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L&E Newsletter

A publication of the Labor and Employment Law Section
of the New York State Bar Association

A Message from the Chair

Not even a snow storm in New York City, not even freezing temperatures, not even long lines for taxi cabs and rail interruptions could affect the turnout for our meeting this January. Our registration figures—compliments to the inviting program and MCLE—was the highest ever, at over 200 participants.

This year, there were no SRO signs at the box office. The new facilities at the Millennium Broadway were able to accommodate the larger crowd and also placed us much nearer the activity and other programs at the NYSBA headquarters at the Marriott Marquis, about a block away.

For our program, members sat in the seats of the old Hudson Theater, complete with double balcony, curtains, lighting and control booth. Lively panel discussions were the "performances," and there was even audience participation. We were, after all, on Broadway. Afterwards, our keynote luncheon speaker, the Hon. Rosemary Pooler (United States Court of Appeals, Second Circuit) provided an overview to the audience about the workings of the Second Circuit.

The evening before, our Section's Executive Committee had been busy planning addressing other needs of our Section.

For example, a matter urgently yet to be determined is our meeting location for next year. Because of a number of considerations and cost issues, while the Millennium remains a possibility, other locations must also be considered. Stay tuned to learn the outcome, which will be announced in the *L&E*, as well as in meeting mailings.

Another matter which is only partly resolved, as reported by our Standing Committee on Alternative Dispute Resolution, is finalization of the Uniform Mediation Act ("UMA"). Our Section, through the tireless work of the ADR Committee's subcommittee on the UMA, headed by Michael Curley, submitted additional comments to the drafters of the act strongly urging that a collective bargaining exemption be included in the act.

As noted in the detailed letter prepared by the subcommittee, the UMA draft currently provides that mediators be required to testify in subsequent arbitration proceedings regarding statements made to them privately during mediation under assumed confidentiality protections. The elimination of these protections would render meaningless the mediation efforts expended by the parties attempting to reach an agreement.

As you have been advised in this column which appeared in the previous *L&E Newsletter*, our Standing Committee on Labor Relations Law and Procedure has been actively addressing member concerns about major changes in case assignments by the National Labor Relations Board in the New York City area. Senator Charles E. Schumer contacted the NLRB on our behalf requesting an explanation concerning the temporary reassignment of cases arising in certain New York State counties to Region 34 in Hartford, Connecticut.

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NLRB General Counsel Leonard R. Page informed the senator that Westchester and Rockland counties were transferred back to Region 2 in Manhattan at the beginning of the current fiscal year. These two counties generated most of the caseload which was subject to the temporary realignment of counties within the jurisdiction of Region 2.

General Counsel Page also pointed out that the NLRB had initiated an award-winning, interregional assistance program, whereby cases could be assigned to another region for handling, in an effort to assist the field offices to reduce existing backlogs and provide more timely service to the public. Cases which arise in Putnam, Orange and Dutchess counties will continue to be handled by Region 34.

Peter Hoffman, the Regional 34 Director, contacted me and Richard Chapman, Co-chair of the Standing Committee on Labor Relations Law and Procedure, to assure us that he is willing to meet and discuss any concerns that might arise concerning this realignment.

Ever responsive to our MCLE needs and the specialized interests of our members, our Standing Committees have been busy preparing new programs for the members. Reflecting the success of our program about "Sexual Harassment in the Law Firm" which was conducted via teleconference in November, 1998, the Standing Committee on Government Employee Labor Relations Law is developing a CLE program on Public Sector Labor and Employment Law using the same format.

Also in the works are more traditional, on-site programs. The Standing Committee on Employee Benefits is developing a program on ERISA and the Committee on Labor Arbitration and Collective Bargaining is working on a program on Discipline of Public School Teachers. And more information will be announced soon about the Section's revamped Arbitrator Mentoring Program, involving the efforts of a sub-committee of our Standing Committee on Labor Arbitration.

Information should be mailed soon to members about the Section's upstate Employment Law Litigation Institute, to be held in conjunction with Albany Law School on May 4-5, 2000. And plans are already being started for the Institute during the spring of 2001, in New York City, in conjunction with St. John's University School of Law.

Although our Standing Committees are actively working, the Executive Committee has again raised issues of concern over reduced participation by members on our Standing Committees. Our by-laws limit membership on standing committees both in numbers and in duration. Time causes rotation-off by some non-participating members and our by-laws allow for removal of non-active committee members, if so recommended by committee chairs. We need active participation on committees, to fairly spread the workload and responsibility. We want active participation to keep all aspects of our membership represented. A Task Force on Membership will be examining this issue and reporting its recommendations.

