SUMMARY OF 2014 LABOR AND EMPLOYMENT DECISIONS FROM THE COURT OF APPEALS

PICKETING AND THE FIRST AMENDMENT

In the Matter of Richard Santer v. Board of Education of East Meadow School District; In the Matter of Barbara Lucia v. Board of Education of East Meadow School District , 23 N.Y.3d 251 (2014). The Court held that the District did not abridge First Amendment rights when it instituted Education Law (EL) §3020-a charges against teachers for the manner in which picketing was conducted. The Court applied the balancing test in *Pickering v. Bd. of Educ. of Township High School Dist. 205, Will County Ill.*, 391 US 563 (1968), which requires a court to determine whether the conduct 1) was speech that addressed a matter of public concern and 2) whether the speech affected governmental operations so as to warrant the imposition of discipline. Teachers were picketing during a period in which their union was negotiating with the District for a successor collective bargaining agreement. In order to rally in support of the union's negotiating position, teachers put picket signs in the windows of their cars and parked them curbside by the entrance to one of the school buildings. Decisions issued pursuant to the EL §3020-a proceedings found that this conduct constituted a safety hazard for the school children and was disruptive to school operations since it caused many teachers to be late that day. The Court affirmed the principle that peaceful picketing is an expressive activity protected by the First Amendment and retains protected status even if intended to create a disruption. In this matter, the labor dispute was a matter of public import. The Court stated, however, that the District had legitimate interests in protecting the safety of the students and maintaining orderly operations at the school. Considering the record as a whole, it found that the speech was sufficiently disruptive and the potential safety hazard to children sufficient to justify the

imposition of discipline. It therefore concluded that, under *Pickering*, the imposition of discipline was not violative of the First Amendment.

DUTY OF FAIR REPRESENTATION

Palladino v. CNY Centro, Inc., 23 N.Y.3d 140 (2014). The Court affirmed the dismissal of a cause of action alleging a breach of the duty of fair representation (DFR) in which the plaintiff alleged, in part, that the Union breached its DFR by failing to submit a grievance to arbitration. The Court rejected the assertions that *Martin v. Curran*, 303 NY 276 (1951) was inapplicable or, alternatively, should be overruled. In that case, the Court held that a complaint must allege that a union's conduct was ratified by "every single member" of the union, which was a voluntary unincorporated association, in order to state a valid cause of action. The Court stated that *Martin* was based upon an interpretation of General Associations Law §13 and that it does not revise statutes. Accordingly, under *Martin*, the complaint was defective. The Court further stated that since the employer is a public employer, an employee as a remedy may file an improper practice charge with the Public Employment Relations Board (PERB) alleging a breach of the duty of fair representation.

CIVIL SERVICE LAW

In the Matter of Subway Surface Supervisors Association v. NYCTA, 22 N.Y.3d 1182 (2014). The Court reversed an Appellate Division decision and held that Civil Service Law, §115, entitled Policy of the state, does not give rise to a private cause of action. This section states, in part, that it is State policy to provide equal pay for equal work. The SSSA had alleged that employees in two different titles, each represented by a different union, performed the same work but were paid at different levels. The Court found, however, that this section merely enunciates a policy and confers no jurisdiction upon a court to enforce that stated policy.

HUMAN RIGHTS LAW

Albunio v. City of New York, 23 N.Y.3d 65 (2014). The Court held that under the NYCHRL, absent an agreement to the contrary, an attorney is entitled to an attorney's fee which is the greater of either the contingency fee or the statutory award. Counsel had brought a declaratory judgment action seeking to enforce retainer agreements between her and her clients. The Court stated that the calculation of a contingency fee should be done exclusive of any fee award, absent a contractual relationship to the contrary, and the fee awarded to the client should then be credited as an offset against the contingency fee owed.

Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824 (2014). The Court held that under both the New York State Human Rights Law (Executive Law §296) (HRL) and the New York City Human Rights Law (Administrative Code of the City §8-107) an employer is not entitled to summary judgment when the employer has failed to demonstrate that it responded to an employee's request for a particular accommodation by engaging in a good faith interactive process regarding the feasibility of that accommodation. The Court reiterated that under the State HRL, an employee has the burden to demonstrate that the core functions of the job can be performed with a reasonable accommodation. In contrast, under the City HRL, a disability is defined only in terms of impairments, and an employer has the burden to demonstrate that a reasonable accommodation cannot be made. The Court stated that an employer cannot generally be granted summary judgment on a State HRL claim unless the record demonstrates that there is no triable issue of fact as to whether the employer duly considered a requested accommodation. To do so, the record must demonstrate that the employer engaged in interactions with the employee revealing some deliberations about the viability of the employee's request. An employer must show that it engaged in a good faith interactive process which assessed the needs

of the disabled individual and the reasonableness of the accommodation. With regard to the City HRL claim, an employer does not automatically fail to establish an affirmative defense premised on lack of reasonable accommodation because it did not engage in an interactive process, but the failure to do so poses a "formidable obstacle" to prove that no reasonable accommodation existed.

