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## What 15th Century English Common Law Has to Say About President Obama's Recess Appointments

By Peder J. V. Thoreen

### Introduction

The D.C. Circuit surprised many when, in January of this year, it issued its decision in *Noel Canning v. NLRB*,<sup>1</sup> holding invalid the recess appointments of three members of the National Labor Relations Board ("NLRB" or "Board"). In May, the Third Circuit followed suit in *NLRB v. New Vista Nursing & Rehabilitation*,<sup>2</sup> reaching similar conclusions and invalidating another Board member's recess appointment.<sup>3</sup> The ramifications of these decisions, which effectively call into question the validity of hundreds of prior recess appointees and, along with them, the thousands of official acts those appointees undertook, are potentially wide-ranging.

For labor law practitioners, such fears are far from hypothetical. In 2010, the Supreme Court effectively invalidated nearly 600 NLRB decisions in a single blow when it held that two members of the Board could not exercise the Board's power to decide cases.<sup>4</sup> However, the resulting uncertainty was just a sliver of the potential disruption that may result from

<sup>1</sup> 705 F.3d 490 (D.C. Cir. 2013).

<sup>2</sup> No. 11-3440, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013).

<sup>3</sup> Author's note: After this article was submitted for publication, the Fourth Circuit followed these cases in *NLRB v. Enterprise Leasing Co. Southeast, LLC*, \_\_\_ F.3d \_\_\_ (4th Cir. July 17, 2013).

<sup>4</sup> See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010); Note, *The New Meaning of New Process Steel, L.P. v. NLRB*, 46 Wake Forest L. Rev. 307, 307 (2011).

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# The Phenomena of Gamification – The Next Big Thing for Employers?

By Paul Cowie & Farha Chowdry

## Introduction

Gamification is the application of game-like elements to real-world tasks. The term “Gamification,” however, may be misleading as one may correlate it simply to playing video games. As Kris Duggan, founder of leading Gamification company Badgeville, explains, at a practical level Gamification involves “taking the techniques that make games fun and addictive and using them to motivate human behavior in a digital context.”<sup>1</sup> Thus, Gamification is used to increase user engagement, loyalty and participation, or to change behavior with the purpose of obtaining superior results. Indeed, Gamification has been used for endless business purposes to “solve” problems or improve outcomes, including externally (to obtain/retain customers) and internally (to motivate/engage employees of all levels). Unsurprisingly, Gamification is making its way into the workplace, with employers using game mechanics to track and manage performance, increase efficiency, reward productive employees and, ultimately, justify terminations. Duggan works with many employers and believes “Gamification in the workplace is set to explode over the next few years because employers can use Gamification to incentivize employees by establishing clear goals and rewarding those employees that achieve those goals.”<sup>2</sup>

According to Gartner, a tech-industry research firm, by 2014, 70 percent of Global 2000 businesses will manage at least one “Gamified” application or system.<sup>3</sup> Analysts also predict that Gamification will be in 25 percent of redesigned business processes by 2015.<sup>4</sup> One reason for this predicted increase is because

early examples of Gamification have proven to be very effective. For example, in a software trial case study of Autodesk® 3ds Max®, 3D design software for games, film and motion graphics artists, software trial usage increased by 40 percent after allowing participants of the trial to compete against peers to earn points.<sup>5</sup> Top performers won an Autodesk Entertainment Creation Suite free of charge. Even before the term “Gamification” came into common use, other fields regularly utilized its elements, the most basic of which are the frequent-flyer programs pioneered by Texas International Airlines (now Continental Airlines) in 1979.<sup>6</sup>

## How Can Employers Benefit From Gamification?

The concept is clear: Gamify tasks to incentivize employees to perform them more quickly, prioritize more productively, produce superior work product, or even simply to perform a task at all. By way of example, at a recent Gamification seminar, a panelist explained that Safeway, Inc. wanted its employees to provide feedback on various promotions, but found it received little meaningful input. To combat this, Safeway introduced a Gamification concept whereby employees who provided frequent and meaningful feedback received awards which allowed them to progress through levels from bronze through to platinum. Despite the fact that these awards did not translate into any monetary or other real-world benefits, Safeway quickly obtained the feedback that it had been seeking for years, but had previously been unable to obtain.

