RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

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I. DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND DELAWARE DISCRIMINATION IN EMPLOYMENT ACT

In *Le v. City of Wilmington*, the United States Court of Appeals for the Third Circuit affirmed the United States District Court for the District of Delaware's grant of summary judgment for the defendant, City of Wilmington (the "City") in 2012.[1] Plaintiff Le T. Le ("Le"), a former employee of the City, brought an action against the City and City officials alleging copyright infringement, civil rights violations under Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1983, a claim under title 19, section711 of the Delaware Code, and a *prima facie* tort claim under Delaware law.

Le's employment with the City began when he was hired as an Information Analyst II in 2003. In this position, he provided support and technical assistance to users of the City's computer network. The City's Network Division consisted of Le, who was of Vietnamese descent, and two African American employees. The City terminated Le because it was experiencing several network system problems, and it determined that it would be more economical and efficient to outsource the Network Division functions to an outside vendor. All of the vendor's employees who performed the work formerly done by the Network Division were white.

Le alleged that the defendants discriminated against him on the basis of his race and/or ethnic background in violation of Title VII. The District Court analyzed whether Le could prove his claim of discrimination by presenting direct evidence as set forth in *Price Waterhouse v. Hopkins*,[2] or indirect evidence through the burden-shifting framework

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1. 736 F. Supp. 2d 842 (D. Del. 2010), *aff'd*, 2012 WL 1406462 (3d Cir. 2012).

2. 490 U.S. 228, 244-46 (1989).

of *McDonnell Douglas Corp. v. Green*.[3] Under *McDonnell Douglas*, "a plaintiff must first establish a *prima facie* case of discrimination by showing that: (1) he belongs to a protected class; (2) he suffered an adverse employment action; and (3) the circumstances of the adverse employment action give rise to an inference of unlawful discrimination such as might occur when a similarly situated person not of the protected class is treated differently."[4] If the plaintiff meets this burden and establishes a *prima facie* case, then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its treatment of the plaintiff. If the employer articulates such a reason, then the burden shifts back to the employee to demonstrate that the employer's reason is pre-textual.

Le contended that there was direct evidence of discrimination in the record. The Court noted that Le solely relied upon his own subjective beliefs that wrongdoing occurred, which was not sufficient to create a genuine issue of material fact and overcome summary judgment.[5] Le alleged that Joseph F. Capodanno, Jr. ("Capodanno") made a racially charged remark to an African American employee. The Court found that this alleged comment was made towards another individual who was of a different ethnic background than Le. Le also presented evidence that Capodanno had difficulty understanding Le's speech because of an accent. The Court noted that while discrimination based on an accent can be evidence of national origin discrimination, the employee's heavy accent or difficulty with spoken English can also be a legitimate basis for adverse employment action where effective communication skills are reasonably related to job performance.[6]

With respect to Le's claims concerning indirect evidence of discrimination, the defendants conceded that Le met the first two prongs of the *prima facie* test because he was of Vietnamese descent and his termination equated to adverse employment action. However, there was a dispute as to whether Le had established whether his termination gave rise to an inference of unlawful discrimination. The Court concluded that Le did not present sufficient evidence from which a reasonable fact finder could infer that Le was unlawfully discriminated against. It reasoned that although the Network Division (made up of minority employees) was replaced with consultants who happened to be white, the City did not interview or select the white individuals who came in to perform the work. Le contended that when African American employee Smith resigned, he was replaced by O'Donnell who is white, rather than Jones who was more qualified and African American. The Court held that Smith's replacement had nothing to do with Le because Le was three job levels below Smith.

The Court concluded that Le could not establish a *prima facie* case of discrimination; however, it nevertheless proceeded with the analysis under the burden-shifting framework. The City's reason for Le's termination was due to his inadequate performance. Le admitted that the City's network had various performance issues, including issues with server connections, the MUNIS software platform, connectivity problems with Outlook, as well as other problems. The Court held that Le's disagreement with the City as to the cause of these issues did not amount to pretext. Therefore, the Court granted summary judgment in favor of the defendants and dismissed Le's Title VII claim. Because the analysis for a Title VII claim is the same as state law claims under title 19, section 711 of the Delaware Code, the Court also dismissed the state law discrimination claim. The Court held that Le's *prima facie* tort claim under Delaware law was not recognized in the employment context.

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3. 411 U.S. 792, 793 (1973).

