The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.

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Kollman & Saucier P.A.
The Business Law Building
1823 York Road
Timonium, MD 21093
P: 410-727-4300
F; 410-727-4391

To be added to our mailing list or if you have any questions or comments, please email us at

NLRB ISSUES REPORT ON SOCIAL MEDIA CASES

By Cliff Geiger

In the modern workplace, it has become common for an employee to use social media to vent frustrations about his employer, supervisors, and coworkers. It is also common for an employer, conscious of the potential impact that such posts may have on its business, to have a policy that prohibits or limits discussion of workplace issues via Facebook, Twitter, LinkedIn, YouTube, and other internet postings. The law in this area is rapidly evolving, and the National Labor Relations Board ("NLRB") is taking an active role in defining the new boundaries of permissible postings. On August 18, 2011, the NLRB's Acting General Counsel issued a report discussing recent case developments in the context of today's social media. This report can be accessed at *https://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases.*

The NLRB cases typically involve an employee being fired for posting something about their employer or coworkers on the internet. The primary legal issue is whether the employee or employees using social media are engaged in "protected concerted activity" under Section 7 of the National Labor Relations Act ("NLRA"). Section 7 provides employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from all of these things. Generally speaking, there is protected concerted activity when two or more employees act together with the goal of improving their terms and conditions of employment. The definition of concerted activity is also broad enough to include circumstances in which an individual employee brings a group concern to management or seeks to initiate or prepare for group action. Covered employees have the right to engage in concerted activities even when there is no union involved. The NLRA prohibits employers from taking or threatening adverse action against employees for engaging in protected concerted activity.

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JOB APPLICANT CANNOT SUE PROSPECTIVE EMPLOYER FOR FLSA RETALIATION

By Randi Klein Hyatt

As of late, the news on employment retaliation claims has not been so great for employers. The Fourth Circuit Court of Appeals (which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina), however, recently issued an FLSA retaliation decision that will make the business community happy, *Dellinger v. SAIC*, No. 10-1499 (4th Cir. August 12, 2011).

In July 2009, Ms. Dellinger sued CACI, Inc., a former employer, for alleged

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NEW HAVEN FIREFIGHTERS' LITIGATION CONTINUES

By Adam Simons

In *Briscoe v. New Haven*, No. 10-1975 (2d Cir. Aug. 15, 2011), the Second Circuit issued its decision created in the aftermath of the 2009 Supreme Court decision of *Ricci v. DeStefano,* 129 S. Ct. 2658 (2009). The *Ricci* case, you may recall, made national headlines. That case involved an exam that the City of New Haven, Connecticut administered to its firefighters in 2003 to be used for promotions. After receiving the results, the City and its Civil Service Board (CSB) noticed that white firefighters had outperformed minority firefighters. Worried that if it certified and used the exam results for promotional purposes the City would face disparate impact liability under Title VII, the CSB discarded the exam results.

Eighteen firefighters (seventeen white and one Hispanic) sued the City and claimed that the City's refusal to certify the results of the exam was disparate treatment based on their races. After litigating the case to the Supreme Court, the Court held "only that . . . before an employer can engage intentional discrimination for the asserted purposes of avoiding or remedying an unintentional disparate impact, [it] must have a strong basis in evidence to believe that it will be subject to disparate impact liability if it fails to take the race conscious, discriminatory action." The Supreme Court then reversed the judgment in favor of the City and ordered the City to certify the results. In so holding, Justice Kennedy attempted to clarify that, if the black firefighters sued, they would lose: "If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate treatment liability."

Nonetheless, after the CSB certified the test results, Michael Briscoe, one of the black firefighters, filed a disparate impact claim based on the use of the test results. New Haven moved to dismiss the case, arguing that the *Ricci* decision precluded Briscoe's claim. The district court agreed and dismissed his case. The district court held that *Ricci* "squarely foreclosed Briscoe's claims" and noted that, while its ruling denied him his day in court, he should have intervened in the case.