Another success story is LiveOps Inc., a company that operates call centers, which began awarding its call

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<sup>1</sup> Interview of Kris Duggan (June 12, 2013) (“Duggan Interview”).

<sup>2</sup> Duggan Interview, *supra* note 1.

<sup>3</sup> Press Release, Gartner Newsroom, *Gartner Predicts Over 70 Percent of Global 2000 Organizations Will Have at Least One Gamified Application by 2014* (Nov. 9, 2011), available at <http://www.gartner.com/newsroom/id/1844115>.

<sup>4</sup> Elise Olding, *et al.*, *Predicts 2012: Organizational Politics Hampers, Gamification Motivates BPM Adoption*, Gartner (Nov. 15, 2011), available at <http://blogs.gartner.com/elise-olding/2011/11/21/bpm-predicts-2012-organizational-politics-hampers-gamification-motivates-bpm-adoption/>.

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<sup>5</sup> Case study: Autodesk, *Autodesk Enhances Trial Experience with Smart Gamification - Increases Trial Usage by 40%*, Badgeville (2012), available at <http://badgeville.com/content/case-study-autodesk>.

<sup>6</sup> David M. Rowell, *A History of US Airline Deregulation Part 4: 1979-2010: The Effects of Deregulation - Lower Fares, More Travel, Frequent Flier Programs*, Travel Insider, Aug. 13, 2010, available at <http://thetravelinsider.info/airline-management/airlinederegulation2.htm>.

agents virtual badges and points for tasks, such as keeping calls brief and closing sales.<sup>7</sup> As a result of these “games,” agents who participated reduced their average call time by 15 percent, and their sales improved by 8 to 12 percent.<sup>8</sup> Significantly, agents who participated in the “Game” outperformed non-users by 23 percent.<sup>9</sup>

Other employers have used Gamification to incentivize physical fitness among employees. In 2011, NextJump installed gyms in their offices and built an application that allowed its employees to form regionally-based teams, check-in to workouts, and see their team performance on a leaderboard.<sup>10</sup> As a result, approximately 70 percent of NextJump staff began to exercise regularly.<sup>11</sup> UPS has also used Gamification techniques in its driver training program to combat a 30 percent failure rate among its trainees in its traditional training program.<sup>12</sup> As a result of Gamification, of the 1,629 UPS trainees who finished the training course, only 10 percent failed the program, a marked improvement.<sup>13</sup>

The hotel industry has also implemented Gamification techniques. In an effort to make employee training more exciting and pertinent, the Hilton Garden Inn began using a game-based employee training program called Ultimate Team Play to provide employees with a simulated interactive video game that places them in a virtual hotel.<sup>14</sup> Specifically, employees are placed in a 3-D virtual Hilton Garden Inn, where they must respond to a number of simulated-guest-related requests by a set deadline. The employee’s performance then

impacts the simulated guest’s satisfaction, which is the means of tracking the employee’s score. This kind of Gamification has the added benefit of providing employers the opportunity to measure employee performance before employees even interact with actual customers. It is easy to see how these techniques may translate into the recruitment process, by allowing recruiters to simulate the work environment and test aptitude.<sup>15</sup>

### Is Gamification a Fad?

Gamification is currently a \$300 million per year industry and is predicted to grow to \$2.8 billion within the next three years.<sup>16</sup> The reason for this exponential growth is simple – the test cases suggest that Gamification provides a means to excite employees about doing things that employers want them to do. Simply put, happier employees are more engaged. According to a 2011 Gallup poll, 86 percent of engaged employees (i.e., employees who are emotionally committed to the organization and its goals<sup>17</sup>) said they often felt happy in the workplace, whereas only 11 percent of disengaged employees said they were happy at work.<sup>18</sup> While this may be as expected, those figures become more relevant in light of a 2012 national study that revealed that 75 percent of employees are not fully engaged at work.<sup>19</sup> The reality of day-to-day employment is that tasks are constantly competing for our time, and our mental and physical energy. Gamification

<sup>7</sup> See Rachel Emma Silverman, *Latest Game Theory: Mixing Work and Play*, WALL ST. J., Oct. 10, 2011, available at <http://online.wsj.com/article/SB10001424052970204294504576615371783795248.html?mod=e2tw>.

