to $2,400 per day, averaging about $873. The average case took about four days for the hearing, travel, and the time spent deciding the case and writing the opinion and award (also known as "study"). Expenses averaged about $398, but can be far higher if the parties bring an arbitrator in from out of town. These numbers reflect only FMCS cases, but are likely to be representative of labor arbitrations using other arbitral service providers. These numbers do not reflect the other costs of arbitration to the parties, such as the cost to each party of its own attorneys' fees, or the opportunity cost of the company and union representatives and the witnesses participating in the arbitration (and the entire grievance process) instead of attending to their regular job duties.

These costs pale in comparison to the cost of taking a case to litigation. Nonetheless, for many parties, especially small employers and union locals, the costs are significant. They may mean the difference between resolving a grievance or, on the other hand, letting it fester or settling it on unfavorable terms. Typically, the parties split equally the cost of the arbitrator, but bear their own attorneys' fees and other expenses.

The simplest way to cut arbitration costs is by choosing an arbitrator with a low per-diem or hourly fee. However, this approach can be penny wise and pound foolish. A more experienced arbitrator can move a hearing along and may require less time than an inexperienced arbitrator for research, preparation, and writing the award. The parties are more likely to have confidence in arbitrators they know and trust, and this by itself can help move the process along. For example, parties who trust the arbitrator are less likely to "pile on" redundant evidence in fear the arbitrator will miss an obvious point.

Other suggestions for keeping the cost of labor arbitration reasonable include:

Mediation: Consider attempting to mediate the grievance before taking it to arbitration. Research indicates that mediation is often successful and that it increases party satisfaction.[1] The FMCS does grievance mediation for free, and many labor arbitrators also are experienced in labor mediation. Mediation has the advantage of offering the parties not just a means to resolve the pending grievance faster and with a resolution that's attractive to both sides, but unlike arbitration, it has the capacity to resolve systemic issues that gave rise to the grievance and that will recur if not corrected.

Avoid Administrative Services: If the parties can agree upon an arbitrator they already know and trust, consider contacting the arbitrator directly instead of through

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DIGITAL ACCESSIBILITY: What it Means for Your Clients/What it Means for You

By Lainey Feingold

Digital accessibility refers to the ability of disabled people to interact with, easily use, and read content on websites, mobile devices, e-readers, electronic kiosks, and other digital tools. Digital accessibility, an aspect of usability, is critical to modern society. Without it, people with disabilities are locked out of government services, higher education, retail, entertainment, and employment.

Tim Berners-Lee, who invented the World Wide Web in 1989, knew that accessibility was integral to the digital age. "*The power of the Web is in its universality,"* Berners-Lee said almost 20 years ago. *"Access by everyone regardless of disability is an essential aspect*."

Lawyers interested in labor and employment law need to know about digital accessibility. Law firms are covered by the Americans with Disabilities Act. Law firm websites that are not accessible risk running afoul of the law. Disabled lawyers need accessible law office technology; disabled clients need access to information.

How do disabled people access websites and mobile devices?

Disabled individuals and their advocacy organizations use a variety of legal strategies, including litigation and administrative complaints, to advance digital accessibility. My clients, co-counsel, and I have used the alternative dispute resolution method known as Structured Negotiation, to negotiate accessibility agreements on behalf of blind clients with Bank of America, CVS, Denny's, Walmart, Anthem, Inc. and dozens of others. Often those negotiations—conducted without a lawsuit on file—begin with a basic question—how do blind people use computers?

Software and hardware, known as *assistive technology*, can read text aloud, provide navigation shortcuts, enlarge text, or produce braille output. The most common type of software for blind people, called a screen reader, accesses back end code to read aloud screen content and speak navigation cues, such as links and headings. Screen readers allow blind users to skim pages, screens, documents, and tables with designated keystrokes. And blind people can use iOS and Android flat screen devices with a series of swipes, taps and double taps while listening to audio output. But assistive technology only works if websites and mobile applications are designed to well-accepted accessibility standards.

Accessibility standards don't just benefit blind people. Deaf people need captions to access online video—that's part of digital access too (and currently subject to pending lawsuits against Harvard and M.I.T). People without hand dexterity can't use a mouse—an accessible site doesn't require one. A growing advocacy movement is looking at how people with cognitive disabilities interact with digital information and how accessibility could improve those interactions.

What are the hot employment law topics around digital access?

Countless jobs today require use of specialized software on a computer or mobile device. If job-related software is not accessible, disabled people can't do the job. Regardless of job demands, a host of employment-based information is online, increasing the need for accessibility. This includes recruiting websites, job applications, training and onboarding materials, and insurance, payroll and benefits information. The accessibility of all digital facets of employment is drawing legal attention.

In February of this year a federal district court jury in Maryland found that Montgomery County, Maryland violated federal law by failing to implement accessible software so the plaintiff could continue to work after technology upgrades in the county's 311 call center. The case, *Reyazuddin v. Montgomery County*, went to the Fourth Circuit on the circuitous path to the jury box. Similar software accessibility cases against Marriott International, Inc., brought by blind employees in San Diego and Baltimore, recently settled confidentially.

Accessibility of online employment applications has also been the subject of legal activity. Gone are the days when a job seeker turns in a paper resume to a potential employer onsite. In February 2015, the United States Department of Justice resolved an investigation with DeKalb, Illinois concerning the city's application process. The settlement addressed use of medical exams and disability-related questions for job candidates. Included in the obligations was the requirement that the City "ensure that its employment opportunities website and job applications contained therein conform to, at a minimum, the Web Content Accessibility Guidelines 2.0 Level AA Success Criteria and other Conformance Requirements ("WCAG 2.0 AA")."