4. *Le*, 736 F. Supp. 2d at 754 (citing *McDonnell Douglas*, 411 U.S. at 802).

5. *Id*. at 854.

6. *Id.* at 855.

Le also alleged that the City violated the Copyright Act of 1976[7] , when it infringed the instant ticketing software application registered by Le with the Copyright Office (the "Work"), when the City used the application for its program to issue instant tickets for code violations. The District Court held that Le created the Work within the scope of his employment. Even if Le created the Work on his own time as he contended, he did so during his employment and without a specific written agreement from the City to the contrary. Therefore, the copyright on the Work belonged to the City.

The Court further held that the parties' conduct created in the City an implied and irrevocable license in the Work because: (1) Le was asked by the City to create the Work, (2) Le (with assistance of other City employees) created and delivered the Work, and (3) Le intended the Work to be used by the City. Le contended that he granted the City a revocable license, and that he exercised his right of revocation by removing the Work from the City's server; however, the Court rejected Le's contention because he was provided consideration. The Court granted summary judgment regarding Le's copyright infringement claims.

Le appealed the District Court's decision to the Court of Appeals of the Third Circuit, and on April 24, 2012, the Third Circuit affirmed the rulings below.[8]

II. RECENT CASE LAW DEVELOPMENTS RELATING TO THE WAGE PAYMENT AND COLLECTION ACT OF THE STATE OF DELAWARE

Due to the existence of employee-favorable remedies available in the Wage Payment and Collection Act of the State of Delaware ("WPCA"),[9] advocates, employees, and employers alike should make an effort to stay abreast of developments in that law. As the below, recent cases illustrate, the question of whether the WPCA applies and, if so, which remedies exist can sometimes be in debate.

A. Employees' Ability To Bring Claims For Unpaid Work During Meal Breaks

In *Bates v. Delaware Health Corp.*,[10] a putative class of certified nursing assistants alleged that they were forced to work through their half-hour lunch breaks, without pay, and that such time was never considered in determining whether overtime pay was due as a result of working hours over 40 in a workweek. Postured as a motion to dismiss for lack of subject matter jurisdiction, the motion was denied. In reaching this decision, the court considered, in part, whether the WPCA raised novel or complex issues of Delaware law. While the court found "there is an interesting legal issue about how Delaware's 'meal break' statute … should be interpreted, which would have some impact on the state law issues," the court denied the motion to dismiss based in large part on the fact that "Delaware has a fairly robust procedure for getting timely rulings on novel state law questions." More specifically, the court stated, "I believe the Delaware Supreme Court would accept and promptly decide a properly certified question."[11] The *Bates* decision does not specify the "interesting legal issue" of Delaware law. There might be at least two interesting legal issues.

7 17 U.S.C. §§ 101-122.

8. 2012 WL 1406462 (3d Cir. Apr. 24, 2012).

9. Del. Code Ann. tit.19, §§ 1101-1115

10. 2012 WL 2674601 (D. Del. July 5, 2012).

11. *Bates*, 2012 WL 2674601, at *2 (citing Del. Const. art. IV, § 11(8) and Sup. Ct. R. 41).

One interesting legal issue that might exist is whether Delaware's "meal break" statute requires only that employers allow a meal break (with a civil penalty for failing to do so) or whether it also dovetails with the WPCA to give employees a cause of action (and perhaps also liquidated damages and attorneys' fees) when employees work during what should have been unpaid meal breaks and are not paid for such work. Delaware's meal break law states, in part, "[a]n employer must allow an employee an unpaid meal break of at least 30 consecutive minutes, if the employee works 7½ or more consecutive hours. The meal break must be allowed some time after the first 2 hours of work and before the last 2 hours."[12] The "meal break" law further states, "[w]hoever violates this section shall be subject to a civil penalty of not less than $1,000 nor more than $5,000 for each violation."[13] Other than vaguely implying that an aggrieved employee may institute a "proceeding" and stating that "[j]urisdiction of violations of this subchapter shall be in any court of competent jurisdiction,"[14] the "meal break" statute otherwise is silent about how an aggrieved employee seeks relief (and for what) when s/he works through what should have been an unpaid meal break. The Delaware Supreme Court previously has held that where workmen's compensation benefits were due (under a statute other than WPCA) after proper demand therefor has been made, in order to give effect to the provisions of such statute, a claim for liquidated damages related to such a sum existed under WPCA.[15] It is possible that the same might be found true for any time worked during what should have been an unpaid meal break. Just as claims in the workmen's compensation context have come to be known as "*Huffman* claims," perhaps such claims in the meal break context will become known as "*Bates* claims."[16]

