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JUDICIAL UPDATE

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JUDICIAL UPDATE

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I. SUPREME COURT DECISIONS

A. *New Process Steel, L.P. v. National Labor Relations Board*, 560 U.S. ___, 130 S. Ct. 2635 (2010).

1. Background

a. A steel processing plant in Indiana unilaterally withdrew recognition from the International Association of Machinists. The union filed unfair labor practice charges for withdrawal of recognition and repudiation of the collective bargaining agreement. The National Labor Relations Board ("NLRB" or "Board") ruled in favor of the union.

b. On appeal to the Seventh Circuit, the employer argued that the Board's decision was of no effect since there were only two sitting members on the five-member Board.

c. Section 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b), which governs the delegation of Board powers to its members, provides as follows: "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof."

d. In December 2007, with one seat already vacant and another member's term about to expire, the four members of the Board delegated all of its authority to a three member panel. When the recess appointment of one member of that group of three expired three days later, the remaining two members proceeded as a quorum. The Board read Section 3(b) to permit them to do so.

e. The two-member Board went on to issue almost 600 decisions before President Obama made recess appointments

in March 2010 to add additional members to the Board.

f. In this particular case, the Seventh Circuit held that the two-member Board had the authority to act.

2. Supreme Court Decision

a. As indicated above, the issue before the Supreme Court was whether Section 3(b) authorized the two-member Board to act as it did.

b. The majority interpreted the first sentence of Section 3(b) as requiring that the delegee group maintain a membership of three in order for the delegation to remain valid.

c. The majority found that Section 3(b) still operates to allow the Board to act in panels of three, and permit any panel to issue a decision by only two members if one member is disqualified. But if the third member ceases to be a member, as happened in this case, the group loses its authority to act.

d. The majority acknowledged the Board's desire to keep its doors open despite Congress's failure to confirm additional members, and the costs that delay imposes on the litigants, but stated that the statute "must be given practical effect rather than swept aside in the face of admittedly difficult circumstances."

3. Dissent

a. Four Justices dissented, taking issue with the majority's interpretation of what they saw as clear statutory text giving the two-member Board the authority to act as it did.

b. One point of contention that the dissenters had with the majority was the fact that there was no textual support for its conclusion that two members of a three-member group could act if the third member was disqualified, but that it could not act if the third member ceased to be a member. According to the dissenters, the plain text of the statute draws no such distinction; rather, it permits two members of a three-member group to act, period.

c. Further, the dissenters noted that "the objectives of the statute, which must be to ensure orderly operations when the Board is not at full strength as well as efficient operations

when it is, are better respected by a statutory interpretation that dictates a result opposite to the one reached by the Court."

B. *City of Ontario v. Quon*, Docket No. 08-1332, 130 S. Ct. 2619 (June 17, 2010)

1. Facts:

a. Jeff Quon was a member of the Special Weapons and Tactic ("SWAT") Team for the Ontario City Police Department, a municipality near Los Angles, California.

b. The City acquired 20 alphanumeric pagers that could send and receive text messages, and the City issued one such pager to Jeff Quon with instructions that he use it to communicate concerning police matters.

c. Within the first or second billing cycle, Quon exceed his monthly text message character allotment, and the wireless provider charged the City an extra fee. Quon reimbursed the City by check for the extra charges. Over the next few months, Quon exceed his character limit three or four times, and he reimbursed the City for the charges related to each incident.

d. The City ordered transcripts of the text messages to determine whether the overages were for personal messages sent on City equipment. Upon review of the transcripts, the City determined that Quon used the equipment for non-work related matters and that some of the communications were sexually explicit. Indeed, some of the messages involved communications related to an alleged extra-marital affair between Quon and a dispatcher, April Florio. Based on the review of the transcripts, the City disciplined Quon for violating the Department's computer policies.

e. Quon sued the City in the California District Court claiming the discipline violated the Stored Communications Act, 18 U.S.C. §2701, California law, as well as the Fourth Amendment to the United States Constitution. The District Court denied the motion for summary judgment on the Fourth Amendment claim because Quon had a reasonable expectation of privacy with the text messages and the City needed to prove that the search was reasonable. *See Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116, 1146-

47 (C.D. Cal. 2006). Ultimately, a jury concluded that the City justifiably ordered the audit to determine the efficacy of the pager character limits, so the Court entered judgment in the City's favor.

f. The Court of Appeals for the Ninth Circuit reversed, concluding that less intrusive means existed for the City to investigate the pager use, so reviewing the transcripts of the text messages violated the Fourth Amendment. *See Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 909 (9th Cir. 2008)

2. Issues: Does a public employer violate the Fourth Amendment by reading text messages sent from electronic devices issued to public employees.