Earlier this year a private job seeker sued thirteen retailers in one action in California based on alleged inability to apply for jobs due to inaccessible technology. And in 2013 Massachusetts Attorney General Martha Cokely and the National Federation of the Blind announced a settlement with Monster Worldwide, Inc. to provide blind job seekers with equal access to all of the recruiting giant's products and services, including mobile applications.

Website accessibility was also at issue in a suit by disabled federal contractors against the General Services Administration. The suit involved the GSA website SAM.com (system for award management) and was settled with an obligation to make the site accessible.

Set an example with an accessible law office

As lawyers we should be setting an example for inclusive technology. Evaluate your firm website for accessibility. Whenever possible, work with disabled people to ensure your site is usable by everyone. Many non-profit organizations provide accessibility testing. Have an accessibility statement on your website and respond quickly to all feedback.

And remember that accessibility is not just about websites. Take an inventory of your technology. Does it work for all your clients, potential clients, and employees? If not, commit to a digital presence that is accessible to everyone. Take the steps necessary to make that commitment a reality. ■

Lainey Feingold (*lf@lflegal.com*) is a disability rights lawyer who has represented the blind community on digital accessibility issues for twenty years. Her book, *Structured Negotiation: A Winning Alternative to Lawsuits,* will be published by the ABA this Fall. More information relevant to this article is available at http://lflegal.com. and http://twitter.com/lflegal.

The federal government (DOL) provides resources for employers and employees concerned about accessible technology. See the Partnership on Employment and Accessible Technology (PEAT), whose goal is to "foster collaboration and action around accessible technology in the workplace." PEAT's online resource helps make "eRecruiting technologies accessible to all job seekers—including those with disabilities."

Modern Accommodation

By Julia Campins

Employment lawyers may face daily issues regarding religious, transgender, and caregiver accommodations. There would seem to be overlap among these topics, but there is not much. Religious accommodations are provided for explicitly by statute. The disputes are disputes of coverage—"religion," types of practices to be accommodated, and notice. Transgender cases are not true accommodation cases, but instead are generally disputes about discrimination. Transgender cases often rely on the theory of sex stereotyping. Caregiver cases cannot be strict accommodation cases, because aside from limited types of leave protected under FMLA, there are no federal accommodation requirements. Like transgender cases, many caregiver cases rely on sex stereotyping theories.

Religion

Title VII prohibits employers from discriminating against "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation. Although generally notice of a need for an accommodation is required, the Supreme Court has held in *EEOC v. Abercrombie & Fitch Stores, Inc.* that it is unlawful to act with the motive of avoiding accommodation even if the actor "has no more than an unsubstantiated suspicion that accommodation would be needed."

Transgender Employees

Although Title VII of the Civil Rights Act of 1964 (Title VII) does not include sexual orientation or gender identity as protected classes on its face, the EEOC takes the unequivocal position in its Strategic Enforcement Plan and enforcement/litigation activity that Title VII protects LGBT individuals. Based upon the Supreme Court's decision in *Price Waterhouse v. Hopkins*, sex stereotyping on the basis of sexual orientation and gender identity is almost universally accepted as actionable sex discrimination. An employer with a specific dress requirement for men that is different than that for women is at risk for a discrimination suit. It is not an "accommodation" request for the transgender employee to dress according to the employee's gender identity, but rather a discrimination claim not to permit the employee to do so. The EEOC has held that Title VII provides coverage for transgender employees. It remains to be seen whether the courts will follow suit.

Caregivers

As the Supreme Court acknowledged:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.

Nevada Dept. of Human Resources v. Hibbs (2003).

The federal legal protections for caregiver accommodations are insufficient. The Family and Medical Leave Act (FMLA) provides *some* employees with unpaid leave for serious health conditions of very close family members (and themselves). The Americans with Disabilities Act (ADA) and Rehabilitation Act prohibit, among other things, discrimination based on "association with" an individual with a "disability" as defined by the ADA. 42 U.S.C. § 12101 et seq; *id.* § 12112(b)(4); 29 U.S.C. § 794. The prohibition on disability discrimination can be used for pregnant workers with disabling conditions. The association provision of the ADA does not provide a right to reasonable accommodation (which is required for individuals who themselves have disabilities). *Id.* § 12112(b). The Fair Labor Standards Act (FLSA) contains a Break Time for Nursing Mothers provision. 29 U.S.C. § 207(r). It is unsettled whether there is a private cause of action to enforce this provision.

The heavy lifting is left to stereotyping claims. There is not, however, an accommodation provision of Title VII. Where the employer does not regularly accommodate other workers, the court will not require it to change its business practices simply because a decisionmaker operates pursuant to pernicious stereotypes. If, however, the employer regularly allows employees to work from home, but denies such an accommodation to an employee because he doesn't believe men should be caregivers, then the stereotyping claim may be viable.

The stereotypes can take many forms: That women who get pregnant will not or should not want to return to work. That women who return to work will not have the time to do the job right. That men who care for children aren't real men. While decisions based on stereotypes might be well-meaning or well-intended, paternalistic sex discrimination is illegal. That women were treated better than a plaintiff woman should not, however, be fatal to a stereotyping claim. The proper analysis requires looking below the surface of the employees' gender to determine whether the true cause is sex stereotyping; whether the decision was "because of sex." ■

While decisions based on stereotypes might be well-meaning or well-intended, paternalistic sex discrimination is illegal.