As for our fall meeting this year, think warm. We will be in Captiva sooner than we think, for our twenty-fifth anniversary year meeting from October 29 through November 2, 2000. Plan to attend, participate and to get to know other Section members in a beautiful and informal setting.

Rosemary Townley

Request For Articles

If you would like to submit an article, or have an idea for an article, please contact

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Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

Letter from the Editor

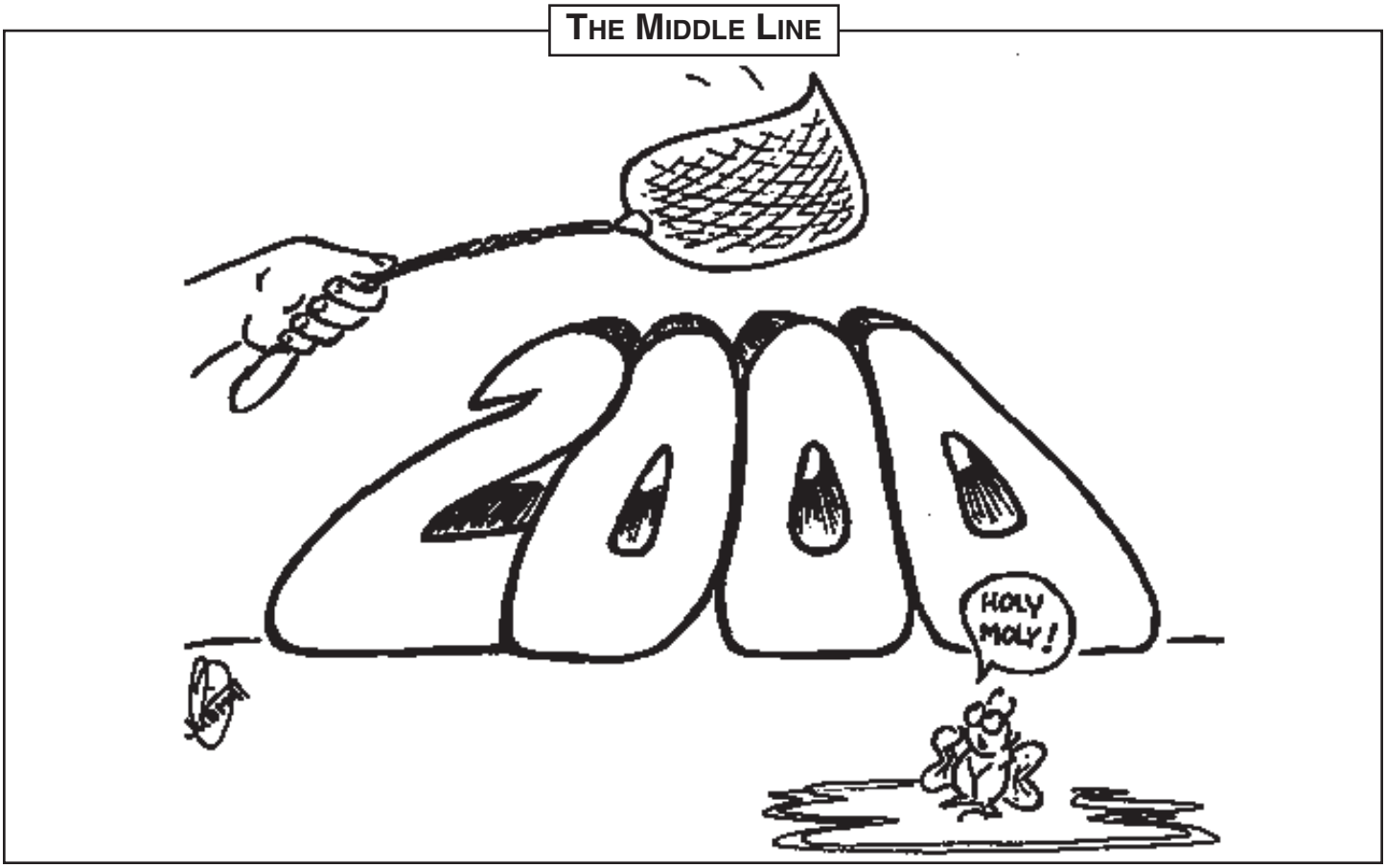
Although I have worked on the *Newsletter* for many years, this issue signals my first time as editor. Like any change this presents both challenges and opportunities for change. Judith La Manna has been the editor for many years and has given the *Newsletter* new life while putting her own imprimatur on it. For this, we can all be grateful. Please join me in thanking Judith for her long service in helping the Section have a strong voice. Fortunately for me she has agreed to continue as my behind-the-scenes mentor and will officially become the guru of "permanent publications" to assist the Section in developing its directory, books and, the most recent effort, a *New York State Bar Journal* devoted to Labor and Employment issues.

