

**The Center for Labor and Employment Law**

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**LABOR AND EMPLOYMENT ARBITRATION**

SPRING SEMESTER 2015 SYLLABUS ---- ***REVISED MARCH 29, 2015***

ROOM 344, MONDAYS 8:35 – 10:45 P.M.

PROFESSORS: DAVID GREGORY AND DAVID MARSHALL

TEXT: ADR in the Workplace, Cooper, Nolan, Bales, and Befort (3rd Edition, 2014, The Labor Law Group)

**N B!!**

**The first three pages of the Syllabus revised as of March 29 2015 supercede all prior meeting times and class requirements.**

***GRADING:***

***Fifteen percent of the Grade is the memo re selection of cases (5%) and the Motion to bifurcate/dismiss (10%), Messrs. Halouvas and O’Neill had A grades and all others had A- grades at the 15% mark.***

***The March 9 (10%) opinion letter and the March 23 opening/closing statement(s)(10%)have somewhat wider grade ranges. We will have more to say in class, but without mentioning individual grades below A-. If you want your original paper, with our comments and your individual grades, give either of us a copy for our records and we will return the graded/marked up paper.***

***N.B.***

***For purposes of writing the post hearing brief and the Arbitrator’s decision, all Motions to bifurcate/dismiss have been denied and they are no longer a factor.***

***IN ADDITION: assume the following:***

***ADELPHI:***

***The Adelphi lightbulb case was settled at the arbitration hearing. The discharge was reduced to a disciplinary suspension without pay and the Grievant signed a “last chance” agreement. Since the Grievant was reinstated, several female and two male students have reported that they had also earlier found the Grievant allegedly “changing light bulbs” in their dorm rooms on several occasions prior to the original incident. One month after returning to work, the Grievant and his daughters attempted to attend a “take back the night” rally on the campus. March organizers were infuriated, a riot ensued, police were summoned, and the Grievant was discharged again. “Wanted” posters of the Grievant began to appear throughout the campus.***

***Students working on any part of any of the Adelphi cases must now negotiate the last chance agreement, and argue whether any/all of the above incidents trigger the last chance agreement. The last chance agreement is silent with regard to all of these particular incidents.***

***MARAJUANA AND GUNS***

***Ten states with common borders have enacted medical and recreational marijuana legislation, removing all limitations and uses. These states also maintain that the Second Amendment right to bear arms trumps any employer rule that presumes to pre vent workers from bringing guns onto workplace premises. Grievances protesting discharges in both instances have now been consolidated before the Arbitrator by the parties.***

***There should be 4 to 6 students on each of these two cases, with 2 or 3 students representing each one of the four parties. We anticipate mini-simulations on April 6 and April 20 (opening statements; direct and cross exam of witnesses; closing arguments)***

***Professors Gregory and Marshall, March 29, 2015***

***We have five remaining class sessions and two remaining major writing assignments.***

***March 30 Discussion***

***April 6 Simulations***

***April 13 Post Hearing Brief (25% of final grade) (N.B., See Professor Doug Ray’s helpful essay re Writing the post hearing brief (text at 1079).***

***April 20 Simulations***

***April 27 Arbitrator’s Decision (25% of final grade)***

Due February 16: 5% --Labor Arbitration Case Selection. Submit a 1-2 page memo setting forth the four labor arbitration cases you wish to work on throughout the semester, and explain why you have chosen these four cases.

Due March 2: 10%--Written Motion seeking bifurcation and dismissal with prejudice of the matter as untimely brought to arbitration. N.B. Be prepared to argue your Motion on behalf of the Employer in class on March 2.

Due March 9: 10%--Opinion letter to client, assessing likelihood of success at arbitration

Due March 23: Written Opening (5%) and Closing (5%) Statements

Post Hearing Brief Due April 13: (25%)

Arbitrator’s Decision Due April 27 (25%)

Class Participation (15%)

**Dave Gregory:**

I may be contacted most efficiently by appointment, stopping by, telephone, and by email, in that very definite order.

This semester, I am also teaching Labor Law, Mondays and Wednesdays 11:20 a.m. – 12:55 p.m., Room 2-12, I will generally be available before and after each class. You may also contact me at any time at my office telephone/voice mail: 718-990-6019. I am much easier to reach by phone than by email. I receive hundreds of email every day, and I respond to emails via time-sensitive triage. If you send me email that is urgent, be certain to also call and alert me to the incoming email. I check voicemail several times each day. You are not required to schedule a formal appointment. I am generally at the School of Law every day.

Direct phone: 718- 990- 6019,

Email: gregoryd@stjohns.edu;

Office Hours Mondays 2:00 -- 8:15 p.m. and Wednesdays 2:00 – 3:15 p.m.