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By Wayne N. Outten

The Labor and Employment Lawyer as Problem-Solver

This is my final column as Chair of the Section. The natural temptation is to write effusively about what a privilege and honor it has been to serve in that role—and in the positions leading up to it. But I will resist that temptation because I want to address another topic: the labor and employment lawyer as problem-solver. (By the way, it has been a highlight of my professional career—and a genuine pleasure—to have had the privilege and honor to serve the Section this year.)

My basic premise is that lawyers, whether representing employees, unions, or employers, can serve their clients best when they address every client problem or dispute first and foremost with a problem-solving mind-set and using problem-solving approaches. That is what I have tried to do in my practice, and I believe it has worked well for my clients—and my practice.

This column is a distillation of a much longer paper on the topic. That paper addresses in detail problem-solving and dispute-resolution techniques that are particularly appropriate in our field. That paper is available at **www.ambar.org/lelchair**.

Many books and articles (some mentioned below) address the subject in greater detail. Read anything on the topic by Professor Carrie Menkel-Meadow. Reading such materials, along with many years of law practice, helped me learn how to practice better, as well as how to describe the problem-solving approach to others.

Of course, my perspective is that of a lawyer representing employees. But the concepts described here are applicable to lawyers who represent employers and to others.

During the past 40 years—as a federal law clerk, a commercial litigator, and an employment litigator—I learned to use the weapons of war to win in court. I gradually learned that litigation, though necessary, can be an ineffective, costly, and unjust way of solving problems and resolving disputes. So, I started learning ways of solving problems and resolving disputes without litigation, pre-litigation, and outside litigation. I read "Getting to Yes" and "Getting Past No." I learned how to negotiate for my clients' interests in the absence of—or before asserting—legal claims. Although I continued to litigate actively, I began to consider myself first a counselor and problem-solver—helping my clients solve their problems using the most appropriate tools in my toolbox.

My primary duty is to serve my clients' interests, consistent with legal and ethical standards. This is a client-centric approach. Everything must be measured by that yardstick.

Clients come to me with problems. Those problems often do not entail legal claims or are not susceptible to resolution through the courts. My job is to help solve those problems, using my knowledge, skills, experience, and judgment.

Our judicial system is based on the adversarial process; a court decides who wins or loses. Lawyers are trained in this win-lose approach. But litigation is a blunt instrument; a scalpel may be more appropriate. As the saying goes, when the only tool one has is a hammer, the world appears full of nails. Good lawyers must use all appropriate tools to serve their clients, using their hammers only when necessary.

Labor and employment law is particularly well-suited for a problem-solving approach. The relationship between employees and employers is mutually dependent, while fraught with opportunities for problems and disputes. Most of those problems are not susceptible to resolution through litigation for many reasons, including the absence of cognizable rights and the costs of litigation.

We, as labor and employment lawyers, need to help our clients with all of these problems, not just those that rise to the level of an open dispute or assertion of claims. A problem that is not solved promptly and effectively can lead to a contentious dispute and/or to the assertion of legal claims. For employers and their counsel, solving such problems early is good human resources management and good legal strategy (i.e., avoidance of disputes and claims). For employees and their counsel, solving such problems early is good for the employee's job, career, and well-being.

For lawyers who represent employees, the problem-solving mind-set affects every aspect of the practice. A threshold consideration for employee-side

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Life After *Wal-Mart*

By Katherine Kimpel

Plaintiffs can be more optimistic about the viability of the class action mechanism today than they have at any point since June 20, 2011 (the day that the *Dukes v. Wal-Mart Stores, Inc.* decision was handed down). Many class certification decisions in the employment context in 2015 and 2016 were supportive of class action treatment.

Several recent opinions at the Circuit Court of Appeals level have supported certification. In *Chi. Teachers Union, Local No. 1 v. Bd. of Education*, the Seventh Circuit overturned a denial of certification at the district court level, endorsed hybrid Rule 23(b)(2) and (b)(3) certification, and, echoing its 2012 decision in *McReynolds*, rejected the idea that subjective reviews doom commonality in a disparate impact claim. The Sixth Circuit's *Rikos v P&G* and the D.C. Circuit's *In re District of Columbia*, although not concerning employment class actions, both discuss elements of the class certification analysis in ways that will be helpful to Plaintiffs and that rebuff some of the major defense themes invoked to counter class action treatment, including whether the existence of individualized issues of proof and damage defeats class treatment.

Most notable, though, was the Fourth Circuit's decision in *Brown v. Nucor*, where the court not only ruled that class certification was proper, but also used sweeping language to laud the importance of class actions. Defense lawyers should expect to see frequent reference to the Circuit's admonition to district courts to use their discretion to "promote the systemic class action virtues" and to view "the class action as a tool to realize Title VII's core promise of equality."

At the district court level, the picture is similarly, albeit not uniformly, rosy. In 2016, at least two decisions have been issued that grant class certification in the employment context—one from each coast. In *Venegas v. Global Aircraft Serv.,* a Maine district court granted 23(b)(3) certification in a state law wage and hour action and rejected defense arguments regarding individualized issues in the defenses and potential to devolve into "mini-trials." In *Rollins v. Traylor Bros.*, a district court in Washington granted 23(b)(3) certification under both disparate treatment and disparate impact theories to a small class.