If you have comments about the *Newsletter*, any ideas for change or proposed articles, write or e-mail me with your suggestions and your proposals for articles at ngm@woh.com—it is the fastest way to communicate and to get a response. It also ensures that we aren't duplicating efforts.

As editor I have the privilege of reflecting on our Section and its strengths. Prime among those is that we are one of the fastest growing sections in the NYSBA. We need new members that the Section has not reached and particularly strive to reach attorneys more recently admitted. Ask a friend or colleague or law school classmate to join you at the next program or meeting or to join to keep current on issues in the field.

Norma Meacham

THE MIDDLE LINE



The Eleventh Amendment of the Constitution and its Effect on Employment Law

By Philip L. Maier

Introduction

In a series of closely and bitterly decided cases, the Supreme Court has elevated the rights of the States to be free from private suit without their consent over Congress' power subjecting them to such suit. In doing so, the Court has ruled in this regard that Congress does not have the power under Article 1[1] of the Constitution to abrogate a State's sovereign immunity. According to the Court, its only power to do so stems from § 5 of the Fourteenth Amendment, and this authority is properly exercised only under limited circumstances. This development is especially significant to public sector employment law in light of the extent of congressional legislation affecting employee rights and the role of States and their subdivisions as public employers. As a result, many of the cases in this area have arisen, and continue to arise, in the context of the various employment statutes Congress made applicable to the States.

The Supreme Court based its decisions upon sources such as the Eleventh Amendment,[2] concepts of sovereign immunity the Court finds inherent in the federal system government, the history surrounding the adoption of the Constitution, the debates of the founding fathers, and its precedent. The dissent has relied upon the same sources in arriving at its competing conclusions concerning its view of federalism. The major philosophical difference dividing the court is the extent to which the States have retained sovereign power within the newly formed federal system of government, and concomitantly, the power which was ceded to the federal government.

This article reviews recent Supreme Court decisions and sets forth significant cases in the employment field in which the Eleventh Amendment and sovereign immunity concepts were held to have affected the applicability of Congressional action to the States. Cases pending before the Supreme Court addressing this issue under the False Claims Act (FCA),[3] and the Equal Pay Act,[4] as well as developments under the Americans with Disabilities Act (ADA)[5] in this circuit will be presented.

Recent Decisions

In *Alden et. al. v. Maine*,[6] the Supreme Court addressed an issue of first impression: whether Congress had authority under Article I of the U.S. Constitution to abrogate a State's immunity from suit in its own courts. In that case, probation officers employed by the State of Maine filed suit alleging a violation of the overtime standards of the Fair Labor Standards Act of 1938,[7] seeking compensatory and liquidated damages. Their original suit brought in federal court was dismissed on the basis of *Seminole Tribe of Florida v. Florida*,[8] discussed below. Thereafter, a suit on the same grounds was brought in state court, the dismissal of which was affirmed by the Maine Supreme Judicial Court on the basis of sovereign immunity.

The Supreme Court, in a 5 to 4 decision, held that the powers delegated to Congress under Article 1 do not include the power to subject nonconsenting States to private suits for damages in state court, and that Maine had not consented to such suits. Since Maine has not consented to being subject to suit for overtime pay and liquidated damages under the FLSA, the Court affirmed the judgment dismissing the suit.

The Court based its decision on its interpretation of the concept of sovereign immunity as enshrined in the nature of this country's federalist system. Sources such as the ratification debates in various state conventions concerning the adoption of the constitution, Federalist Paper 81, authored by Alexander Hamilton, comments made by James Madison and John Marshall taken to reflect the understanding of the constitutional structure of government, practice, and precedent in support of its position, were cited in support of the premise that the states possess a degree of sovereignty within the federal structure of government. Reflective of this Court's view of the States' role in the federal system is the following passage, at 2246-47:

> The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amdt. 11. We have, as a result sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this

> Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the State enjoyed before ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

In the Court's view, the structure and history of the constitution make it clear that sovereign immunity exists today by constitutional design, and that the logic which precludes a suit against a State in federal court also extends to suits against a State in State court. Finding that subjecting a State to private suit in its own courts for violation of a federal statute is beyond the reach of Congress' Article I powers, and that Maine has not consented to suit, the Supreme Court affirmed dismissal of the suit.[9]

In *Seminole Tribe of Florida v. Florida*,[10] the Supreme Court, held, in a 5 to 4 decision, that despite Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and the Act cannot grant federal court jurisdiction over a State that does not consent to be sued. The Court further held that the doctrine of *Ex parte Young*,[11] may not be used to enforce 2710(d)(3) against a state official.