3. Holding: In an opinion by Justice Kennedy, the Court held that a public employer did not violate the Fourth Amendment by ordering a transcript of text messages to determine whether employees used the electronic telecommunication equipment properly.

4. Reasoning:

a. The Fourth Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by government officers. *See Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-14 (1989). This protection extends to the search related to allegations of workplace misconduct by public employees. *See O'Connor v. Ortega*, 480 U.S. 709, 711 (1987).

b. The Court assumed without deciding that Quon had a reasonable expectation of privacy in the use of the pager equipment to send personal messages. *See Katz v. United States*, 389 U.S. 347, 353 (1967) (finding that reasonable expectation of privacy exists in a telephone both).

c. Consequently, the public employer's search could only be constitutional if the measures adopted were reasonably related to the objectives of the search, and they did not excessively intrude on Quon's privacy in light of the circumstances giving rise to the search.

d. Upon review of all of the facts and circumstances, the Court concluded that reviewing the text message transcripts was reasonable because "it was an efficient and expedient way to

determine" whether the excessive use of the pager was for work-related or personal reasons. The Court also reasoned that a reasonable police officer would be aware that sound management principles might require the audit of messages to determine whether the equipment is used in accordance with the City's policies.

5. Other Opinions:

a. Justice Stevens concurred because, as a police officer, Quon had a limited expectation of privacy. However, Stevens wrote separately to state his belief that the additional analysis in the majority opinion was unnecessary to resolve the case.

b. Justice Scalia concurred because, in his view, the Court did not need to determine the legal theory related to the reasonableness of the search. Instead, Justice Scalia maintained that any City search of text messages in this situation was inherently reasonable.

C. *Rent-A-Center West, Inc. V. Jackson*, Docket No. 09-0497, 130 S. Ct. 2772 (June 21, 2010)

1. Facts:

a. Rent-A-Center West, Inc. ("RAC") hired Antonio Jackson at an entry level position. As a condition of employment, RAC required that Jackson execute an agreement to arbitrate any claims that he had against the employer.

b. The second provision of the arbitration agreement stated that the arbitrator shall have "exclusive authority to resolve any dispute relating to the enforceability of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable."

c. When Jackson allegedly complained internally about the failure to receive promotions because of his race, RAC terminated him.

d. Jackson filed a lawsuit against RAC in the Nevada District Court contending that he was terminated because of his race in violation of federal law. *See* 42 U.S.C. §1981. The District Court dismissed the action based on the arbitration agreement. *See Jackson v. Rent-A-Center-West, Inc.*, 2007 U.S. DIST. LEXIS 99067, *7 (June 7, 2007).

e. The Court of Appeals for the Ninth Circuit reversed (over the dissent from Judge Hall) reasoning that the District Court must decide the threshold issue of whether the employment contracts is arbitrable and that the duty included the obligation to resolve challenges to the agreement itself as unconscionable. *See Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 920 (9th Cir. 2009).

2. Issues: Whether a District Court must decide that an arbitration agreement is unconscionable or whether that decision is reserved for arbitrator.

3. Holding: In an opinion by Justice Scalia, the Court held that claims of unconscionability must be resolved in arbitration, and the District Court properly dismissed the action because the terminated employee failed to exhaust the arbitration requirement.

4. Reasoning:

a. Section 2 of the Federal Arbitration Act requires courts to enforce the arbitration obligation, unless the obligation is invalid for "fraud, duress, or unconscionability." *See* 9 U.S.C. §2; *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

b. Parties can agree to arbitrate about "gateway" questions, such as whether the parties agreed to arbitrator at all or whether the arbitration agreement covers a particular controversy. *See Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002).

c. The only type of challenge that is relevant to a court's determination about whether the arbitration agreement is enforceable is the validity of the agreement to arbitrate, not challenges to the contract as a whole. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-46 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

d. Under this precedent, if the former employee had made challenges for fraud in the inducement of the arbitration clause, the District Court could have considered the challenge without arbitration. In this case, the former

employee challenged the entire agreement, so the District Court was required to submit the dispute to arbitration.

e. Furthermore, as with labor law arbitration, the agreement to arbitrate must be clear and unmistakable if the arbitration will consider non-contractual claims. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1473-74 (2009). Here, there was no dispute about the agreement to arbitrate disputes, so the challenges to the enforceability of the entire agreement proved fatal for the District Court case.