There have also been denials of class certification for Plaintiffs. For example, in *Robinson III v. General Motors Co.*, a district court in Texas denied certification without prejudice and granted leave to amend the complaint in a manner that suggested that plaintiffs would face more favorable reception after amendment. Similarly, in *Chen-Oster v. Goldman Sachs*, a New York magistrate judge wrote at length about how certification was proper, but for the absence of current employees as Class Representative—a defect the plaintiffs currently are in the process of curing and that other courts have rejected as immaterial. And a decision speaking starkly against certification like *Brand v Comcast Corp.*, was issued by an Illinois district court that denied certification of a Rule 23(b)(3) promotion claim but left undisturbed its previous certification of a hostile work environment claim.

At the same time, Justice Scalia's death is certain to have lasting implications for employment class actions and for class action jurisprudence more broadly. The February 2016 announcement by Dow Chemical of its $835 million consumer class action settlement explicitly tied resolution of the matter to "growing political uncertainties due to recent events within the Supreme Court and increased likelihood for unfavorable outcomes for business involved in class action suits." The 6-2 decision penned by Justice Kennedy in *Tyson Foods v. Bouaphakeo* only stands as further proof that the class action mechanism is no longer an endangered species.

Betty Dukes AP PHOTO

Plaintiffs' counsel report that courts around the country seem to be increasingly inclined to utilize their authority to manage cases in furtherance of certification. The flexibility enjoyed by the judiciary can take the form in re-crafting a class definition that may otherwise raise ascertainability concerns; employing subclasses; ordering successive rounds of briefing to narrow issues; allowing counsel to reframe certification requests; calling for amendment or intervention to address typicality or adequacy concerns or even denying motions but allow re-filing at a later date.

Anecdotal evidence is also proving to be influential in a range of decisions. The story-telling power of anecdotal evidence is capturing more of the courts' attention at the same time that reliance on social framework expert evidence is waning. That said, courts certifying class actions continue to cite positively those reports by industrial and organizational psychologists that focus on the nuts and bolts of how specific systems ought to work and that identify existing design flaws in a defendant's Human Resources systems.

Certification of a class is never guaranteed. There are persistent currents against certification where the class size is too large, the roles at issue are diffuse, or where the claims might be framed as ones concerning excessive delegations of discretion not constrained by identifiable corporate policy or practice. But counsel can no longer assume that motions for certification will be viewed with the skepticism or hostility many assumed would be the norm in the wake of *Dukes*. ■

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Pay Inequity Persists for High and Low-Wage Female Workers

By Adam T. Klein and Nantiya Ruan

Although the past fifty years reflect tremendous strides in gender equality, progress on the gender wage gap is at a standstill. For full-time workers, the median salary for women still hovers around 80% of the median salary for men. One element of this persistent wage inequality is employer practices that, although facially neutral, allow unfettered subjective decision making in pay and promotion decisions that have proven disparate effects against women in both high and low wage jobs.

Evaluation Systems that Adversely Impact Professional Women

For professional employees, pay is often directly correlated to performance evaluation systems. Those performance evaluation procedures can disadvantage women when they systematically undervalue the relative performance of women based on a lack of reliability and validity. In professional settings, employers often implement uniform performance evaluation procedures, which if implemented without being professionally constructed and monitored for adverse impact, can disadvantage women and, in part, explain the persistent wage gap professional women experience. Performance evaluation systems often have two parts: multi-source feedback (*e.g*, 360 degree review) and forced distribution or ranking. If implemented without being validated by experts, both are easily susceptible to causing adverse impact on women.

Both multi-source feedback and forced distributions must meet basic professional standards in the field of Industrial Organizational Psychology (IOP)– the field dedicated to designing and validating employment systems. If observed gender differences arising from the performance evaluation systems are not justified by reliable measures, they are based on practices that are unsupported in the field of IOP. IO psychologists explain how targeted performance evaluations and compensation-setting procedures can be unreliable and invalid.

Two professional standards provide the measuring stick for whether employer practices are within the best practices recognized by experts in the field. First, the "Principles for the Validation and Use of Personnel Selection Procedures" ("SIOP Principles") is a policy statement of the Society for Industrial and Organizational Psychology. The SIOP Principles apply to both performance evaluation and compensation-setting processes. Second, the federal governement's Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines") incorporate guidelines relating to compliance with federal anti-discrimination law, including a framework for the proper use of selection procedures. The Uniform Guidelines are "designed to aid in the achievement of our nation's goal of equal employment opportunity without discrimination on the grounds of race, color, sex, religion or national origin."

The function of IOP (including the SIOP Principles) and the Uniform Guidelines is to ensure the use of appropriate employment practices and to make clear that adverse impact must be identified, examined, and addressed. IOP emphasizes concepts of reliability (consistent outcomes) and validity (accurate outcomes) in workplace decisions.

Scheduling Systems that Adversely Impact Hourly Women

For low wage workers, their compensation is tied to the number of hours they work. Modern day scheduling practices disparately

impact women when managers are given unfettered discretion to give desirable work hours and schedules to employees they deem most worthy.