<sup>8</sup> Silverman, *supra* note 7.

<sup>9</sup> Silverman, *supra* note 7.

<sup>10</sup> Gabe Zichermann, *7 Winning Examples of Game Mechanics in Action*, MASHABLE, July 06, 2011, available at <http://mashable.com/2011/07/06/7-winning-examples-of-game-mechanics-in-action/>.

<sup>11</sup> Zichermann, *supra* note 10.

<sup>12</sup> Sharlyn Lauby, *The Evolution of Gamification in the Workplace*, MASHABLE, Jun. 15, 2012, available at <http://mashable.com/2012/06/15/gamification-business-evolution/>.

<sup>13</sup> Jennifer Levitz, *UPS Thinks Out of the Box on Driver Training*, WALL ST. J., Apr. 7, 2010, available at [http://finance.yahoo.com/news/pf\\_article\\_109258.html](http://finance.yahoo.com/news/pf_article_109258.html).

<sup>14</sup> Hilton Team Play, *Hilton Ultimate Team Play*, Virtual Heroes, available at <http://virtualheroes.com/projects/hilton-ultimate-team-play>.

<sup>15</sup> Mario Herger, *An Overview of Gamification in Recruitment*, Enterprise Gamification, May 28, 2013, available at <http://enterprise-gamification.com/index.php/en/human-capital-management/154-an-overview-of-gamification-in-recruitment>.

<sup>16</sup> Wanda Meloni & Wolfgang Gruener, *Gamification in 2012: Market Update, Consumer and Enterprise Market Trends*, M2 Research (2012), at 8, available at <http://gamingbusinessreview.com/wp-content/uploads/2012/05/Gamification-in-2012-M2R3.pdf>.

<sup>17</sup> Kevin Kruse, *What is Employee Engagement*, Forbes (June 22, 2012), available at <http://www.forbes.com/sites/kevinkruse/2012/06/22/employee-engagement-what-and-why/>.

<sup>18</sup> Elizabeth Lupfer, *Social Knows: Employee Engagement Statistics (August 2011 Edition)*, Social Workplace, Aug. 8, 2011, available at <http://www.thesocialworkplace.com/2011/08/08/social-knows-employee-engagement-statistics-august-2011-edition/>.

<sup>19</sup> Whitepaper, Dale Carnegie Training, *What Drives Employee Engagement and Why it Matters* (Dale Carnegie & Assocs., Inc. 2012), available at [http://www.dalecarnegie.com/assets/1/7/driveengagement\\_101612\\_wp.pdf](http://www.dalecarnegie.com/assets/1/7/driveengagement_101612_wp.pdf).

presents a possible solution by making unexciting tasks fun and engaging. Indeed, Duggan believes that as soon as people understand what Gamification does and how it delivers results, they quickly agree that Gamification is here to stay.<sup>20</sup>

### **Gamification and Human Resources**

Given the objectives of Gamification, the logical progression is for employers to routinely use it as a means to manage employee performance, and to utilize the resulting data in making promotion and termination decisions. Mario Herger, founder and partner of Enterprise-Gamification.com, frequently consults with employers about this very issue and advises that “[g]ame mechanics can be utilized to measure key performance indicators beyond simply the number of sales.”<sup>21</sup> Herger explains, “Employers can use Gamification to gather data regarding customer satisfaction, employee satisfaction, response time, task completion time, number of tasks completed, and adherence to many other company objectives.”<sup>22</sup>

From a legal perspective, employers can use such Gamification data to demonstrate legitimate nondiscriminatory reasons for terminations. Gamification can also be used to identify poor performers earlier, allowing employers to manage that performance in a focused way to achieve better results. However, such methodology will inevitably lead to new ways for employees to argue that the system itself is “rigged,” and that Gamification data should not have been used to make such decisions.