Briscoe appealed to the Second Circuit Court of Appeals. The Court held that his claim was neither precluded nor properly dismissed. The Second Circuit held that the Justice Kennedy's statement regarding Mr. Briscoe's suit was dicta (unnecessary) to the holding. The Second Circuit saw the holding regarding disparate impact litigation as not logically related to the Court's express holding that an employer may avoid disparate-treatment liability where it had a "strong basis in evidence" that certifying the test results would result in disparate impact liability. The Second Circuit stated, "we see no way to reconcile the dicta, on which the city's argument relies, with either the Court's actual holding in Ricci or long-standing, fundamental principles of Title VII law[.]"

The Court also explained that "the question that *Ricci* answers for disparate treatment claims has already been answered for claims of disparate impact." Title VII already provides for a statutory definition of the claim under that section, which permits conduct that is "job related" and "consistent with a business necessity." As long as the conduct falls within this definition, the court explained, the employer acts lawfully and "[t]here is no need to stretch *Ricci* to muddle that which is already clear."

The Second Circuit also rejected the application of the "strong basis in evidence" defense to disparate impact claims because "it is hard to see how one can adduce a 'strong basis in evidence' that oneself will later act with 'discriminatory intent or motive.'" The Court explained that, while this is conceivable, it is "fiendishly complicated, and therefore unsuitable for a conduct-guiding standard."

This case clarifies what was confusing to many about the *Ricci* decision. Employers may avoid disparate treatment liability for refusing to certify an exam with a disparate impact where they have a strong basis in evidence that they will face disparate impact liability. If, however, they are later required to certify the exam results, they can avoid a disparate impact lawsuit where the test is job-related and consistent with a business necessity. Prior to the Second Circuit's opinion, the *Ricci* decision created confusion because it created a form of circular logic, in which each cause of discrimination required an event of the same type to cause it. At least for now, the Second Circuit has simplified the standard.

MARYLAND COURT OF APPEALS KEEPS LIMITS ON THE ABUSIVE DISCHARGE STANDARD

By Darrell VanDeusen

The common law doctrine of "employment at will" permits either an employer or employee to terminate the employment relationship at any time, or for any reason, with or without notice. Maryland courts are reluctant to diminish an employer's decision-making discretion, but the tort claim of "abusive or wrongful

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FLSA RETALIATION CLAIM REJECTED

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minimum wage and overtime violations under the FLSA. About a month later, she applied for a job with Science Applications International Corporation (SAIC) and was offered a position contingent upon passing a drug test, obtaining security clearance, and completing certain paperwork.

During the midst of this contingency process, Ms. Dellinger was required to disclose on her security clearance paperwork any pending noncriminal court actions to which she was a party. She dutifully listed her pending suit against CACI, completed the forms and turned them in to SAIC. A few days later, SAIC withdrew the offer. Not surprisingly, Ms. Dellinger sued SAIC after it rescinded a job offer.

The trial court tossed out Ms. Dellinger's lawsuit, finding that the FLSA's anti-retaliation provision did not apply to prospective employees. Ms. Dellinger then appealed to the Fourth Circuit, arguing that the FLSA's anti-retaliation provision protects any employee that has been the victim of FLSA retaliation by "any person", which term includes future employers. Thankfully, the Fourth Circuit disagreed and held that the FLSA's text makes clear that only an employee has the right to sue his or her current or former employer for retaliation, and a prospective employee cannot sue a prospective employer for retaliation.

The FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3), prohibits "discrimination" against "any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding" under the Act. The court rejected Ms. Dellinger's argument that "employee" in Section 215 (a)(3) should be interpreted to include job applicants. The court wrote the statutory term "does not exist in a vacuum" but rather is defined elsewhere in the FLSA as "any individual employed by an employer." Indeed, while Section 215(a)(3) does prohibit all "persons" from engaging in certain acts, including retaliation against employees, the court noted the FLSA does not authorize employees to sue "any person." An employee (one who works for an employer) may only sue employers for retaliation, per Section 216(b). Recognizing also that no prior case had extended FLSA protections to applicants or prospective employees, the Fourth Circuit concluded that the anti-retaliation provision can only be applied within the employer-employee relationship.