For hourly, low wage workers, the gender pay gap is driven in significant part by disparities in hours given to men versus women. Today's workforce is filled with part-time, female contingent workers who are at the mercy of their supervisors in the number and scheduling of hours they work. According to the Bureau of Labor Statistics, the number of part-time workers has steadily increased over the last decade, with involuntary part-time workers (those forced to downgrade from full-time to part-time because of economic conditions or the employer's needs) numbering 6 million and the total number of part-time workers who are part time for economic reasons exceeding 20.6 million. These data points exclude women who choose part-time work for the flexibility it affords when juggling family, educational, and other personal interests. Two-thirds of all part-time workers are women, and as the Congressional Joint Economic Committee has recognized, the gender pay gap is partly driven by the earning penalty for part-time work, which pays less per hour than the same or equivalent work done by full timers.

Receiving fewer than expected hours to work and less pay as a result has devastating effects on women, especially female-headed households. As the Pew Research Center found, forty percent of households with children under age 18 include women who are the sole or primary source of income for the family. As an example of such inequities, a survey of 200 mothers working in the restaurant industry found half had unpredictable and erratic schedules, two out of five had a last minute schedule shift which impacted child care, and a third said that child care impaired their ability to work desirable shifts. Strikingly, nearly a third of the forty percent of single income mothers who pay for child care use up half their income to do so. Getting to work, particularly when work is scheduled during non-standard hours, is challenging for low wage workers who rely on "off peak" public transportation schedules that increase already long commute times.

Scheduling practices of employers are rarely challenged, yet they are the center of the gender pay gap facing hourly female workers. Supervisors seemingly make capricious decisions on whom to schedule, when, and for how many hours. When individual supervisors make these unilateral decisions without regard to employment standards or criteria, they appear to do so with little oversight and guidance, which can lead to discriminatory bias based on gender. This gender bias can be motivated (consciously or unconsciously) by societal stereotypes casting women as less than "ideal workers" with weak commitment to the workplace because of outside caregiving responsibilities. Such bias can lead to women being scheduled both fewer hours and in less desirable timeslots. ■

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California and North Carolina Courts Reject Challenges to Teacher Employment Rights

By Eileen B. Goldsmith

This April, the California Court of Appeal and the North Carolina Supreme Court turned back challenges to employment rights for public school teachers. Both decisions are grounded in well-established principles of constitutional law—in particular, the need to show that the challenged laws cause the alleged harm in order to trigger any degree of constitutional scrutiny. Decided within days of each other, they signal that pending legal challenges to teacher tenure laws are likely to fail in other states as well. Taken together, these appellate decisions reflect judicial skepticism as to the contention that teacher tenure laws prevent school districts from making reasonable personnel decisions about underperforming teachers, concluding instead that the evidence in each case failed to support that claim.

The plaintiffs in *Vergara v. California* sought to strike down several California laws governing public school teachers' employment, including the two-year probationary period, the dismissal process, and seniority-based layoffs, on the theory that those laws violated students' state constitutional equal protection rights by preventing school districts from dismissing underperforming teachers. Following a two-month trial, the trial court invalidated the challenged laws in their entirety in 2014. The State of California, the California Teachers Association, and the California Federation of Teachers promptly appealed.

The California Court of Appeal issued its opinion in *Vergara* on April 14, reversing the trial court's invalidation of California's teacher employment laws. The court held that the trial evidence did not support the lower court's ruling that statutory teacher employment protections harmed students by preventing school districts from dismissing underperforming teachers when necessary. Rather, the evidence "firmly demonstrated" that school district employers, not the challenged laws, were responsible for teacher assignments and employment decisions, including decisions plaintiffs complained about like assigning ineffective teachers to poor and minority students. "Critically," wrote the court, "plaintiffs failed to show that the statutes themselves make any certain group of students more likely to be taught by ineffective teachers than any other group of students."

Even if the plaintiffs could have proven causation, the court held that they were unable to prove an equal protection violation because the statutes did not draw any distinctions among groups of students. The court was also unconvinced that striking down teacher protections would remedy the alleged constitutional harm to students, precisely because evidence of causation was lacking. The California Supreme Court denied the plaintiffs' petition for review on August 23, 2016, leaving the Court of Appeal's decision in place and putting an end to the California litigation.

Meanwhile, North Carolina legislators repealed the law by which teachers could be awarded "career status" by their school districts after four years of employment and retroactively stripping due process rights from teachers who had already earned career status under the prior law. Career-status teachers and the North Carolina Association of Educators sued in *North Carolina Association of Educators v. State*, challenging the repeal as a violation of the Contract Clause of the U.S. and North Carolina Constitutions and as a taking. In 2014, a trial court granted the plaintiffs' summary judgment motion, and in 2015, an intermediate appellate court affirmed this ruling.

On the heels of *Vergara*, the North Carolina Supreme Court affirmed on April 15, holding that the legislative repeal substantially impaired career teachers' vested contractual rights to employment with protections against arbitrary dismissal. Rejecting the State's argument that such impairment was necessary to "alleviat[e] difficulties in dismissing ineffective teachers," the court found that "no evidence indicates such a problem exists." Further, the court emphasized that the evidence before it showed that school districts dismissed underperforming teachers when necessary and less drastic legislative measures could have been effective.

Taken together, these appellate decisions reflect judicial skepticism as to the contention that teacher tenure laws prevent school districts from making reasonable personnel decisions about underperforming teachers.

After the *Vergara* and *NCAE* appellate decisions, lawsuits similar to *Vergara* followed in New York and Minnesota.. The plaintiffs in *Wright v. New York* are challenging New York's tenure, dismissal, and layoff laws as violating students' rights under the state constitution's education clause. *Wright* is pending on an interlocutory appeal from denial of a motion to dismiss. In *Forslund v. Minnesota*, filed just days before the Court of Appeal decision in *Vergara*, the plaintiffs contend that similar Minnesota statutes violate students' rights under the state constitution's education, equal protection, and due process clauses. The suits face the adverse *Vergara* and *NCAE* precedents, in particular on the theory that the challenged laws inevitably cause students to be taught by ineffective teachers.