### **Data Privacy and Other Legal Considerations**

While Gamification presents a myriad of interesting and creative possibilities for employers seeking to improve employee productivity, employers should pay attention to the legal implications of instituting “Games” in the workplace, and avoid situations that could potentially result in violations of labor and employment laws. For example, employers should take steps to prevent the “Game” from encouraging employees to achieve better results by missing meal or rest breaks (a constant favorite for Plaintiff lawyers in California), and should consider whether the “Game” unfairly disadvantages employees with disabilities or other protected groups.

<sup>20</sup> Duggan Interview, *supra* note 1.

<sup>21</sup> Interview of Mario Herger (May 31, 2013) (“Herger Interview”).

<sup>22</sup> Herger Interview, *supra* note 21.

Because certain gamified programs involve announcing individual performance information and employee data, employee privacy concerns should also be thoroughly analyzed before the launch of any program. Indeed, in some jurisdictions, the use of leaderboards and badges necessitates approval by unions and works councils.<sup>23</sup> Similarly, several states have adopted laws that restrict the monitoring of employee communications without advanced written notice.<sup>24</sup> Therefore, at a minimum, employers should inform employees about the purpose of the “Game” and the fact that the employer is monitoring the employees’ activity,<sup>25</sup> as well as ensure that participating employees have agreed to any information disclosures.

Employers who use points or coupons to reward success should also be aware of how coupons are regulated. Under federal law, it is illegal to sell gift cards that expire within five years.<sup>26</sup> Additionally, failure to adequately disclose coupon and reward conditions could expose employers to potential litigation. Groupon, for example, was recently sued for allegedly imposing illegal and undisclosed deal restrictions.<sup>27</sup> Further, employers should be aware of the way their particular state regulates contests and sweepstakes. For instance, California recently amended its sweepstakes law by requiring that solicitation materials be clearer and imposing strict prohibitions on potentially misleading language.<sup>28</sup> These potential issues indicate the importance of seeking legal counsel and engaging experts during the implementation phase to help safeguard against such risks.

### **Implementation – How Does It Work?**

There are various options to pursue if you are trying to “Gamify” an aspect your business, including offering

<sup>23</sup> Mario Herger, *Gamification and Law or How to Stay out of Prison Despite Gamification*, Enterprise Gamification, Jan. 3, 2012, available at <http://enterprise-gamification.com/index.php/en/blog/4-blog/65-gamification-and-law-or-how-to-stay-out-of-prison-despite-gamification>.

<sup>24</sup> See, e.g., Del. Code, tit. 19 § 705.

<sup>25</sup> Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. No. 4, 851, 857 (2011-12).

<sup>26</sup> Credit Card Accountability Responsibility and Disclosure Act of 2009, H.R. 627, 111th Congress, 1st Leg. Sess. (2009–2010), available at <http://www.govtrack.us/congress/bills/111/hr627/text>.

<sup>27</sup> *In re Groupon, Inc.*, No. 11md2238 DMS (RBB), 2012 U.S. Dist. LEXIS 185750 (S.D. Cal. Sept. 28, 2012).

<sup>28</sup> Cal. Bus. & Prof. Code § 17539.15.

levels, gifts, competitions, points and virtual items. Herger explains:

A good way to determine which model is best suited for your company's particular needs is to back into it. First, decide who you are trying to motivate and then think about what results you are trying to achieve: do you want more first-time visits to your website or repeat visits; do you want your employees to work more efficiently or to perform undesirable tasks; or do you want to market your product generally or pique the interest of a certain audience? Once these questions are answered, it will likely be easier to determine which Gamification mechanism is right for your company's specific needs.<sup>29</sup>

Of course, there are industry experts, like Herger and Duggan, available to help answer these questions.

### **The Future of Gamification**

The Gamification industry is growing rapidly and is a very exciting concept that can and has provided real-world benefits and advantages. Employers interested in pursuing such techniques should obtain professional advice regarding the practical solutions offered by Gamification, as well as to avoid the legal ramifications if not correctly implemented.

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<sup>29</sup> Herger Interview, *supra* note 21.