I created the precursor to the Labor and Employment Arbitration (LEA) course in the early and mid 1980s. When I joined the St. John’s faculty in 1982, we had a two-credit Arbitration course which concentrated exclusively on Article 75 of the CPLR. In 1986, we launched a Negotiations course with two sections, with 20+ students each, on Saturday afternoon. The LEA course draws upon the full range of our Labor and Employment Law and ADR curricula. Perhaps the central difference from the 1980s is our emphasis on interactive simulation and professional written work. I am delighted to return to the LEA course with my fine friend and faculty colleague, David Marshall. David co-taught this course a few years ago with our friend Pearl Zuchlewski. David and I first met in a Labor Arbitration; I was the Arbitrator, and David represented a corporate employer.

**David Marshall:**

I may be contacted at Lockelord LLP by email at david.marshall@lockelord.com, by telephone at 212.912.2788 and via TWEN. Please feel free to contact me by email and to speak to me after class. I will also accommodate requests to meet in person before class if arrangements for a meeting are made in advance via email or telephone.

David Marshall is a graduate of Harvard College and the University of Michigan Law School. He has practiced labor and employment law for more than thirty years, starting with a summer associate position at the United Auto Workers headquarters in Detroit, three years with the National Labor Relations Board in Washington, D.C., and nearly three decades in New York City with a number of national firms representing management-side clients. Currently, he is Counsel to LockeLordEdwards where his practice includes the representation of several of New York City’s largest hospitals in a wide variety of labor and employment matters. Employment discrimination cases before state and federal courts and government agencies comprise the largest part of his annual docket of cases.

**DATE** **Assignment**

2/9/15 Class 1: Pp. 1-31 (History & Introduction); Pp.1059-1065 (FAA text)

2/16/15 Class 2: Pp. 41-81 (Federal Common Law & Arbitrability)

3/2/15 Class 3:  Pp. 84-114 (Judicial Review)

**2/23 – 2/27/15 Spring Break**

3/9/15 Class 4:  Pp. 135-162 (Deferral to Arbitration)

3/16/15 Class 5:  Pp. 196-227 (Role of External Law in Arbitration)

3/23/15 Class 6:  Pp. 229-256 (Evidence and Procedure in Arbitration)

3/30/15 Class 7:  Pp. 258-285 (Evidentiary Concerns Bearing On Due Process)

4/1/15 Class 8:  Pp. 285-307 (The Role of Precedent in Arbitration)

4/6/15 Class 9:  Pp. 309-342 (Subjects of Arbitration: Arbitrability; Discipline & Discharge)

4/13/15 Class 10:  Pp. 383-426 (Common Issues: Remedies; Management Rights; Past Practice)

4/20/15 Class 11:  Pp. 739-779 (History of Individual Arbitration: Gilmer, Circuit City, Pyett, Waffle House)

4/27/15 Class 12:  Pp. 781-833 (Application of Gilmer)

5/4/15 Class 13:  Pp. 833-859 (Use of External Law & Judicial Review)

By the beginning of the class on February 16, you will be expected to have selected four decisions from the list below, and to have familiarized yourself with the essential facts and procedural issues (if any) of the four cases you have selected. Beginning March 2, we may distribute procedural and substantive modifications to the original decisions. Meanwhile:

See, for example;

Mount Sinai Hospital and New York State Nurses Association, 131 LA 878 (2013);

IUE/CWA Communication Workers of America Local 465 and FCI USA, 126 LA 710 (2009);

Town of North Hempstead, New York and Civil Service Employees Association Local 882, 125 LA 1814 (2008);

Yeshiva University and 1199 SEIU, 125 LA 885 (2008);

Time Warner Cable of New York City and Local 3, International Brotherhood of Electrical Workers, 125 LA 664 (2008);

Valero Oil and United Steelworkers Local 1-624, 124 LA 431 (2007);

Village Voice and Local 2110, UAW, 123 LA 1279 (2007);

Bloomingdale’s and Local 3, United Store Workers, RWDSU, 123 LA 560 (2007);

American Sugar Refining Company and the International Longshoreman’s Association, Local 1814, 123 LA 277 (2007);

Teachers Association, 123 LA 106 (2007);

Adelphi University and the American Association of University Professors, 122 LA 1065 (2006);

Brookhaven Science Associates/Brookhaven National Laboratory and IBEW, Local 2230, 122 LA 882 (2006);

Adelphi University and Adelphi Physical Plant Workers’ Labor Union, 121 LA 1010 (2005);

Long Island College Hospital and New York State Nurses Association, 121 LA 489 (2005);

Garden City School District and Civil Service Employees Association, Local 1000, 120 LA 1797 (2005);

City of Toledo, Ohio and Toledo Police Command Officers’ Association, 119 LA 14 (2003);

Garden City School District, New York and Civil Service Employees Association, Local 1000, 118 LA 1470 (2003);

Nextra and Local 1109, Communications Workers of America, 116 LA 1780 (2002);

Advantage Logistics, Livonia, Michigan and Teamsters, Local 337, 116 LA 785 (2002);

Town of North Castle, New York and Civil Service Employees Association, Local 1000, 116 LA 153 (2001);