Dissenting, Judge King suggested that the majority ignored the logic of the Supreme Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), where the Court held that the term "employee" as defined in Title VII permitted a former employee to sue a former employer for retaliation. Writing for the majority, Judge Niemeyer explained that *Robinson* involved a former employee's retaliation claim against his former employer, not a retaliation claim by an applicant who never worked for the company. To the extent *Robinson* is relevant, said Judge Niemeyer, the Fourth Circuit has ruled that the FLSA's anti-retaliation clause covers employees suing their former employers. "The issue here," said Judge Niemeyer, "is whether the FLSA applies to persons who are not yet employees and who have never worked for the employer. Because Robinson deals only with former employees, it does not speak to the issue in this case."

While the Court noted sympathy for Ms. Dellinger's argument that it would be problematic to permit future employers to discriminate against prospective employees for having exercised historically their rights under the FLSA, the court was more concerned with permitting any person who once sued an employer under the FLSA to sue a prospective employer claiming retaliation based on past litigation. The court properly recognized such a holding would broaden the scope of the FLSA beyond its stated purpose of regulating minimum wages and maximum hours of work.

MARYLAND'S HIGH COURT REJECTS WRONGFUL DISCHARGE CLAIM

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discharge" has been recognized in limited circumstances. The seminal case in Maryland is *Adler v. Am. Standard Corp.*, 291 Md. 31 (1981). In *Adler*, an employee filed a wrongful discharge action alleging that he was terminated for his internal reporting of misuse of corporate funds and falsification of company financial documents.

In *Adler*, the Court of Appeals recognized the tort of wrongful discharge, which creates an exception to the employment at will doctrine. With this tort, an employee must identify a clear mandate of public policy that is violated with the termination (i.e., being fired for: serving jury duty, filing a worker's compensation claim, or refusing to commit a crime). In so doing, the Court balanced the vulnerability of at-will employees with the rights of an employer to terminate employees when it is beneficial to the business. The Court held that Adler's abusive discharge claim failed because his allegations did not specify how the employer's conduct constituted a violation of public policy under Maryland law..

Since recognizing the tort of wrongful discharge in *Adler*, Maryland courts have refined its requirements and the scope of the tort on a case-by-case basis. Recently, in *Parks v. Alpharma, Inc.*, __ Md. __, 2011 Md. LEXIS 449 (July 19, 2011), the Court of Appeals

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MARYLAND HIGH COURT REJECTS WRONGFUL DISCHARGE CLAIM

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affirmed the trial court's dismissal of the plaintiff's complaint, holding that she had not stated a sufficiently clear public policy as the basis of her wrongful discharge claim.

Parks worked out of her employer's Baltimore office, marketing prescription drugs throughout Maryland from 2001 until July 2006, when she was fired. Parks' complaint alleged that her termination was "in retaliation for her complaints about Alpharma's illegal marketing activities." The articulated public policy basis for her wrongful discharge claim was the Maryland Consumer Protection Act (MCPA), Md. Comm. Law. Art § 13-303 and the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45 which prohibit "unfair or deceptive" acts or trade practices.

The Circuit Court for Baltimore City granted Alpharma's motion to dismiss, holding that (like Adler) Parks had not complained of her concerns outside of Alpharma, but had only done so internally. The Court of Appeals took the case on its own motion, bypassing the Court of Special Appeals and affirming dismissal of the complaint, but on different grounds.

The Court of Appeals held that neither the MCPA nor the FTCA provided a sufficient basis of public policy on which Parks could rest her allegations. Writing for the Court, Judge Battaglia stated that "[t]he Consumer Protection Act . . . does not provide the specificity of public policy that we have required to support a wrongful discharge claim." The FTCA's provisions are even more general and, said the Court, "we are left with Ms. Parks's naked allegation that Alpharma was violating the Federal Trade Commission Act, a claim identical to that rejected in Adler, being far 'too general, too conclusory, too vague, and lacking in specifics' to establish that Alpharma contravened a clear mandate of public policy."