Another interesting legal issue might be whether an aggrieved employee has a cause of action in court for the "meal break" statute's applicable penalty. A penalty provision similar to that found in the "meal break" statute exists in the WPCA.[17] However, unlike the "meal break" statute, the WPCA also includes a "remedies of employees" section.[18] Although the remedies provision applies on its face only to "wages" and "liquidated damages," it has been applied to "benefits or wage supplements."[19] But due in part to there being "a clear statutory delineation between remedies afforded to an employee and civil penalties," the "remedies of employees" section of the WPCA has been held not to apply to the

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12. Del. Code Ann. tit. 19, § 707(a). Exceptions apply that should be considered , some of which are unclear and not tested in the courts,*e.g.,* "[o]nly 1 employee may perform the duties of a position.". A provision prohibiting retaliation also exists. *See* Del Code tit. 19, § 707(b).

13. Del. Code Ann. tit.19, § 707(c).

14. Del. Code Ann. tit.19, § 707(b), (c).

15. Nat'l Union Fire Ins. Co. v. McDougall, 877 A.2d 969 (Del. 2005) (citing Hoffman v. C.C. Oliphant & Son, Inc., 432 A.2d 1207 (Del. 1981)) (including as "wage" claim claims based on unpaid workers' compensation benefits due after proper demand therefor has been made in order to give effect to provisions of Del. Code tit. 19,§ 2357).

16. *Nat'l Union Fire Ins. Co.,* 877 A.2d at 971 ("[c]ivil actions filed under section 2357 to collect unpaid workers' compensation awards have been known as *'Huffman'* claims").

17. Del. Code Ann. tit. 19, § 1112(a) ("[a]ny employer who violates or fails to comply with any requirement of this chapter or any regulation published thereunder shall be deemed in violation of this chapter and shall be subject to a civil penalty of not less than $1,000 nor more than $5,000 for each such violation").

18. Del. Code Ann. tit. 19, § 1113 ("[a] civil action to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction").

19. Commons v. Green Giant Co., 394 A.2d 753 (Del. Super. 1978).

penalty provision of the WPCA.[20] Thus, the penalty identified in the WPCA simply is not a remedy afforded to aggrieved employees. Nonetheless, an open question is whether the lack of a "remedies of employees" section in the "meal break" law (and thus there no statutory delineation between the "meal break" statute's penalty provision and any remedy provision) is enough to distinguish the "meal law" from the WPCA for purposes of determining whether an employee has a private right of action against an employer for the civil penalty.[21]

Practicing attorneys in this field must stay tuned to learn whether the issues discussed above are resolved in the *Bates* litigation.

B. No Liquidated Damages For Wage Supplements

In *Hantman v. P/E, LTD.*, the Delaware Superior Court reaffirmed that the WPCA provides a cause of action to covered employees for both earned but unpaid "wages" and earned but unpaid "wage supplements."[22] The *Hantman* case also reaffirmed the more textually obvious issue that a civil action may be initiated to recover liquidated damages; and that a plaintiff who prevails in a WPCA action (for "wages" or "wage supplements") is entitled to "costs of the action, the necessary costs of prosecution, and reasonable attorney's fees" to be paid by the defendant. It is on the issue of liquidated damages that the *Hantman* case is noteworthy. The *Hantman* Court ruled that, because the liquidated damages provision of the WPCA applies to wages but not to wage supplements,[23] liquidated damages are not available on permanency awards, medical expert witness awards or attorney's fees for an administrative agency action before the Industrial Accident Board.

C. Reasons Why The WPCA Should Not Be Over-Applied

In *Klig v. Deloitte LLP*,[24] the Delaware Court of Chancery granted summary judgment in favor of an employer on a WPCA claim that wages were due during an unpaid leave of absence. The issue leading to judgment for the employer was whether the plaintiff was covered by the WPCA, which applies to persons "suffered or permitted to work by an employer under a contract of employment either *made in Delaware* or to be *performed wholly or partly therein*."[25]

The Court of Chancery found that the plaintiff did not work wholly or partly within Delaware and that nothing suggested that relevant agreements were "made in Delaware." In the Court of Chancery's ruling on this issue, informative analysis was provided regarding why the WPCA is not (and should not be) more broadly applied. Specifically, the Court of Chancery explained that there is no basis to think that Delaware could enforce its vision of appropriate employment law

20 . Rodas v. Serv.ice Gen. Corp., 2010 WL 2355314, at *1 (Del. Super. June 10, 2010).