5. Other Opinions:

a. Justices Stevens, Ginsburg, Breyer, and Sotomayor dissented, maintaining that the employee was challenging the arbitration requirement of his employment agreement as well as the agreement itself, so the District Court should have resolved the validity of the arbitration agreement before dismissing the case for arbitration.

b. "Gateway" matters, like whether a dispute is arbitrable, are typically handled by the Courts unless the parties specifically delegate their resolution to arbitration. *See First Opticians of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

c. A claim that an arbitration agreement is unconscionable inherently challenges whether there was "clear and unmistakable" assent to arbitration. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (O'Connor, J., concurring in judgment and dissenting in part).

d. As there was no clear and unmistakable delegation of the dispute to arbitration, the dissenters maintained that the District Court should have resolved the threshold issues, rather than refer the case to arbitration.

e. The dissenters further contended that the majority opinion extends the reasoning from *Prima Paint* beyond its intended sphere. *Prima Paint* stands for the severability proposition: the fraudulent inducement claim involved in the dispute should not prevent enforcement of an arbitration clause. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967). To the dissenters, *Prima Paint*, therefore, lets a party "pluck from a potentially invalid *contract*, a potentially valid *arbitration agreement*." Like "Russian nesting dolls," the dissenters criticized the majority for

adding a new layer of severability, where a party can pluck from a potentially invalid *arbitration agreement*, a valid *delegation clause*. Under the majority's approach the parties are forced into ever greater specificity in the details of their challenge to an arbitration clause.

D. *Granite Rock Co. v. Int'l Bhd of Teamsters,* Docket No. 08-1214, 130 S. Ct. 2847 (June 24, 2010).

1. Facts:

a. Teamsters Local 287 in San Jose, California represented production and shipping employees for the Granite Rock Company, a concrete and building supplies manufacturer operated from San Francisco.

b. After the expiration of its collective bargaining agreement in April 2004, Local 287 began a strike on June 9, 2004 that lasted until July 2, 2004 at which time the parties reached a tentative agreement for a new labor contract.

c. Although Local 287 proposed a "back-to-work" agreement that would have held the Local and its members harmless for strike related damages, the parties did not agree to the terms of such an agreement when the members ratified the new labor contract.

d. The Teamsters International Union instructed Local 287 and its members not to return to work until the employer agreed to shield the union and its members from claims for strike related damages. The International further escalated the labor dispute by announcing a Company-wide strike involving hundreds of workers and numerous facilities.

e. On July 9, 2004, the employer sued the International and Local 287 seeking an injunction to end the strike. *See Boys Market, Inc. v. Retail Clerks*, 398 U.S. 235, 254-55 (1970). The International responded that the collective bargaining agreement was not validly ratified in June 2004, so Local 287 was entitled to continue the strike under the Norris-LaGuardia Act. *See* 29 U.S.C. §§101, 104.

f. On September 13, 2004 (the day the District Court scheduled to consider the Company's injunction request), Local 287 ratified the new labor contract, and the employees returned

to work. *See Granite Rock co. v. Int'l Bhd of Teamsters,* 402 F. Supp. 2d 1120, 1123 (N.D. Cal. 2005).

g. With the injunction request mooted, the Company amended its complaint to seek damages under a claim for the tortious interference with contract, a tort claim that the Company hoped to recognize as part of the federal common law.

h. The District Court dismissed the tort claim. However, the District Court held a trial about whether Local 287 had a contractual obligation toward the Company based on the June 2004 tentative agreement. The jury unanimously decided that Local 287 ratified the labor contract on July 2. Since the jury rejected the September ratification date, the District Court ordered the parties to proceed to arbitration on the claim for strike related damages. *See Granite Rock co. v. Int'l Bhd of Teamsters,* 208 U.S. DIST. LEXIS 111084, *2 (N.D. Cal. July 7, 2008).

i. The Ninth Circuit Court of Appeals agreed that the tortious interference with contract claim was unavailable as a matter of law, but it disagreed that the District Court had jurisdiction to consider the ratification date because the dispute about contract interpretation was a matter reserved for arbitration. *See Granite Rock co. v. Int'l Bhd of Teamsters*, 546 F.3d 1169, 1177-78 (9th Cir. 2008).

2. Issues: (i) whether disputes about the ratification of a collective bargaining agreement are subject to arbitration; and (ii) whether Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, authorized a common law cause of action for tortious interference with contract.

3. Holding: In an opinion by Justice Thomas, the Court held that (i) the dispute about contract ratification must be handled by the District Court before arbitration because there was uncertainty about the parties' arbitration agreement; and (ii) the common law developed under the labor laws does not authorize a civil action for tortious interference with contract.