Parks's attempt to rely on the FTC's regulations also failed to sway the Court, which noted that "[t]he regulation at issue provides the FDA's standard for what details must be included on a prescription drug label if there is 'reasonable evidence' that a particular drug has a 'clinically significant hazard.' What is not clear from the regulation is the specific public policy mandate that Alpharma allegedly violated to support the instant wrongful discharge claim. Under such circumstances, we are left with only our own discernment to determine whether the behavior Ms. Parks's alleges constituted non-compliance by Alpharma, a judgment we abjure, absent a clear, unmistakable signal in the law. In reaching this conclusion, the Court relied upon the Fourth Circuit's decision in *Szaller v. American National Red Cross*, 293 F.3d 148 (4th Cir. 2002), which rejected use of FDA regulations as a public policy basis.

In a concurring opinion, Judge Adkins agreed that Parks's complaint should be dismissed, but wrote separately for two reasons. First, he noted that "the majority leaves in a state of doubt the law regarding whether a whistleblower action requires external reporting. We resolved this issue in favor of internal reporting in *Lark v. Montgomery Hospice, Inc.,* [414 Md. 215 (2010)] . . . ."

Second, Judge Adkins found the *Szaller* decision "poorly reasoned" and criticized the Court's reliance on it. Sounding personally offended and aggrieved, Judge Adkins wrote that "the Fourth Circuit surely underestimates our skill in separating the wheat from the chaff. It is by no means beyond the ken of this Court to assess the relative importance of one Federal regulation over another in terms of wrongful discharge law."

Judge Adkins first concern should get employers' attention. Traditionally, "internal only" complaints have not been fodder for a wrongful discharge claim. The *Lark* case was brought under Maryland's Health Care Worker Whistleblower Protection Act, which contained specific provisions about notice to the employer. But the Court did reject the argument that Lark was required to report the wrongful actions to external authorities to state a claim. It remains to be seen whether the Court would apply this reasoning beyond the healthcare setting.

COURT ALLOWS RECOVERY OF ELECTRONIC DISCOVERY COSTS

By Mike Severino

Most litigants and in-house counsel are well aware of the impact that electronically stored information (ESI) can have on litigation. While ESI can have significant benefits in the fact finding arena, it can also be a Pandora's Box in terms of costs. Most commercial litigation cases do not warrant the potential costs associated with electronic discovery. Some cases, however, do require the full panoply of investigation and/or production of ESI. When such a case arises, a litigant must search their electronic databases and produce electronically stored information in its native format, often employing outside vendors to properly handle these tasks. The associated fees charged by these vendors can be significant and are usually borne by the party responding to the request for information. Courts, however, have recently begun providing prevailing parties relief from these costs. Pursuant to federal law that allows a

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NLRB PUBLISHES GUIDANCE ON SOCIAL MEDIA

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The NLRB applies an expansive view of what constitutes concerted activity regardless of where the activity takes place. In the eyes of the NLRB, a face-to-face water cooler conversation among employees is no different than a blog or a post to the internet. Although the cases discussed by the Acting General Counsel generally have not made it to the hearing stage, and therefore do not necessarily represent the current state of the law, they do provide insight into what the NLRB believes constitutes interference with Section 7 activity. Facebook posts that arguably involve complaints or concerns about working conditions, especially if directed to fellow employees, normally will be protected. This is true even if the posts involve profanity, critical or disparaging remarks, or name calling directed at supervisors.

On the other hand, the NLRB has recognized that employers must have some right to have rules against disruptive behavior. Employees are not always engaged in protected concerted activity when slamming their employer or supervisor on the internet. For example, disparaging an employer's products or customers, or disclosing trade secrets, are not protected. Likewise, employees who use social media to air individual gripes, or to engage in critical speech that does not involve group action or the terms and conditions of employment, are not protected. The issue, of course, often will turn on whether a particular post was a personal gripe or in furtherance of group action.