21. Even if a cause of action is found to exist for the "meal break" statue's penalty, it is unlikely that the penalty would be deemed a "wage" for purposes of the WCPA's liquidated damages provision. *See generally* Hantman v. P/E, LTD, 2011 WL 5316763 (Del. Super. Oct. 20,2011), which is discussed *infra*.

22. 2011 WL 5316763.

23. *See also* McNaboe v. NVF Co., 2002 WL 31444484, at *7 (Del. Oct. 31, 2002) (finding liquidated damages provision did not apply to severance pay, which was a wage supplement); Gen. Motors Corp. v. Local 435 of Inter. Union, et al., 546 A.2d 974, 980 (Del. 1988) (finding liquidated damages provision did not apply to holiday pay, which was a wage supplement).

24. 36 A.3d 785 (Del. Ch. 2011).

25. *Id.* (citing Del. Code Ann. tit. 19, § 1101(a)(3)) (emphasis added in *Klig* opinion).

regulation within another state's territory. The court observed that child labor laws, minimum and other wage laws, laws affecting health and safety, and workmen's compensation laws are a few examples of broad authority granted to states (and exercised by states such as Delaware) as police powers to regulate the employment relationship. The Court of Chancery explained that a co-equal state sovereign such as Delaware can readily regulate within its borders, but cannot regulate the wages of an individual working in another state, outside of Delaware's jurisdiction.

A reader should not interpret the *Klig* case as implying that if the WPCA had applied the employee would have had a legitimate claim for wages that were not paid during a leave of absence. The Delaware Superior Court recently held "[n]othing in the Act requires an employer to continue paying wages to a suspended employee."[26]

III. "GOOD CAUSE" TO THROW IN THE TOWEL: RECENT CASE LAW DEVELOPMENTS RELATING TO VOLUNTARY TERMINATION OF EMPLOYMENT UNDER DELAWARE LAW

Delaware law provides that an individual is disqualified from receiving unemployment benefits if he or she "left work voluntarily without good cause attributable to such work."[27] Generally, in order to qualify for unemployment benefits, the claimant bears the burden of demonstrating "good cause" for leaving work.[28] The Superior Court of Delaware has interpreted the phrase "good cause" to mean:

> [S]uch cause as would justify one in voluntarily leaving the ranks of the employed and joining the ranks of the unemployed ….
>
> [A]n employee does not have good cause to quit merely because there is an undesirable or unsafe situation connected with his employment. He must do something akin to exhausting his administrative remedies.[29]

The Delaware Supreme Court most recently concluded that "a more contextually appropriate definition of good cause" would be "where: (i) an employee voluntarily leaves employment for reasons attributable to issues within the employer's control and under circumstances in which no reasonably prudent employee would have remained employed; and (ii) the employee first exhausts all reasonable alternatives to resolve the issues before voluntarily terminating his or her employment."[30] In other words, an aggrieved employee must try to resolve the issues internally with her employer, exploring all reasonable alternatives, before walking out on the process and filing for unemployment. This exhaustion requirement sounds good in theory but as recent case law demonstrates there are some nuances to the rule that make it difficult to put into practice.

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26. Broesler v. Wardens & Vestry of St. Barnabas Episcopal Church, 2011 WL 2174924 (Del. Super. Feb. 28, 2011).

27. Del. Code Ann. tit.19, § 3314(1)(2012).

28. Drummond v. Dentsply LLC, C.A. No. S12A-04-001-ESB, Bradly, J. (Del. Super. Nov. 14, 2012) (concluding that employee could not demonstrate good cause when she voluntarily left work because she felt her body could not withstand the demands of her job and did not supply her employer with any medical documentation that she was medically unable to work). *See* Longobardi v. Unemployment Ins. Appeals Bd., 287 A.2d 690, 692 (Del. Super. 1971).