4. Reasoning:

a. Issues of contract formation must be generally decided by the courts before the parties can compel arbitration. *See AT&T Technologies, Inc. v. Communications Workers*, 475

U.S. 643, 648-49 (1986).

b. Although "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration," this principle does not apply to disputes about the formation of the contract itself, where the parties did not consent to the arbitration of such disputes. *See Bucheye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006).

c. The formation-date defense could not be characterized as arising under the labor contract because the defense deals with when the contract came into existence, not the terms of the agreement itself.

d. The development of a federal common law to interpret labor contracts is not "any freewheeling inquiry into what the federal courts might find to be the most desirable rule." *See Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 255 (1974).

e. The federal common law of collective bargaining agreements is confined to contracts, and it is not a source of independent rights, such as tort claims.

f. The better claim involves an unfair labor practice charge against the International for imposing extraneous non-bargaining unit considerations into the collective bargaining process. *See Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1407-09 (6th Cir. 1992).

5. Other Opinions:

a. Justices Stevens and Sotomeyer dissented because, in their view, the contract formation issues should have been resolved in arbitration, instead of being decided by the District Court. They believed the issue of when a contract is effective should be decided in the first instance by arbitration.

b. Because the parties made the labor contract retroactive to May 1, 2004, any allegations of violations during June 2004 should have been submitted to arbitration. The dispute about whether the no strike clause proscribed the July work stoppage is a dispute arising under the labor contract, and it should have been submitted to arbitration, accordingly. *See*

Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

6. Secondary Commentary: *See* Adam Liptak, "Justices Offer Receptive Ear to Business Interests," *NYT* Section A, pg. 1 (December 19, 2010); Adam Liptak, "The Most Conservative Court in Decades," *NYT* Section A, pg. 1 (July 25, 2010).

E. *Thompson v. North American Stainless, LP*, Docket No. 09-291, 562 U.S. ___ (2011).

1. Background

a. A female employee of North American Stainless, a stainless steel mill based in Ghent, Kentucky, filed a charge alleging sex discrimination with the EEOC.

b. Three weeks later, the company fired her fiancé, Eric Thompson.

c. Thompson then filed a charge with the EEOC claiming that the company fired him in order to retaliate against his fiancée for filing her sex discrimination charge with the EEOC.

d. The district court granted summary judgment in favor of the company, reasoning that Title VII does not permit "third party retaliation claims." The Sixth Circuit affirmed, finding that Thompson did not engage in any protected activity, either on his own behalf or on behalf of his fiancé.

2. Supreme Court Decision

a. The Court addressed two issues: (1) whether the company's firing of Thompson constituted unlawful retaliation; and (2) if it did, whether Title VII grants Thompson the right to sue.

b. A unanimous Court found in favor of Thompson on both issues.

c. Regarding the first issue, the Court noted that the text of Title VII does not expressly preclude third-party retaliation claims, and that its antiretaliation provision covers a broader range of conduct than the antidiscrimination provision (which prohibits discrimination with respect to terms of

conditions of employment).

d. The Court restated the antiretaliation rule as follows: "Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

e. Applying that rule, the Court found it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

f. The second issue – whether Thompson (rather than his fiancé) may sue for the unlawful retaliation – turned on the interpretation of the statutory phrase "a civil action may be brought . . . by the person claiming to be aggrieved."

g. The company argued that "the person claiming to be aggrieved" must be the person who was the subject of the unlawful retaliation, i.e., Thompson's fiancée. But the Court saw no basis in the text of the statute for limiting the phrase in that manner.

h. Instead, the Court found that a person may sue under Title VII's antiretaliation provision if he "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." In other words, "any plaintiff with an interest 'arguably [sought] to be protected by the statutes'" can file suit for retaliation under Title VII.

i. The Court concluded that Thompson was well within that zone of interest: "Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming [his fiancée]. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue."

j. Two Justices issued a very brief concurrence suggesting that the majority should have given deference to the EEOC's Compliance Manual, which directly addressed the issues

raised (in favor of Mr. Thompson). Further, they noted that the EEOC's position is consistent with the NLRB's interpretation of the NLRA as prohibiting retaliation against an employee's relative for that employee's protected activity.

F. *Kasten v. Saint-Gobain Performance Plastics, Corp*, Docket No. 09-834 (argued Oct. 13, 2010).

1. Background

a. Employees at Saint-Gobain, a company that manufactures high performance plastic materials, were required to use a time card to swipe in and out of an on-site time clock.

b. Employee Kevin Kasten received discipline several times for failing to properly swipe in and out, and the Company eventually terminated him for the infractions.

c. Kasten alleged that prior to being fired, he had verbally complained to several supervisors about the legality of the location of the time clocks. Specifically, he told his supervisors that the location of the time clocks prevented employees from being paid for time spent donning and doffing their protective gear.

d. Under the Fair Labor Standards Act ("FLSA"), employers are required in some cases to pay employees for time spent donning and doffing special gear.

e. After being fired, Kasten filed suit for retaliation under the FLSA. The FLSA antiretaliation provision makes it unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

f. The district court and Seventh Circuit held that the FLSA's antiretaliation provision required the filing of a written complaint, and that verbal complaints were insufficient to support a retaliation claim.