While evidence that many poor and minority children perform worse in school than other students should concern us all, the *Vergara* and *NCAE* decisions are a reminder that causation is still critical—not only as a matter of constitutional law, but also because without a clear-eyed understanding of the real reasons for these disparities, schools, communities, and states cannot hope to fix them. The evidence before the *Vergara* and *NCAE* courts showed that, far from harming students, laws protecting teachers from arbitrary employment decisions help school districts attract and retain teachers despite low pay and often thankless work. With many states facing serious teacher shortages, policy makers should focus on improving teaching and learning conditions in high-need schools, in order to encourage excellent teachers to enter the profession and stay. ■

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Tips on Tip Pooling

By Philip I. Person

The rule relating to tip pooling practices has varied depending on the state and federal circuit where the tip pooling practice has been implemented. Employers and employees alike have sought clarity on if, and how, mandatory tip pooling practices can be implemented.

Section 203(m) of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA), regulates tip crediting in connection with tip pooling practices. "Tip crediting" is the practice by which an employer fulfills part of its hourly minimum wage obligation to a tipped employee by using the employee's tips. Section 203(m) of the FLSA provides that if an employer takes a tip credit, it must (a) provide notice to its employees and (b) allow its employees to retain all of the tips they receive, unless the employees participate in a valid tip pool. Section 203(m) further provides that a tip pool is valid if it is comprised exclusively of employees who are customarily and regularly tipped.

Employers have argued, based upon the express language of Section 203(m), that the FLSA limits only employer-mandated tip pooling practices when linked to a tip credit or sub-minimum wage. For instance, in a 2010 Ninth Circuit opinion, *Cumbie v. Woody Woo, Inc.*, the Ninth Circuit held that that the FLSA does not expressly prohibit an employer from requiring its employees to participate in tip pooling agreements when the employer does not take a tip credit. Stated differently, the Ninth Circuit read Section 203(m) to apply only to employers who took a tip credit and found that the statute was silent with respect to employers who require employees to participate in tip pooling without taking a tip credit.

Cumbie has been cited by 36 federal district courts and circuit courts, 23 of which have been by courts outside of the Ninth Circuit. One judge opined that "the analysis in [*Cumbie*]" is persuasive . . . ."

Just when employers and employees thought they had a grasp on the tip pooling restrictions relating to Section 203(m), the Ninth Circuit and the Department of Labor ("DOL") have now announced a change of course or clarification regarding tip pooling practices.

In 2011, shortly after *Cumbie* and its progeny of cases, the DOL promulgated a rule ("the 2011 rule") that extended the FLSA's tip pooling restrictions to all employers, not just those that take a tip credit. Simply put, under the 2011 rule, a tip pool is valid only if it is comprised exclusively of employees who are customarily and regularly tipped.

Until recently, litigants have challenged whether the DOL had the authority to promulgate the 2011 rule, arguing that the rule was contrary to Congressional intent. In a 2016 opinion, *Or. Rest. & Lodging Ass'n v. Perez*, the Ninth Circuit concluded that (1) the DOL has the authority to regulate the tip pooling practices of employers who do not take a tip credit and (2) the DOL reasonably interpreted Section 203(m). The Court reconciled its prior ruling by explaining that the statute was silent as to employers who do not take a tip credit and, therefore, left room for the DOL to promulgate the 2011 rule.

In light of *Perez*, counsel (both for employers and employees) should advise their clients on the recent tip pooling restrictions. Specifically, counsel and their clients should be aware that, under *Perez*, any tip pool mandated by an employer must include only employees who are customarily and regularly tipped. Whether an employer engages in a tip credit practice has no bearing on whether tip pooling restrictions apply.

Although *Perez* is a fairly recent case in the Ninth Circuit, counsel practicing outside of the Ninth Circuit should analyze the effect *Perez* could have on courts within its jurisdiction. If district courts outside of the Ninth Circuit relied on the Ninth Circuit's analysis in *Cumbie*, they could now adopt the more recent rationale set forth in *Perez*. Conversely, a district court outside of the Ninth Circuit could also reach an opposite conclusion. It could conclude that the *Cumbie* analysis—with its statutory interpretation and discussion of the legislative intent behind Section 203(m)—is more persuasive than the *Perez* analysis and, thereby, decline to find that the DOL had the authority to extend the restrictions set forth in Section 203(m)1. Therefore, *Perez* should be on employment lawyers' radar when analyzing tip pooling issues. ■

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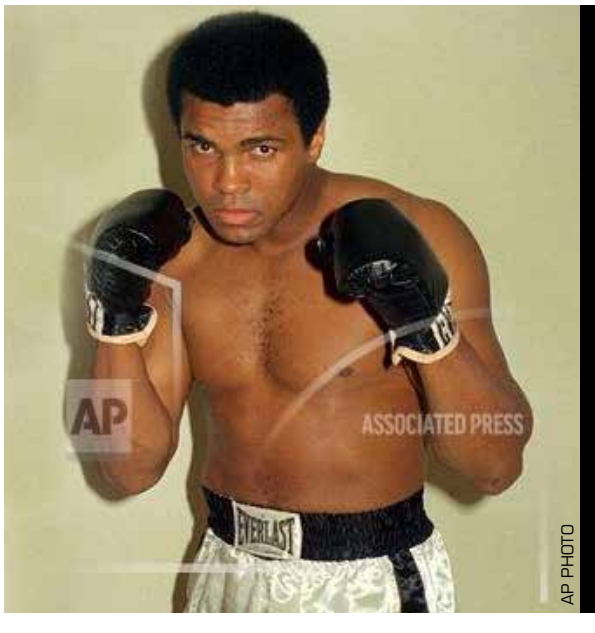