29. O'Neal's Bus Serv. v. Employment Secur. Comm'n, 269 A.2d 247, 249 (Del. Super 1970).

30. Thompson v. Christiana Care Health Sys., 25 A.3d 778, 783 (Del. 2011).

The Delaware Department of Labor's Division of Unemployment Insurance has made it clear that an employee who voluntarily terminates employment without good cause is not eligible for unemployment benefits.[31] This rule has been upheld even where the employee's decision to leave her job is for good personal reasons and the employer is sensitive and perhaps sympathetic to those reasons, like the employer in *Johnson v. Christiana Care Health System*.[32] However, as *Johnson* makes clear, an employee only has good cause to voluntarily terminate her employment when the issue that gives rise to her resignation is within the employer's control.[33]

In *Johnson*, the claimant, Mary Johnson abruptly left her job with Christiana Care and moved to another state because of a life-threatening incident in her home.[34] Ms. Johnson had worked for Christiana Care for about thirteen years and "liked [her] job" but had to suddenly resign after someone attempted to kill her daughter in their home.[35] The Unemployment Insurance Appeals Board held that Ms. Johnson did not qualify for unemployment benefits because her resignation was not related to the conditions of her employment and moreover, was not within the employer's control.[36] Ms. Johnson appealed and the Delaware Superior Court upheld the Board's decision.[37] The court acknowledged it was sensitive to Ms. Johnson's personal reasons for resigning but her resignation was not attributable to actions taken by her employer, thus she did not qualify for benefits.[38] Put differently, while Ms. Johnson had good grounds for leaving her job, her resignation had to be connected to or the byproduct of an unhealthy *work* environment before she could receive unemployment insurance benefits.[39]

The "good cause" requirement also requires the employee to do something akin to exhausting his or her administrative remedies or exhausting all reasonable alternatives before he or she can be eligible for benefits. Recent case law demonstrates that this exhaustion requirement means the employer must take reasonable measures to remedy the problematic conditions of the work environment, and the claimant must take advantage of the corrective opportunities provided by the employer or at least give the employer the chance to correct the problem before the claimant quits and files for unemployment.[40]

In *Thompson v. Christiana Care Health System*, the claimant, Linda Thompson, worked for Howard Wellness Center, a medical facility operated by Christiana Care Health System, from September 2002 to February 2008.[41] In the

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31. Johnson v. Christiana Care Health Sys., 2011 WL 5855039 (Del. Super. Oct. 28, 2011).

32. *Id.*

33. *Id.*

34. *Id.* at *1.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Thompson*, 25 A.3d at 780.

41. *Id.*

latter part of her employment, "from 2006 to 2008, her working environment was 'very disruptive,' involving power struggles and repeated employee disagreements" with her supervisor and colleagues.[42] Ms. Thompson reported the issues involving her stressful work environment to her supervisor's manager and also complained to a recruiter in Human Resources.[43] The claimant's only misstep was that she did not completely follow her employer's internal procedures for addressing such issues,*i.e.*, she contacted the recruiter and not the employee relations representative.[44] When Ms. Thompson met with her supervisor's manager and requested a transfer to a different wellness center, she was told a transfer was not available.[45] A few days later, Ms. Thompson submitted her letter of resignation just as the internal process for reviewing her complaints had begun.[46]

The Claims Deputy denied Thompson's claim for unemployment benefits and the Appeals Referee affirmed the decision of the Claims Deputy.[47] However, the UIAB reversed the Appeals Referee's decision concluding Ms. Thompson had "voluntarily terminated her employment for 'good cause.'"[48] The UIAB reasoned that the employer had failed to resolve the issues in the workplace and moreover, had transferred other employees to different facilities and wrongfully denied Ms. Thompson's request notwithstanding the turnover in the workplace.[49]

The Superior Court reversed the UIAB's decision concluding "unhappiness arising out of an unpleasant work environment does not constitute 'good cause' for purposes of 19 *Del. C.* § 3314(1)."[50] The Delaware Supreme Court affirmed the Superior Court's decision.[51] The Supreme Court held that the record did not support Ms. Thompson's claim that she resigned because her transfer requests were denied or that she qualified for any of the positions at the other centers.[52] The court also concluded that Ms. Thompson did not give her employer the opportunity to remedy the job conditions, thus her "unpleasant work environment, without more, d[id] not constitute good cause."[53]

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 781.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 783.

50. Christiana Care Health Sys. v. Thompson, 2010 WL 532451, at *3 (Del. Super. Feb. 8, 2010). *See* Swann v. Cabinetry Unlimited, 1993 WL 487892 (Del. Super. Oct. 15, 1993) (affirming the UIAB's decision that an employee did not quit her job for "good cause" where the employee claimed that she could not longer tolerate her employer's temper); Ament v. Rosenbluth Int'l, 2000 WL 1610770 (Del. Super. Aug. 31, 2000) (affirming the UIAB's decision that stress does not constitute "good cause" for leaving employment).