2. Issue Before the Supreme Court

a. The issue before the Supreme Court is whether an employee who has made verbal complaints about possible FLSA violations to his supervisors has "filed any complaint" under the statute.

b. Since Justice Kagan has recused herself from this case, it is likely that the Court will affirm the Seventh Circuit's ruling, holding that one must file a written complaint with his employer or governmental agency before receiving protection under the FLSA's antiretaliation provision.

G. *CIGNA Corp. v. Amara*, Docket No. 09-804 (argued Nov. 30, 2010).

1. Facts:

a. This case involves a class action of over 27,000 participants in the CIGNA Pension Plan. During 1996 and 1997, CIGNA converted its defined benefit pension plan to a cash balance plan, and the participants challenged whether the conversion violated the age discrimination and anti-cutback requirements of the benefits laws.

b. The District Court in Connecticut held that the conversion was lawful. *See Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 320, 329 (D. Conn. 2008).

c. However, the District Court concluded that statements in CIGNA's summary plan descriptions were incomplete, false, or misleading, and the District Court ordered the reformation of the plan such that participants could receive the benefits as described in the misleading documents. The District Court also ordered CIGNA to pay the benefits in accordance with the reformed plan, plus interest. *See Amara v. CIGNA Corp.*, 559 F. Supp. 2d 192, 220-22 (D. Conn. 2008).

d. The Court of Appeals for the Second Circuit affirmed the District Court's opinions without further elaboration. *See Amara v. CIGNA Corp.*, 348 Fed. Appx. 627 (2d Cir. 2009).

2. The Supreme Court granted the petition for the writ of certiorari to determine the appropriate remedy when an administrator makes a false or misleading statement in summary plan descriptions. *See CIGNA Corp. v. Amara*, 130 S. Ct. 3500 (2010).

3. During oral argument, the Justices seemed concerned about whether relief is limited to the equitable relief recognized under Section

502(a)(3) or whether the class participants are entitled to the benefits summarized in the mistaken notices under Section 502(a)(1)(B). See *Great West Life & Annuity Co. v. Knudson*, 534 U.S. 204, 213-24 (2002).

H. *Wal-Mart Stores v. Dukes*, No. 10-277 (to be argued Mar. 29, 2011)

1. Background

a. The plaintiff filed a class action against Wal-Mart claiming sex discrimination under Title VII of the Civil Rights Act of 1964. Essentially, the plaintiff claimed unequal pay and denial of promotions to managerial positions because she was a woman.

b. The proposed class was "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices."

c. According to Wal-Mart's petition for certiorari, the class includes "[e]very woman employed for any period of time over the past decade, in any of Wal-Mart's approximately 3,400 separately managed stores, 41 regions, and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications."

d. The district court granted class certification, allowing the massive class action to go forward. The Ninth Circuit narrowly affirmed, reasoning that there was sufficient evidence of corporate-wide policies and practices that would have affected female Wal-Mart employees nationwide, thus satisfying the class action requirement of common questions of fact and law. Moreover, despite the fact that plaintiffs were seeking billions of dollars in damages, the court certified the class under Rule 23(b)(2), which applies where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

e. The dissenters argued that there was not enough evidence of nationwide policies and that plaintiff had not shown that the 1.5 million or so women suffered similar discrimination. Further, they argued that certification under Rule 23(b)(2)

was not appropriate because plaintiffs primarily sought damages.

2. Issue Before the Supreme Court:

a. Whether claims for damages can be certified under Rule 23(b)(2), or whether that subdivision is limited to claims for injunctive or declaratory relief.

b. Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a); e.g., whether the requirements of numerosity, commonality, typicality, and adequacy of representation have been met.

II. COURT OF APPEALS DECISIONS

A. *I.B.E.W. Local 36 v. Rochester Gas & Electric Corp.*, 2010 U.S. App. LEXIS 23473, 189 L.R.R.M. 2801 (Nov. 12, 2010)

1. Background

a. The NLRB found (among other things) that the employer committed an unfair labor practice by refusing to bargain over the effects of its decision to discontinue the benefit of allowing unit employees to take a service vehicle home after work. Despite the employer's arguments to the contrary, the NLRB found that the Union did not waive its right to effects bargaining.

b. The employer filed a petition for review (an appeal) in the D.C. Circuit Court of Appeals challenging the NLRB's unfair labor practice finding because the case law in that court favors the employer with respect its waiver argument.

c. The Union filed a petition for review in the Second Circuit Court of Appeals challenging the NLRB's remedy finding because the case law in that court favors the Union with respect to the employer's waiver argument.