The NLRB also addressed social media policies in the cases reported. In every case, the NLRB found some aspect of the employer's social media policy unlawful because the policy used overbroad terms that could be construed to prohibit criticism of an employer's labor policies, treatment of employees, and terms and conditions of employment. Policies prohibiting "disparaging comments" or "inappropriate discussions" regarding the company, management, and/or coworkers are too broad. So are rules against individuals identifying themselves as employees or posting pictures that include the employer's logo. Even policies prohibiting employees from revealing confidential and proprietary information are too broad if the employer does not define or limit what it considers confidential and proprietary.

Given the emphasis the NLRB is placing on social media cases, employers should review their social media policies carefully. To avoid being overly broad, social media policies must use carefully defined terms or somehow limit their application to exclude Section 7 activity. One way of narrowing a policy may be to include a disclaimer providing that the policy will be applied consistent with the NLRA, or that the policy is not intended to interfere with employees' rights to discuss the terms and conditions of their employment with each other, or some similar statement. Once a properly tailored social media policy is implemented, employers should take care train managers on applying the policy correctly.

Employers should stay tuned to the NLRB's activities and what the NLRA permits and prohibits. The Acting Attorney General's report is just a start. There are many other social media cases in the NLRB's pipeline. We will continue to monitor and report on this delicate balancing act between employer and employee rights.

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prevailing party its "costs" of litigation, courts have begun to include outside electronic discovery expenses as recoverable costs to be shifted to the losing party.

In *Race Tires America, Inc., et al. v. Hoosier Racing Tire Corp., at a*l., 2011 U.S. Dist. LEXIS 48847 (W.D. Pa. 2011), the United States District Court for the Western District Pennsylvania awarded two defendants, who prevailed on summary judgment, approximately $370,000 for the costs associated with producing ESI. The Court relied on 28 U.S.C. § 1920(b), which provides for the taxation of costs for "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case …." The Court noted that the parties agreed at the outset of litigation to a comprehensive case management order that specifically addressed electronically stored information and that the plaintiff "aggressively pursued e-discovery under the Case Management Plan." The amounts awarded constituted the costs defendants incurred for third-party vendors to produce electronic discovery and excluded attorney or paralegal charges.

The courts are divided on this issue. *Cf. Mann v. Heckler & Koch Defense, Inc.*, 2011 U.S. Dist. LEXIS 46045 (E.D. Va. 2011) (costs incurred for creating searchable database, as opposed to simply burning files to a disk, are not taxable). The Guidelines for Bills of Costs promulgated by the Clerk's office for the federal district court of Maryland does not address costs associated with producing electronically stored information. Nevertheless, litigants need to be careful about what they ask for in discovery. Shifting e-discovery costs to a losing litigant can cause a party to more closely examine its position, especially in

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the majority of cases where a party cannot shift attorneys' fees. Essentially, everyone now has some skin in the game.

In order to minimize any potential exposure, parties should address electronic discovery early in the litigation and should weigh the anticipated e-discovery costs for all parties against the expected damages. For example, the parties can agree to produce hard copies of emails and other information while reserving the right to later ask for specific data in electronic format if necessary. The parties can also agree that third party costs for producing electronic discovery shall not be allowed as taxable costs. At the outset of litigation, neither party knows who will prevail, but most litigants do not want the specter of a large e-discovery bill looming in the distance.

FLSA LITIGATION -- RECENT HIGHLIGHTS

By Kelly Hoelzer

The Fair Labor Standards Act (FLSA) is one of the more complicated and illogical employment laws in its everyday application. Even well-meaning employers may run afoul of the statute's many technicalities, resulting in costly violations. The Department of Labor (DOL) enforces the FLSA and has the authority to audit employers, often with limited advance notice, and to collect wages owed and penalties on behalf of employees. Employees can also sue in court, and can recover up to three years of back wages, plus an equal amount in liquidated damages, and attorneys' fees.