Congress, acting pursuant to its authority to regulate commerce with the Indian tribes under Article 1 Section 8 if the United States Constitution, passed the Indian Gaming Regulatory Act.[12] The Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. A duty is imposed on upon the states to bargain in good faith with the tribe towards the formation of that compact, and a tribe is authorized to bring suit in federal court to compel performance of that duty. The Seminole Tribe of Florida commenced suit against the State of Florida and its Governor in federal district court, alleging that the respondents had not negotiated in good faith under the Act. The suit was dismissed by the Court of Appeals on the ground that the Eleventh Amendment barred the suit against respondents.

In affirming the decision below, the Court premised its rationale on its understanding that

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Id.*, at 13 (emphasis deleted), quoting Federalist No. 81. . . . "For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.' *Hans*, *supra*, at 15." "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). 116 S. Ct. 1122.

In analyzing whether the Act abrogated the States' immunity form suit, the Court addressed whether Congress had unequivocally expressed its intent to abrogate the immunity and whether it acted pursuant to a valid exercise of power. Having found the requisite specificity to conclude that Congress intended to abrogate the States' immunity,[13] the Court addressed the second prong of the test and concluded that Congress' power under Article 1 of the Constitution does not constitute a valid basis to assert federal court jurisdiction over a nonconsenting State. The Court stated that:

> [it] reconfirmed that the background principle of state sovereign immunity is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vest in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. *Seminole Tribe of Florida v. Florida, supra*, at 28-29.

In reaching this conclusion, the Court overruled *Pennsylvania v. Union Gas Co.*,[14] a plurality opinion in which the Court held that Congress had the power

under the Interstate Commerce Clause, Art. I, 8, cl. 2 to abrogate state immunity. *Union Gas* was overruled because, according to the Court, it was of questionable precedential value since a majority of the Court disagreed with the rational of the plurality, the case involved constitutional analysis which can be changed only by constitutional amendment or the Court itself, and because it departs from established rationale.

With regard to that aspect of the suit against the Governor, the Court distinguished the case from those in which the Court has found federal jurisdiction over a state official when the relief sought is prospective injunctive relief to "end a continuing violation of federal law."[15] In *Ex parte Young*,[16] the Court had held that an individual, acting as an officer of a state, may be enjoined by a federal court from enforcing unconstitutional acts, notwithstanding the fact that the government is also thereby restrained. The Court, however, held that the narrow exception to the Eleventh Amendment provided by the *Ex parte Young* doctrine is not applicable because Congress enacted a remedial scheme specifically designed for the enforcement of rights under the Indian Gaming Act.

In *College Savings Bank and United States v. Florida Prepaid Postsecondary Education Expense Board*,[17] the Court addressed the issue of whether the Trademark Remedy Clarification Act (TRCA) is effective to permit suits against a State for its alleged misrepresentation of its own product. College Savings Bank argued that Florida Prepaid waived its immunity from Lanham suits by engaging in the interstate marketing and administration of its program after it was clear that such activity would subject Florida to suit. It further argued that there had been an implied or constructive waiver under *Parden v. Terminal R. Co. of Ala. Docks Dep't*,[18] in which the court had held that Alabama had impliedly or constructively waived its immunity from suit.

After observing that *Parden* had been narrowed by subsequent decisions, the Court expressly overruled it, stating that there is no constructive waiver of constitutional rights. In this regard, the Court stated, at 2223, that

> We have long recognized that a State's sovereign immunity is a "personal privilege which it may waive at its pleasure." *Clark v. Barnard*, 108 U.S. at 447. The decision to waive that immunity, however, "is altogether voluntary on the part of the sovereignty." *Beers v. Arkansas*, 20 How. 527, 529 (1858). Accordingly, our "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atasacadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985). Generally, we will find a waiver either if the State voluntarily invokes out jurisdiction, *Gunter v. Atlantic Coat Line R. Co.*, 200 U.S. 273, 284 (19806), or else if the State makes a "clear declaration" that it intends to submit itself to out jurisdiction, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). *See also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (State consent to suit must be "unequivocally expressed"). Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. *Smith v. Reeves*, 178 U.S. 436, 441-445 (1900). Nor does it consent to suit in federal court merely by stating its intention to "sue and be sued," *Florida Dep't Of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 19-150 (1981) (per curiam), or even by authorizing suits against it "'in any court of competent jurisdiction,'" *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-579 (1946). We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit. *Beers v. Arkansas, supra*.