2. Statute Governing Circuit Court Jurisdiction

a. The statute governing petitions for review of a Board order is 28 U.S.C. Section 2112(a).

b. Where two or more petitions for review of the same Board order are filed in different circuits and the Board receives

from the parties who filed those petitions copies of the petitions stamped by the court with the date of filing within ten days after issuance of the Board order, the circuit court is chosen by random selection.

c. It used to be that whoever filed their petition first had his choice of venue. This led to a "race to the courthouse" every time an agency decision was handed down and, worse yet, protracted litigation over who had actually won the race to the courthouse. Hence the addition of the ten day period for filing followed by a random selection to determine venue.

3. Board Motion to Transfer Union's Petition to D.C. Circuit

a. Despite the fact that both parties filed petitions in separate courts and sent copies to the Board within ten days, the Board did not pursue random selection of venue.

b. Rather, the Board made a motion in the Second Circuit to transfer the Union's petition to the D.C. Circuit because, it argued, the copy of the petition it received from the Union was not "stamped by the court with the date of filing," as the statute requires.

c. The Union had not provided the Board with a copy of the petition which had been physically date-stamped by the court. The Union did, however, provide the Board with a copy of the petition along with a copy of the email it sent to the Second Circuit which denoted the official date and time of filing under the local rules of that court.

4. Court's Decision

a. The Second Circuit denied the Board's motion to transfer, holding that the Union's petition satisfied the requirements of Section 2112(a)(2). Specifically, the Court found that "where a party files a petition for review in the Second Circuit and then serves the agency with the petition accompanied by the email, bearing the date and time of filing, by which the petition was filed, the party has satisfied the requirements of 28 U.S.C. § 2112(a)(2)."

b. The Court reasoned that the Board's literal interpretation of the statute did injustice to its obvious purpose, which is "to provide [the agency with] a mechanism to verify that the

party filed the petition for review within ten days." Id. at 11-12. Accordingly, the Court denied the Board's motion.

c. The petition the Board received from the employer also had not been date-stamped by the D.C. Circuit, and since that court's rules required the filing of paper copies and there was no way for the Board to verify that the employer's petition actually had been filed. Thus, the only statutorily sufficient petition was the Union's and the cases were consolidated in the Second Circuit.

B. *Albrecht v. The Wackenhut Corp.*, 379 Fed. Appx. 65 (2d Cir. 2010).

1. Facts:

a. Wackenhut provides security guard services to the Ginna Nuclear Power Plant in Ontario, New York.

b. The average time it took employees to obtain ammunition, a gun belt, and a radio, and then to report to the assigned post was between ten to fifteen minutes. The employees spent about the same amount of time returning from their posts and disarming at the end of the shift.

c. The employer did not compensate these employees for time spent in these preliminary and postliminary activities, claiming that they were *de minimis*, or of such a trifling amount of time that no compensation was due.

d. The District Court held that the "donning and doffing" in this case was not compensable because the activities involved were similar to putting on safety gear, which was not compensable. *See Albrecht v. The Wackenhut Corp.*, 2009 U.S. DIST. LEXIS 88073, *20 (W.D.N.Y. September 24, 2009) (citing *Steiner v. Mitchell*, 350 U.S. 247, 248-49 (1956)).

2. Issues: Whether the time spent arming up and arming down before and after a shift is compensable time under the Fair Labor Standards Act, 29 U.S.C. §251 *et seq.*

3. Holding: The Court of Appeals for the Second Circuit held that the time spent dealing with weapons before and after the shift was non-compensable principal activity and that the plaintiffs waived their claims concerning the other time that might have been compensable.

4. Reasoning:

a. The testimony confirmed that the time related to obtaining and returning fire arms was only 30-90 seconds. The bulk of the time described in the complaint related to travel to assigned posts and waiting for shirts to begin. As the activities related to the firearms did not involve a substantial measure of time and effort, the employer was entitled to summary judgment concerning these claims. *See Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 652 (2d Cir. 1995).

b. Although the employees might have been entitled to payment for the time traveling to posts and waiting for the shift to begin, the plaintiffs failed to allege that they were seeking such time in the complaint. This waiver prevented any recovery in the action.

C. *True v. State of Nebraska*, 612 F.3d 676 (8th Cir. 2010).

1. Facts:

a. Plaintiff Brian True worked as a correctional officer at the Lincoln Correction Center in Lincoln, Nebraska.

b. To prevent contraband from entering the correctional facility, the supervisors conducted unannounced searches of employee vehicles in the facility parking lot. Importantly, the facility declined to articulate a particularized reason for the searches during the litigation. Instead, the State maintained that it had authority to search any motor vehicles on the facility property at any time for any reason.

c. True refused to allow the search of his vehicle, and the correction facility terminated him accordingly.

d. The District Court held that the State of Nebraska was entitled to judgment as a matter of law because correctional officers have a lower expectation of privacy making searches without suspicion permissible. *See True v. State of Nebraska*, 2009 U.S. DIST. LEXIS 17691, *10 (D. Neb. 2009).