It comes as no surprise, then, that FLSA litigation is on the rise. Recent years have seen increasing numbers of well-publicized, multi-million verdicts against employers in FLSA collective action lawsuits. Many of these cases are brought by employees challenging whether they are exempt from the overtime provisions of the Act. Where courts have ruled that the employees do not fall within one of the exemptions under the FLSA, employees have recovered millions of dollars in overtime pay. The DOL also has stepped up enforcement of the Act, obtaining judgments and settlements on behalf of workers against employers of all sizes.

So far, 2011 has been no exception. This year, restaurants and retail outlets appear to be a key target, as highlighted in the cases mentioned below:

In a consent judgment issued on February 24, 2011, Martino's Pizzeria Inc. (d/b/a Mama's Pizzeria) in Copiague, New York, agreed to pay $800,000 in back wages and penalties to approximately 40 employees. The DOL sued Martino's Pizzeria and its owners for failing to pay minimum and overtime wages. According to the DOL, its investigation revealed that employees were often required to work 70 to 80 hours per week without overtime pay. Martino's also paid its employees in cash, off the company's books, and failed to keep time records showing work hours. The employer agreed to pay the employees $390,000 in back wages and an additional $390,000 in liquidated damages, as well as a $20,000 penalty to the government for willful violation of the FLSA. *Solis v. Martino's Pizzeria Inc.*, No. CV-09-3644 (E.D.N.Y. Feb. 8, 2011).

On May 25, 2011, a federal court ruled that the owners of three restaurants in Illinois owed $1.5 million in unpaid overtime and minimum wages to 64 employees. The DOL sued the restaurants after its investigation showed that in 2006-2008 the employees received no money from their paychecks (because they signed them back over to their employer) and were paid only in tips. The DOL also found recordkeeping violations stemming from the restaurants' instruction to workers not to record all hours worked. The court ordered the employer to pay $574,851 in back pay, and an equal amount in liquidated damages, to the workers. *Solis v. El Matador Inc.*, No. 2:08-cv-2237 (C.D. Ill. May 26, 2011).

In another case instituted by the DOL, two restaurants in Jacksonville, Florida agreed on August 5, 2011, to pay more than $930,000 in back pay and liquidated damages to 30 employees for violations of the FLSA. The DOL claimed that the employers failed to pay overtime wages as a result of improperly classifying kitchen employees as exempt. The DOL also reported that wait staff received only tip wages because they had to sign their paychecks back to the employer. *Solis v. La Nopalera Mexican Rest.* #10, Inc., No. 3:11-cv-0583 (M.D. Fla. Aug. 5, 2011); *Solis v. LAJAL Inc.*, No. 3:11-cv-0584 (M.D. Fla. Aug. 5, 2011).

In August 2011, Starbucks Corp. settled a lawsuit brought by over 550 current and former retail store managers nationwide claiming they were improperly classified as exempt employees and not entitled to overtime wages. The company agreed to pay over $613,000 in back wages, plus attorneys' fees and costs of about $950,000. *Hernandez v. Starbucks Coffee Co.*, No. 09-cv-60073 (S.D. Fla., dismissed Aug. 15, 2011).

As these cases make clear, any employer – no matter how small – may be within the DOL's sights. Employers are well-served to audit their pay practices, with the assistance of employment counsel. Wage and hour law is often counter-intuitive, and tackling these issues with plain common sense does not always work.

NLRB ISSUES THREE NEW DECISIONS PROMOTING UNION REPRESENTATION

By Eric Paltell

On August 26, 2011 -- the final working day of Chairman Wilma Liebman's term -- the National Labor Relations Board ("NLRB") issued three new decisions that make it easier for unions to organize workers and protect incumbent unions. The three decisions -- *Specialty Healthcare and Rehab Center of Mobile*, 357 NLRB No. 83, L*amons Gasket Co*., 357 NLRB No. 72, and *UGL-UNICCO Service Co*., 357 NLRB No. 76 – appear to be a blatant attempt by a pro-labor NLRB to reverse the decades-old decline in union representation.