RETIREMENT PLANS/FOIL

Kaslow v. City of New York, 23 N.Y.3d 78 (2014). A member who retires under the Tier 3 CO-20 retirement plan established under the Retirement and Social Security law §504-a is not able to receive credit for prior civilian service with a New York City agency when calculating his pension. The Court reversed the lower courts and found that NYCERS' interpretation of the statutory framework is entitled to a degree of deference, and was coherent and rational.

Lynch v. City of New York, 23 N.Y.3d 757 (2014). The Court held that §480(b) of the Retirement and Social Security Law does not require the City of New York to make "Increased-Take-Home-Pay" (ITHP) pension contributions on behalf of New York City police officers and firefighters appointed on or after July 1, 2009.

In the Matter of Empire Center for New York State Policy v. Teachers' Retirement System of New York; In the Matter of Empire Center for New York State Policy v. Teachers' Retirement System of New York of the City of New York, 23 N.Y.3d 438 (2014). The Court held that Public Officers Law §89 (7) exempts from FOIL only the home addresses, not the names, of retirees who receive benefits from public employees' retirement systems. Relying on the plain language of the statute, the Court found no basis to deny a request for the names of the retirees.

WORKERS' COMPENSATION

New York Hospital Center of Queens v. Microtech Contracting Corp., 22 N.Y.3d 501 (2014). The Court held that an employer's rights under the safe harbor provision of the Workers Compensation Law, section 11, which permits a third party suit against an employer by a defendant only under limited circumstances, are not affected due to the injured plaintiff's status as an undocumented alien hired in violation of the Immigration Reform and Control Act (IRCA). This holding is consistent with the court's prior decision in *Balbuena v. IDR Realty, LLC*, 6 NY3d 338, 363 (2006), in which the Court held that an injured employee, due to his status as an undocumented alien, is not precluded from recovering lost wages in a personal injury action against a landowner under the Labor Law.

Isabella. v. Halloc, 22 N.Y.3d 788 (2014). An employee, injured as a result of a car accident while he was riding in a car driven by a co-employee during the course of their employment, sued the driver of the other vehicle. The co-employee was driving a car owned by her husband. The Court stated that the driver of the other vehicle is not permitted to bring a claim for contribution against the owner of the vehicle in which the plaintiff was a passenger by virtue of Worker's Compensation Law §29, which limits the remedy of an employee injured by a co-employee to benefits under that statutory provision.

WHISTLEBLOWER PROTECTION – LABOR LAW §740

Webb-Weber v. Community Action for Human Services, Inc. et al., 23 N.Y. 3d 448 (2014). The Court held that a pleading alleging a violation of Labor Law §740(2), the "whistleblower" statute, need not identify the specific "law, rule or regulation" allegedly violated by an employer. The Court stated that the plain language of Labor Law §740 (2) (a) does not require that the specific "law, rule or regulation" be identified. The Court agreed that just as an employee need not cite a specific "law, rule or regulation" when the complaint is made, it is also not required in

a pleading. Although at trial it must be proven that an actual violation occurred and that it created a substantial and specific danger to the public, the pleading only need contain sufficient facts so that the employer has notice of the alleged complained-of conduct and therefore "must identify the particular activities, policies or practices in which the employer allegedly engaged." The facts alleged in the complaint met the standard and it adequately met pleading requirements.

TAYLOR LAW

In the Matter of the Town of Islip v. PERB, 23 N.Y.3d 482 (2014). The Court affirmed a PERB decision and held that it correctly determined that the Town violated its bargaining obligation by unilaterally terminating a past practice in which employees were permitted to utilize Town vehicles for commuting purposes. The Court did not reach the Town's contention that the past practice was illegal under local law, because it did not find that the practice was in fact illegal. The Court, did, however, modify the remedial order which required the restoration of vehicle assignment for commuting purposes. The Court found that the order was unduly burdensome under the circumstances because the Town had sold most or all of the vehicles and restoring the vehicle assignments would have forced the Town to spend significant taxpayer monies to replace the vehicles. The Court therefore remitted the matter for PERB to grant commensurate, practical relief.

EDUCATION LAW – §3020-a

In the Matter of Roseann Kilduff v. Rochester City School District, 24 N.Y.3d 505 (2014). The Court held that a tenured employee is entitled to choose the statutory review process in Education Law (EL) §3020-a over an alternative grievance process contained in a collective

bargaining agreement (CBA). Accordingly, it affirmed a decision which annulled a disciplinary determination that imposed discipline after the District had denied the petitioner the benefit of choosing the statutory disciplinary process. The Court stated that the statute unambiguously provides that when a CBA is altered by renegotiation or takes effect on or after September 1, 1994, a tenured employee must be able to elect the EL §3020-a review process. In this matter, the CBA was renegotiated in 2006 and accordingly the employee was entitled to elect the statutory process.