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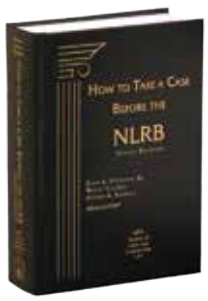

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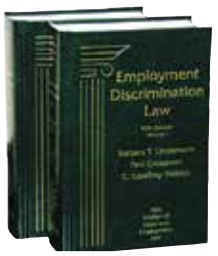

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Labor Arbitration

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an arbitral service provider. Arbitral service providers provide valuable services in some cases—particularly by providing rosters of potential arbitrators—but their services are not necessary in every dispute.

Reduce Briefing: Most labor arbitrators find pre-hearing briefs unhelpful, and as such the briefs represent wasted time and expense. If you are confident a pre-hearing brief will be useful in a particular case, coordinate with the other party before writing one. If the arbitrator receives a pre-hearing brief from one party but not the other, chances are the arbitrator will not read it before the hearing because of the possibility of causing real or perceived prejudice.

Stipulations: Before the hearing, consider conferring with the other party about the possibility of offering joint stipulations of facts. Most parties confer before the hearing on joint exhibits; joint stipulations of facts can shorten the hearing, narrow the issues, and reduce the amount of the arbitrator's preparation and writing time. Submit these stipulations to the arbitrator in Microsoft Word so the arbitrator can cut-and-paste it directly into her or his award.

Resolve Objections in Advance: Have each side indicate to the other which exhibits will be objected to, and the basis for the objections. Some of these objections may be resolvable by the parties before the hearing. Even if not, the hearing will go much more smoothly if the parties know in advance what the objections will be, so they can succinctly make their arguments to the arbitrator.

Use Technology: If the arbitrator is bringing a computer to the hearing, consider loading all the exhibits onto a flash drive instead of introducing paper copies. You'll save in copy costs, and a tech-savvy arbitrator will appreciate the portability of your submission. Keep in mind that there often is an inverse relationship between the quantity of paper a party provides in exhibits and the relevance of the exhibits.

Go Local: Choosing a local arbitrator, rather than one from out of town, will save significantly on the arbitrator's fee for travel costs and time.

Coordinate Witnesses: Before the hearing, confer with the other party to coordinate which witnesses will be called when, and by whom. This will accomplish two objectives. First, it will minimize the witness's frustration at having to sit around for hours waiting to be called. Second, it will allow the parties to call witnesses in a logical order that will help the arbitrator understand as early in the hearing as possible what the dispute is about and what the critical testimony will be.

No Transcripts: Consider whether you really need a court reporter. In many disputes, the critical language is in the collective bargaining agreement, not the testimony. A good arbitrator is a good listener and can take good notes. Consider as a compromise conducting a digital audio recording of the hearing that can immediately be shared with all parties and the arbitrator. Court reporters are expensive, and can significantly delay the time between the hearing and the award.

Start Early: Start the hearing early in the morning, especially if there is a chance the hearing will go late. Few things add to delay and expense more than having to unexpectedly extend a hearing to a second day. Seldom are all of the parties and attorneys and witnesses and the arbitrator available the very next day, and resuming the hearing weeks or months later requires everyone to prepare for the second phase of the hearing almost from scratch.

Go Lean: Don't beat dead horses. If your fourth witness is saying exactly the same thing your previous three witnesses just said, you're unnecessarily extending the time and cost of the hearing. Feel free to seek the arbitrator's guidance on whether the point has been made adequately. A good arbitrator will signal this to you without your having to ask. Watch for those cues.

Letter Briefs: Keep post-hearing briefs short. Consider agreeing with the other party to submit "letter briefs—a written version of a good closing argument—instead of traditional briefs.

Use Technology-2: Send post-hearing briefs by email, and send them in both PDF and Microsoft Word form. The PDF format is ideal if the parties have agreed that the arbitrator will exchange post-hearing briefs with the parties upon receipt of each party's brief. The Word document allows the arbitrator to cut-and-paste elements from the briefs—especially the relevant contract language and the parties' arguments—into the arbitration award, thus reducing the amount of time required for drafting the award. Similarly, be sure to send the CBA to the arbitrator electronically in Word to save the cost of the arbitrator having to retype provisions of the CBA. This is better than just putting CBA language in the brief because the arbitrator may need to cite other provisions in the CBA than the ones on which a particular advocate wanted to rely.

Short Opinions: Choose an arbitrator who does not feel obligated to turn the simplest discipline award into a tome worthy of a Dostoevsky novel. Both parties—and especially the losing party—want to know that the arbitrator heard and understood the factual testimony, want a reasoned opinion and award, and want the award to acknowledge each of the parties' arguments and why the arbitrator has accepted or rejected them. But they don't necessarily want to pay for a 30-page award in a straightforward discipline case. ■

Endnotes

1. See, e.g., Stephen B. Goldberg, Grievance Mediation: Why Some Use it and Others Don't, 2009 Proceedings of the National Academy of Arbitrators 275.