51. *Thompson*, 25 A.3d at 784.

52. *Id.*

53. *Id.* at 784-85.

After *Johnson* and *Thompson* it seems employers now have an affirmative duty to take reasonable measures to remedy the problematic conditions of the work environment that are within their control and make sure those processes are effective. Additionally, claimants must be apprised of the process and give their employers the chance to correct the problems before seeking benefits. *Johnson* and *Thompson* also teach that good cause for leaving employment cannot be based on stress or unhappiness but requires something more that is not always defined by the case law.

IV. DELAWARE PUBLIC SECTOR LABOR LAW: RECENT CASE LAW DEVELOPMENTS

In *AFSCME v. State of Delaware, Public Employment Relations Board*,[54] the Delaware Superior Court considered a motion for summary judgment[55] which alleged that the Public Employment Relations Board ("PERB") exceeded its authority in determining that only unrepresented employees, *i.e.*, employees who were not part of an existing bargaining unit, were eligible to vote in a union representation election.

The case arose after the PERB scheduled a union representation election for a bargaining unit consisting of 1,636 employees. Of those employees, 1,323 were already represented by AFSCME in other existing bargaining units. AFSCME argued that all 1,636 employees—both represented and unrepresented—should be permitted to vote in the election. The PERB maintained that only the 313 unrepresented employees were entitled to vote. According to the PERB, allowing employees who were already represented by AFSCME to vote would dilute the rights of the 313 unrepresented employees thereby ensuring the outcome of the election,*i.e.*, that AFSCME would become the representative for all employees in the bargaining unit).

At issue was the PERB's interpretation of its rules governing the conduct of elections. Under PERB Rule 4.3(b), "[a]ll public employees who are included within the designated bargaining unit and who were employed as of the end of the pay period which immediately precedes an election or who were on approved leave of absence shall be eligible to vote.[56]

A literal interpretation of Rule 4.3(b) would entitle all 1,636 employees to vote in the representation election, including those already represented by the Union. However, according to Rule 1.9, the PERB is empowered to exercise discretion to suspend or waive the rules to promote the orderly administration of the Public Employment Relations Act:

> These regulations set forth rules for the efficient operation of the Board and the orderly administration of the Act. They are to be liberally construed for the accomplishment of these purposes and may be waived or suspended by the Board at any time and in any proceeding unless such action results in depriving a party of substantial rights.[57]

The court determined that the PERB acted appropriately in utilizing Rule 1.9 to invoke its discretion to "suspend" the terms of Rule 4.3(b) when defining voter eligibility.[58] The court also found that the PERB acted within the scope of

54. 2011 WL 2176113 (Del. Super. May 25, 2011).

55. *Id.* at *2 (though captioned as a motion for summary judgment, the court determined that AFSCME was actually seeking a writ of mandamus pursuant to DEL. CODE ANN. tit. 29, § 10143).

56. *Id.* at *3.

57. *Id.*

58. *Id.*

its discretionary authority under Rule 1.9 to construe Rule 4.3(b) so as to exclude historically represented employees from eligibility to vote in the election.[59]

While the court explained that this particular issue had not previously been decided under Delaware law, it nonetheless found that the principles underlying Delaware's collective bargaining statute, together with the presumption of validity that accompanies the PERB's construction of its own regulations,[60] confirm that the PERB acted within its authority by deciding which employees were entitled to vote in the representation election. Though the court was mindful that its analysis was complicated by the fact that the right of employees to vote in the representation election would be impacted under either parties' interpretation of the Rules, it concluded that the PERB's determination of the bargaining unit's electorate was discretionary (rather than ministerial) and therefore ruled that AFSCME's request for mandamus relief was inappropriate.[61]

In *AFSCME v. State*,[62] the Delaware Court of Chancery considered an appeal from two orders of the Public Employment Relations Board addressing whether the State committed an unfair labor practice by unilaterally changing the minimum hours for overtime compensation and imposing a temporary freeze on career ladder promotions.