The most radical of the three decisions is *Specialty Healthcare*. In that case, the Steelworkers union petitioned to represent a group of full and part-time Certified Nursing Assistants (CNA's) at an Alabama nursing home. The home argued that a proper bargaining unit should include 33 additional non-professional service and maintenance employees. The Regional Office of the NLRB approved the CNA-only unit, and the employer sought review from the full NLRB.

Reversing decades of precedent, the Board held that when a union petitions to represent a group of employees, the petitioned-for unit should be deemed appropriate unless the employer proves that excluded employees share an "overwhelming community of interest" with the employees included in the petition. This will be a difficult standard to meet -- particularly if the process for litigating these issues is expedited pursuant to the NLRB's proposed rule concerning the election process (see the July/August 2011 issue of *The Employment Brief* for more details on the NLRB's proposed rule).

The *Specialty Healthcare* decision will make it much easier for unions to organize employees. It will now be possible for unions to represent small subsets of the employee population, such as a single job classification or a single department. In its decision, the Board noted that it might even be appropriate to have a unit consisting only of night shift CNA's, as opposed to all CNA's. The ruling is a dramatic departure from prior Board precedent, where the Board included employees in the bargaining unit unless they were "sufficiently distinct" to warrant their exclusion. Now, the inquiry has been flipped, and the employer bears the heavy burden of showing that the excluded employees belong in the unit.

The NLRB's other two decisions are less dramatic, but nevertheless reflect the Board's desire to make it easier for unions to represent employees. in *Lamons Gasket,* the Board overruled its 2007 decision in *Dana Corporation*, 351 NLRB 424, which established a process for employees or rival unions to challenge an employer's voluntary recognition of a union (which usually occurs through a card check). Under *Dana Corporation*, employees were granted a right, within 45 days of recognition, to file a petition to decertify the union. In *Lamons Gask*et, the Board held that a voluntarily recognized union may not be challenged through the election process for a "reasonable period of time," which it defined as a minimum of six months and a maximum of one year after the parties' first bargaining session.

In *UGL-UNICCO*, the NLRB overruled another Bush-era decision, *MV Transportation,* 337 NLRB 770 (2002). In *MV Transportation* (and for most of the past few decades), the Board held that a union which represents employees who have been acquired by a successor company has only a rebuttable presumption of majority support, and it allowed employees to decertify the existing union or select a new union if no collective bargaining unit is in place with the successor employer. In *UGL-UNICCO*, the Board reimplemented a "successor bar" doctrine (which had also been briefly implemented by the Clinton NLRB in *St. Elizabeth's Manor*, 329 NLRB 341 (1999)). Under this successor-bar doctrine, an incumbent union is protected from an election challenge during a "reasonable" period of time following the first bargaining session. The Board went on to explain that where the successor employer adopts the predecessor's existing terms of employment (but not the existing CBA), the successor bar will last for a period of six months after the first bargaining session. In cases where the successor employer exercises its right to establish new terms of employment, the bar will last for a minimum of six months, and a maximum of one year. In the event the parties negotiate a new CBA, the "contract bar" (which blocks election petitions during the term of a contract) will be imposed for two years instead of the normal three years.

These three decisions may very well be the last opportunity for the Obama Board to issue such dramatic, precedent-changing decisions. Chairman Liebman is now gone, and the term of Member Becker (perhaps the most union-friendly member of the Board) expires at the end of 2011. At that point, the Board will likely have only two members, which is not a quorum for purposes of issuing decisions. With that in mind, we probably have seen the worst of the damage from this very labor-friendly NLRB, and employers now need to focus on adapting to the rules set forth by these new decisions, as well as continuing to resist the Board's attempt to issue its proposed Final Rule expediting the union election process.