2. Issues: Whether a public employer can require random searches of public employee motor vehicles located on the employer's property.

3. Holding: The Court of Appeals for the Eighth Circuit held that a dispute of material fact existed concerning whether the State of

Nebraska had a reasonable basis to search the vehicles, and the Court remanded the case for further development of the factual record.

4. Reasoning:

   a. The Fourth Amendment applies to the government even when it acts in the capacity as employer. *See Skinner v. Railway Labor Executive's Assn.*, 489 U.S. 602, 613-14 (1989).

   b. To determine whether a search of public employees is reasonable, the inception and the scope of the search must be reasonable. *See O'Connor v. Ortega*, 480 U.S. 709, 726-27 (1987).

   c. Here, the State failed to prove that the inception of the search was reasonable in part because there was ambiguity about whether the inmates had access to the vehicles and whether any suspicious activity existed generally to warrant the intrusion on the employees' privacy interest with respect to their cars. *See McDonell v. Hunter*, 809 F.2d 1302, 1309 (8th Cir. 1987).

   d. The Court of Appeals distinguished *Quon* by recognizing that it did not eliminate the Fourth Amendment protection for public sector employees, it merely recognized a framework for analyzing claims about such violations.

   e. The appellate court's decision is surprising because of *Quon* and the decreased expectation of privacy surrounding motor vehicles. *See California v. Carney*, 471 U.S. 386, 392 (1985) (stating "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order. The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation").

D. *McDermott v. Ampersand Publishing LLC*, 593 F.3d 950 (9th Cir. 2010)

1. Facts:

   a. The employer published a daily newspaper in Santa Barbara, California. In July 2006, six editors and reporters resigned their positions to protest what they perceived as unethical interference in news reporting by the employer's owner, Wendy McCaw.

   b. About thirty (30) employees met with representatives of the Graphic Communications Conference, International Brotherhood of Teamsters concerning union representation. Several days later, these employees delivered a signed petition demanding that the Company hire the six employees that resigned and negotiate with the union concerning a collective bargaining agreement. On July 17, the employer rejected the demands.

   c. Thereafter, the employees began a campaign to notify newspaper readers about the dispute, and in September 2006, the employees voted 33 to 6 for union representation. On August 17, 2007, the Labor Board overruled the Company's objections and certified the union as the exclusive bargaining agent. Although the parties began negotiations on November 13, 2007, the employer refused to agree to a collective bargaining agreement.

   d. Between August 2006 and March 2007, the union filed a series of unfair labor practice charges, including charges concerning the discharge of eight employees. The administrative law judge agreed that the employer committed numerous unfair labor practices, and the administrative law judge ordered reinstatement of the discharged employees among forms of relief. *See Ampersand Publ., LLC*, 2010 NLRB LEXIS 134, * 17-19 (ALJ Anderson May 28, 2010) (describing procedural events in case).

   e. The Regional Director sought injunctive relief under Section 10(j) compelling the employer to reinstate the employees, but the District Court denied the relief because it posed a significant risk to the freedom of speech rights of the employer. *See McDermott ex rel. NLRB v. Ampersand Publ., LLC*, 2008 U.S. DIST LEXIS, 94596, *40 (C. D. Cal. May 21, 2008)

2. Issues: Whether Section 10(j) of the National Labor Relations, 29 U.S.C. §160(j), permits a District Court to order a newspaper publisher to reinstate reporters or editors.

3. Holding: The Court of Appeals for the Ninth Circuit affirmed the District Court (over the dissent from Judge Hawkins) because compelling a publisher to reinstate employees involved with newspaper content would interfere with the publisher's First Amendment rights.

4. Reasoning:

   a. A party seeking a preliminary injunction must establish that the movant is likely to succeed on the merits, that the movant is likely to suffer irreparable harm in the absence of the preliminary injunction, that the balance of equities tips in the favor of the movant, and that the injunction is in the public interest. *See Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008).

   b. Where the injunction would infringe on free speech rights, the Court uses a heightened equitable relief standard. *See Overstreet ex rel. NLRB v. United Brotherhood of Carpenters and Joiners*, 409 F.3d 1199, 1207-08 (9th Cir. 2005).

   c. While newspapers are subject to the general restrictions of the labor laws, *Associated Press v. NLRB*, 301 U.S. 103, 131 (1937), requiring newspapers to reinstate journalists is generally defective under the constitution. *See e.g., Passaic Daily News v. NLRB*, 736 F.2d 1543, 1556-59 (D.C. Cir. 1984).

   d. Because the organizational drive was "tied" to editorial content, the controversy lied at the core of First Amendment rights. The right of employees to bargain about wages and working conditions does not necessarily provide them with the power to compel certain view points from the employer making the publication.

   e. Under the injunction analysis, the Regional Director failed to prove that the equities favored the issuance of the injunction in light of the constitutional considerations. The majority further reasoned that the balance of hardships did not warrant the injunction because of the employment conditions and the availability of monetary relief.