The case arose following a series of efforts by the State to control government expenditures. These included a freeze on "career ladder promotions," and the General Assembly's enactment of legislation restricting overtime payment.[63] In response to these efforts, AFSCME filed unfair labor practice charges with PERB alleging that the State had failed to bargain in good faith by unilaterally stopping payments to employees that earned increases in compensation through the career ladders, circumventing the collective bargaining process, and engaging in impermissible communications with bargaining unit employees.[64]

The PERB hearing officer dismissed the unfair labor practice charges, and AFSCME thereupon sought review by the full Board. The full Board affirmed the underlying decisions unanimously and dismissed the charges.[65]

AFSCME then sought review of the PERB's ruling with the court. It argued that: (1) "employees have a constitutionally protected property right to bargain collectively;" (2) career ladders and overtime compensation are mandatory terms and conditions of employment over which the State must bargain; and (3) the State failed to bargain "in good faith by engaging in unilateral action to alter the terms and conditions of employment."[66]

The State maintained that overtime compensation and "career ladder promotions are not mandatory subjects of bargaining" and can therefore be unilaterally changed.[67] The State also pointed out that the Fiscal Year 2010 Appro-

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59. *Id.*

60. Del. Code Ann. tit. 29, § 10141(e).

61. 2011 WL 2176113, at *3.

62. 61 A.3d 620 (Del. Ch. 2012).

63. *Id.* at 625.

64. *Id.*

65. *Id.* .

66. *Id.* at 626.

67. *Id.*

priations Act superseded the provisions in the collective bargaining agreement, and that it was bound by the Delaware Constitution to implement the provisions of the Appropriations Act imposing the limitations on overtime compensation.[68]

The court agreed with the State's position that it was not required to bargain over non-mandatory or discretionary subjects of bargaining. In this regard, it noted that section 1305 of Title 19 of the Delaware Code provides that:

> A public employer is *not required to engage in collective bargaining on* matters of inherent managerial policy, which include, but are not limited to, such areas of *discretion* or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel.[69]

The court explained that the collective bargaining statute defines "discretionary subject" as "'any subject [1] covered by merit rules which apply pursuant to § 5938(c) of Title 29, and [2] which merit rules have been waived by statute.'"[70] The court reasoned that, "[f]or the purposes of this case, if the first part of this definition is met, the subject matter is a nonmandatory subject of collective bargaining, and, therefore cannot support [an unfair labor practice charge]."[71]

As to whether career ladder promotions and overtime compensation are mandatory or discretionary subjects of bargaining, the court noted that 29 *Del. C.* § 5938(c) "expresses the General Assembly's intent to reserve to the State the exclusive authority to govern the excepted sections (*i.e.*, §§ 5915 through 5921, 5933, 5935 and 5937)." In other words, "the Merit Rules would be controlling over these topics and collective bargaining as to them would not be authorized."[72]

"With these principles … in mind," the court analyzed "whether the career ladder and overtime provisions conflict with a 'general rule-making authority' incident to the excepted sections in Section 5938(c), and, therefore, are not subject to collective bargaining."[73] In conducting this analysis, the court reasoned that the career ladder is a form of promotion under both the collective bargaining agreement and the Merit Rules.[74] It stated that "this conclusion … comports with the plain meaning of 'promotion,'" which is "defined in Merriam-Webster's Dictionary as 'the act or fact of being raised in position or rank.'"[75] The court explained that "the career ladder satisfies this definition in that it raises an employee to a new position based on the acquisition of additional training and certification."[76] The court therefore found that "[b]ecause the career ladder [is a promotion], and promotions are excepted under 29 *Del. C.* § 5938(c), the State could not have violated 19 *Del. C.* § 1307(a) by refusing to negotiate the career ladder or unilaterally making changes to it."[77]

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68. *Id.*

69. *Id.* at 628 (quoting Del. Code Ann. tit. 19, § 1305)).

70. *Id.* at 629 n.56 (quoting Del. Code Ann. tit.19, § 1302(h)).

71. *Id.*

72. *Id.* at 629.

73. *Id.* at 629-30.

74. *Id.* at 632.

75. *Id.* at (citing Merriam–Webster's Collegiate Dictionary (11th ed. 2004)).