Triborough Bridge and Tunnel Authority and Local 1931, DC 37, AFSCME, 114 LA 229 (2000);

Eaton Corporation and United Autoworkers Union, Local 220, 112 LA 705 (1999);

BMW of Manhattan and Local 259, United Autoworkers Union, 111 LA 525 (1998);

Macy’s, New York City and Local 1, Retail Wholesale Department Store Workers Union, 108 LA 489 (1997);

Interfaith Medical Center and New York State Federation of Physicians and Dentists, 106 LA 544 (1996)

This course can satisfy the advanced practice writing requirement

**The Advanced Practice Writing Requirement (the “APWR”)** is intended to ensure that all students attain proficiency in the type of practical writing assignments attorneys perform regularly.  The APWR must be satisfied through coursework.  As with the ASWR, it is strongly suggested that students complete the APWR before the end of their second-to-last semester.

For a course to satisfy the APWR, it must provide a substantial opportunity for students to develop and improve litigation and/or transactional writing skills.  Courses satisfying the APWR require students to submit practice-writing assignments (regardless of number) totaling at least 25 pages, or a total of seven assignments (regardless of the number of pages), which have been written and/or rewritten with the benefit of instructor critique.  A student must be awarded a grade no lower than a C+ to receive APWR credit.  The supervising faculty member must certify that the student’s work meets the above criteria.

All APWR courses have, as a pre-requisite, successful completion of Legal Writing II (LRWR 1010).

If you intend to satisfy the APWR requirement via this course, send us a memo to that effect by March 2.

N.B. All writing must be submitted by hard copy and by email to both Professors, at the commencement of the class. Late work generally receives a grade no higher than the lowest grade of work submitted on time. Work must be carefully read and typo-free. If we must perform significant editorial work, the highest possible grade is usually a D.

MODIFICATIONS OF PROCEDURAL HISTORIES TO BE TAKEN INTO ACCOUNT IN WRITING THE MOTION TO BIFURCATE DUE ON MARCH 2, 2015.

Take any one of the four cases you have selected. You represent the Employer. At the arbitration hearing, when you are asked to make the opening statement for the Employer, you make the procedural argument that the grievance is untimely and time-barred and must therefore be denied in its entirety. You ask the Arbitrator to rule on the Employer’s Motion to bifurcate the hearing and, ultimately, to dismiss the grievance as untimely.

The following facts apply if your particular case does not present such an important procedural dynamic.

The labor contract’s grievance procedure defines a “grievance” as “any dispute between or among the Employer, the Union, and/or any Employees.” The grievance was filed at the first step two months after the incident giving rise to the grievance; the labor contract expressly states that any grievance must be filed within thirty days after such incident. The parties, however, never raised an untimeliness issue in more than three decades of a unionized work force---not until this grievance. The Union raises several arguments in response to the Employer’s Motion: the parties’ past practice trumps the Employer’s unprecedented Motion; the Employer waived its right, having never raised its procedural objections in any of the lower steps of the grievance procedure; it is the Employer who is untimely, and the hearing should proceed on the merits without bifurcation.

You have anticipated all of these Union arguments, and have responded to same, in your Motion.

Professors Gregory and Marshall, February 16, 2015

ASSIGNMENTS OF ARBITRATION DECISIONS TO TEAMS FOR BALANCE OF SEMESTER. APWR memos due today, March 2 2015

Team 1 John Collarafi; Michael Ferri; Walter McElwain (Time Warner)

Team 2 Eric Bolanos; Stephen Halouvas; Matthew O’Neill (both Adelphi cases, and Eaton)

Team 3 Elizabeth Crowther; Sarah Mannix (Bloomingdales and Macy’s)

Team 4 Sonali Setia; Cynthia Vella (both Garden City cases); Alex Francois

\*AF is added to the Garden City team

**RE: Grading: Prof. Gregory, March 3 2015**

Per the discussion in class yesterday evening, Prof. Marshall and I used the first memo re your decision selections as a diagnostic tool to obtain a sense of everyone’s writing ability.

We have read all of the Motions submitted yesterday evening in class. Most were excellent (i.e., A grade), but virtually all of the Motions could benefit from more careful edits (and consequently receiving A-, rather than A.)

Perhaps the best combination of a fine Motion and a supplemental oral argument was presented by Stephen Halouvas.

Prof. Marshall and I plan to hand back the Motions on March 9, with additional editorial comments and suggestions.

Re class participation --- You are encouraged, but not required, to engage in direct and cross examination of witness(es) re your case on April 13, 20, and 27. Witnesses ideally are not students in our class. The simulation snap shot should take about 20-30 minutes. If there are no volunteers by March 9, we reserve the right to assign you.

N.B. The OPINION Letter is due at the beginning of class on March 9 (2 hard copies and email your OL to both Prof. Marshall and to me).

Labor and Employment Arbitration Syllabus revised March 29 2015