Rick Bales (*r-bales@onu.edu*) is the Dean of Ohio Northern University, Pettit College of Law in Ada, OH. He also a part-time labor arbitrator in both public and private sector cases, and is a panel member of FMCS and AAA. Special thanks to Laura Cooper and Steve Lazarus for comments to this article.

From the Chair

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lawyers is determining who will become a client. Some of those lawyers evaluate and screen prospective clients based on whether the client has a viable legal case: if yes, the lawyer may represent the client; if not, the lawyer may send the person away.

That approach misses the opportunity to help people with their very real problems even when they have no meaningful legal claims (or they lack the wherewithal to pursue such claims). The presence or absence of a legal claim is a factor in developing and implementing a plan of action; but the absence of a legal claim does not mean that the client doesn't have a problem or that the lawyer cannot help the client with that problem.

Most lawyers have good analytical skills. Many clients do not; even those who do typically lack the objectivity to analyze their situations effectively. A problem-solving lawyer can provide valuable assistance merely by helping the client think through the problem, identify possible avenues for solution, and decide on a course of action, all without regard to the existence any legal claims.

The employment lawyer with a client-centric approach should approach every representation with a problem-solving mind-set and should look for problem-solving approaches to addressing whatever problems and disputes are presented. The client, whether an employee or an employer, generally will be well served by such an approach. ■

The NHL's Pension Power Play

By Alec Robserson

The National Hockey League has traditionally been considered the "poor cousin" of the professional sports leagues because of its less attractive retirement plans and the lack of bargaining strength of its union, the National Hockey League Players' Association ("NHLPA"), when compared to other professional sports unions. The NHL's retirement plan had been considered the weakest of all of the major sports because in 1986, the NHL switched from a defined benefit to a defined contribution retirement plan. But the "poor cousin" stigma may not be applicable anymore, because the NHLPA signed a new collective bargaining agreement ("CBA") between the players and the league returning to a defined benefit plan for the players.

A defined benefit retirement plan, commonly known as a pension plan, is one that puts the risk of the payments into the hands of the employer rather than the employee. After retiring, the plan pays the employee an amount, usually per month, that is calculated by a formula consisting of years of service and the salary amount of that employee while working. The employer is on the hook for those payments. The NHL's plan is a multiemployer defined benefit plan under ERISA section 3(37). The NHL's plan is a multiemployer defined benefit plan under ERISA section 3(37). This means multiple employers are required to contribute to the plan, maintained pursuant to a CBA, which guarantees employees a defined benefit when they retire.

By contrast, a defined contribution plan puts the risk on the employee by specifying the contributions, but not the amount the employees can expect to receive on retiring. Moreover, some defined contribution plans, such as 401(k) plans, are funded by employee contributions, sometimes matched by employers, to accounts invested in various funds. When the employee retires, he or she can make withdrawals from an account balance.

This change in retirement plans for the NHL comes at a very interesting time. Even though most major sports have some form of a defined benefit plan, most employers across the country seem to be moving away from traditional defined benefit to defined contribution plans because of the risk factor. A movement from a defined contribution plan to a defined benefit plan is almost unheard of today. To the players, this new retirement plan became a matter of utmost importance during CBA negotiations. The NHLPA was able to achieve this through shrewd negotiating. The league negotiated a 50/50 split in revenue between players and the owners. Previously, the split in revenue was 57/43 in favor of the players. This compromise on behalf of the players combined with the fact that most other major professional sports have defined benefit plans may be the simple answer as to how the players were able to get this plan.

The NHL looked at the statistics of life expectancy and average career lengths of players to assess costs of the plan. Under the NHL's plan, players are considered participants after playing in one game at the NHL level.

AP PHOTO

They cannot receive their benefits until age 62 unless they elect a pro rata share no earlier than age 45. A player will only receive full benefits if he plays ten full seasons; those benefits come in the form of a single life annuity paying for the life of the player, or if the player is married, a qualified 100% joint and survivor annuity paying for the life of that player and his spouse. If he plays less than ten seasons, the benefits are paid at a fractional amount of the number of seasons played over ten. The plan looks at quarters of seasons as twenty game increments. Applying all of these rules means that a player who never reaches twenty games will receive nothing under the plan, and one who played only twenty games would receive .25/10 of the maximum benefits available under the plan.

Statistically, the average life expectancy of players may not be particularly short, the average career length is. An overwhelming majority of players never reach a full season of service under the plan. Most players don't enter the NHL until around age twenty, and most retire between ages twenty-two and thirty-two. This means that the majority of players will not be able to get any benefits, or if they do it is only a fractional amount. The risk of the defined benefit plan is still on the league, but these statistics seem to show the financial burden on the league may not be excessive. ■

Alec Roberson (*robeac13@wfu.edu*) is a recent graduate from Wake Forest University School of Law and is planning on taking the North Carolina Bar Examination in the summer of 2016. Upon completion of the bar exam, he will be an Associate with Hickmon & Perrin, PC in Charlotte, NC.

Labor AND Employment Law

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SUMMER 2016, VOL. 44, NO. 4

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Los Angeles, California
Miami, Florida
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November 5–6
Law Student Trial Advocacy Competition
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November 9–12
10th Annual Section Conference
Sheraton Chicago Hotel & Towers
Chicago, Illinois

November 19–20
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January 26–29
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January 28–29
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February 8–11
Employee Benefits Committee Midwinter Meeting
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