76. *Id.*

77. *Id.*

As to whether the State unilaterally made changes to the collective bargaining agreement regarding overtime compensation, the court determined that "[t]he adoption of the overtime provision … was a necessary part of the [State's] pay plan scheme because it provided for "'additional compensation for work performed in excess of the standard work week.'"[78] By including the pay plan scheme in the statute, the court stated that "the General Assembly made clear that compensation for Merit Employees is outside of the mandatory scope of collective bargaining for covered employees. Because premium pay was adopted pursuant to that Section," the court found that there was "no basis for concluding that the State violated section 1307(a) of PERA by making the challenged changes to overtime compensation."[79]

The court also agreed with the State's argument that the collective bargaining agreement "cannot override the Fiscal Year 2010 Appropriations Act."[80] In this regard, the court explained that the plain language of section 1313(e) renders unenforceable any agreements that are "'inconsistent with any statutory limitation on the public employer's funds' or 'contrary to law.'"[81] Here, the court found that the General Assembly, in enacting the Fiscal Year 2010 Appropriations Act, had created irreconcilable conflicts with the collective bargaining agreement by expressly limiting overtime eligibility and implemented a hiring review process in direct opposition to the terms of sections 14 and 15, thereby making these provisions "invalid and unenforceable."[82]

For these reasons, the court "conclud[ed] that PERB correctly found that the career ladder and overtime matters complained of by AFSCME were not mandatory subjects of bargaining, and that, therefore, the State did not violate 19 *Del. C.* § 1307."[83]

In *State of Delaware v. Public Employment Relations Board*,[84] the Delaware Superior Court considered a petition for a writ of certiorari filed by the State asserting that the PERB committed legal error by: (1) basing its decision on information from a web page that was not part of the evidentiary record, and; (2) failing to apply the "community of interest" in concluding that certain employees did not belong in a specified bargaining unit identified in the collective bargaining statute.

The case arose in the context of a union representation proceeding before the PERB. At issue was whether Justice of the Peace Court Constables could belong in a specified bargaining unit. The PERB Hearing Officer concluded that the Constables did not belong in that bargaining unit.[85] In reaching this conclusion, the Hearing Officer relied upon information contained on the website of the State's Office of Human Resource Management.[86] This information had not

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78. *Id.* at 633 (citing Laborers' Int'l Union of N. Am. Local 1029 v. State, 310 A.2d 664, 668 (Del. Ch. 1973)).

79. *Id.* at 633-34.

80. *Id.* at 634.

81. *Id*. at 635.

82. *Id*.

83. *Id.* at 636.

84. 2011 WL 1205248 (Del. Super. Mar. 29, 2011).

85. *Id.* at *2.

86. *Id.*

been introduced into evidence at the hearing.[87] The State appealed the Hearing Officer's decision to the full Board. The full Board affirmed the Hearing Officer's decision.

The State then filed a petition for a writ of certiorari alleging that the PERB erred: (1) when it affirmed the decision based on facts from the State's web page when that information was not part of the record; and (2) in failing to apply the "community of interest" standard in to conclude that the Constables did not belong in the bargaining unit.

The court explained that the purpose of a common law writ of certiorari is not to review the merits of the underlying action (as would be the case with an appeal), but to determine whether an error of law occurred below.[88] According to the court, "review on certiorari is on the record and the reviewing court may not weigh evidence or review the lower tribunal's factual findings."[89] Having determined that this case met the threshold requirements for a writ of certiorari, the court explained that the issue was whether PERB committed two errors of law in affirming the decision of the Hearing Officer.[90]

The PERB claimed that the Delaware Rules of Evidence ("D.R.E.") provide guidance in administrative hearings and that the administrative notice taken in this case was in accord with D.R.E. 201.[91] The court found that the PERB failed to comply with D.R.E. 201(e) which requires the parties be given notice of the facts to be judicially noticed and an opportunity to be heard.[92] The fact that the State was on notice of the nature of the hearing and that the information was publicly available was not sufficient, according to the court. Instead, it explained that D.R.E. 201(e) explicitly states each party "is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."[93] By taking administrative notice of facts outside the record without first giving the parties notice and an opportunity to be heard, the court concluded that the PERB committed legal error.

However, the court found that the PERB did not err in relying on the statutory language to determine whether the Constables belonged in the bargaining unit. The court explained that the PERB is empowered to administer the Public Employment Relations Act and to determine the proper assignment of job classifications to bargaining units and the bargaining unit status of individual employee.

Accordingly, the court found that while the PERB applied the correct test in deciding the composition of the bargaining unit, it impermissibly relied upon information outside the record—job classification taxonomy from the State's website—that was not introduced into evidence. As a result of the reliance on evidence outside the record, the court reversed and remanded the case to the PERB.

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at *3.

92. *Id.*

93. *Id.*