5. Other Opinions:

a. Judge Hawkins dissented because the reinstatement of employees does not inherently infringe on the expression of the publication. After all, employees that fail to follow the publishers orders could be disciplined or discharged following reinstatement.

b. Withstanding pressure from employees is the heart of protected, concerted activity. By insulating the management in essentially First Amendment immunity, the majority undermines the employees' protests about arbitrary management conduct. By rejecting the injunction request, the majority interferes with the remedy for the unfair labor practices. The injunction is necessary to insure that the unfair labor practices will not succeed, and, form the dissent's view, that goal tips the equitable balance in the Regional Director's favor.

III. DISTRICT COURT CASES

A. *Donohue v. Paterson*, 715 F. Supp. 2d 306 (N.D.N.Y. 2010)

1. Background

a. In May 2010, with no State budget having been passed, Governor Paterson submitted and the New York State Legislature passed an emergency temporary appropriations bill (or "extender bill") which enacted unpaid furloughs, a wage freeze, and a benefits freeze on certain state employees.

b. The furloughs and other cuts were in contravention of various collective bargaining agreements between public employee unions and the State.

c. The various unions representing the affected employees filed an action in federal district court in Albany seeking a preliminary injunction enjoining Paterson and the Legislature from submitting, enacting, or implementing the extender bill. The unions argued that the bill violated the Contract Clause of the U.S. Constitution, which provides "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

d. A preliminary injunction is generally considered to be an extraordinary remedy. Courts only grant such injunctions where the plaintiffs would otherwise suffer irreparable harm, and if there is a substantial likelihood that the plaintiffs will ultimately succeed on the merits of their claim.

2. Decision

a. First, the court found that the legislation would result in irreparable harm to the plaintiffs.

b. While noting that loss of employment typically does not, in and of itself, constitute irreparable harm, the court pointed out that the action here involved the "massive furloughing and wage freeze of tens of thousands of workers."

c. The court also noted that the harm to workers in this case was non-compensable. (Harm that is compensable, i.e., can be subsequently remedied by a monetary award, generally is not "irreparable.") The court cited the workers' "personal long-term obligations such as mortgages, credit cards, car payments," and other such obligations that would be irreversibly impacted as a result of the legislation.

d. Second, the found that there was a substantial likelihood that the plaintiffs would ultimately succeed on the merits of their Contract Clause claim.

e. The court began by noting that the command of the Contracts Clause is not absolute; rather, it is limited by the State's power to protect the health, safety, and welfare of its citizens.

f. The extent to which the Contract Clause limits that State power is determined by a three-part test: (1) whether the contract is substantially impaired; (2) whether the legislation serves a significant public purpose; and (3) whether the means chosen to accomplish that purpose are reasonable and appropriate.

g. As to the first factor, the court stated that "[i]mpairments that go to the heart of the contract, that affect terms upon which the parties have reasonable relied, or that significantly alter the duties of the parties under the contract are substantial." In this case, the furlough provision of the bill resulted in a 20% pay reduction (one day per week) and denied them

raises due under the contracts. (The court said it did not matter to the court that the bills promised subsequent reimbursement of unpaid wage increases once the 2010-11 budget was in place.) The court found that the bill would substantially impair the collective bargaining agreements.

h. As for the second element, the court acknowledged the precarious nature of the State's financial situation, but pointed out that the contractual impairments were "the sudden and sole work of the Executive and were proposed in a manner that largely precluded legislative deliberation." In other words, the extender bills were emergency appropriations bills submitted by the Governor and not subject to the normal legislative process. Thus, the court found, the Legislature had not actually assessed whether the furlough and wage freeze provisions ultimately served the public good. However, the court assumed for the sake of argument that there was a significant public purpose.

i. Finally, the court addressed whether the bills were a reasonable and necessary means to address their proffered public purpose. The court found they were not. Noting that less deference is given to a state's decision to impair a contract where it is a party to that contract, the court held that the State had not shown that it considered impairing the contracts on pay with other policy alternative. Further, it did not show that more moderate actions were not available to it, or produce a record showing that other options were considered and compared before opting for the drastic furlough measure. In all the surrounding circumstances, the court concluded, the bills were not reasonable and necessary means of achieving the proffered purpose.

j. Thus, the court granted the preliminary injunction, pending further litigation and a decision on the merits.