The Court therefore held, in a 5 to 4 decision, that the federal courts have no jurisdiction because Florida did not voluntarily waive its sovereign immunity.[19]

Title VII of the Civil Rights Act of 1964

Fitzpatrick v. Bitzer[20] addressed whether the Eleventh Amendment barred a federal court from awarding money damages to an individual against a state government found to have subjected the person to employment discrimination on the basis of "race, color, religion, sex, or national origin" under the 1972 amendments to Title VII of the Civil Rights Act of 1964.[21]

The Court held that the legislation was passed pursuant to Congress's authority under § 5 of the Fourteenth Amendment.[22] Since Congress is expressly granted authority to enforce by appropriate legislation the substantive provisions of the Fourteenth Amendment, the Eleventh Amendment, and the principle of state sovereignty which it embodies, are limited by the enforcement provisions of the Fourteenth Amendment. Thus, money damages as well as attorney's fees, are permissibly awarded under the statute.

Fitzpatrick v. Bitzer[23] was reaffirmed by the Court in *Florida Prepaid Postsecondary Education Expense Board v.*

College Savings Bank and United States.[24] In that case, the Court in a 5 to 4 decision found unconstitutional Congress' amendments to the patent laws in which it explicitly abrogated the States' sovereign immunity from patent infringement claims. Respondent, College Savings Bank, marketed and sold certificates of deposits, which are essentially annuity contracts for financing future college expenses, and obtained a patent for its financing methodology. Petitioner, Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid), administers similar tuition prepayment contracts available to Florida citizens. College Savings Bank brought suit against Florida Prepaid in federal court for patent infringement and the Court of Appeals found that the congressional action was valid.

The Court reiterated that two questions need be asked to determine whether Congress validly abrogated state immunity: namely 1) whether Congress has unequivocally expressed its intent to abrogate the immunity and 2) whether Congress has acted pursuant to a valid exercise of power. Finding a clear intent to abrogate immunity,[25] the court addressed whether the Congressional action was a valid exercise of powers under Article I and § 5 of the Fourteenth Amendment. The Court disposed of the arguments based upon Article I by stating that *Seminole Tribe* made clear that Congress may not abrogate sovereign immunity pursuant to its Article I powers.

Turning its attention to the Fourteenth Amendment argument, the Court stated in *Fitzpatrick*, "we recognized that the Fourteenth Amendment, by expanding federal power at the expense of State autonomy, had fundamentally altered the balance of state and federal power struck by the constitution." The Court further described *Fitzpatrick* as holding that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by the Amendment."

In determining whether the Act passes constitutional muster under the Fourteenth Amendment, the Court applied *City of Boerne v. Flores*,[26] which sets out the general test for determining whether Congress has enacted "appropriate" legislation pursuant to § 5 of the Fourteenth Amendment. In that case the Court stated that:

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. *City of Boerne v. Flores, supra*, at 519-520. 117 S. Ct. 2157.

In order for Congress to invoke its power under § 5 of the Fourteenth Amendment, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[27]

The Court found that since there was little support for Congress' conclusion that the States were depriving patent owners of property rights without due process of law, the Act is so out of proportion that it cannot be considered to be designed to prevent unconstitutional behavior.[28] The legislation in question could therefore not be based upon a valid exercise of power under the Fourteenth Amendment. It noted that while Congress' intent in creating a uniform remedy for patent infringement, and of placing the States on same footing as private parties are proper concerns under Article I, they are beyond its power.

Rehabilitation Act

In *Atascadero State Hospital v Scanlon*,[29] the Court held that the Eleventh Amendment bars suits against States and State agencies in federal court by litigants seeking retroactive relief under § 504 of the Rehabilitation Act of 1973.[30]

As relevant to the discussion herein, the Court said that the States will be deemed to have waived immunity only where expressly stated, or when the overwhelming implication in the text leaves no room for any other reasonable construction. Such a waiver requires an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of states.

The Court rejected the arguments that Eleventh Amendment is not a bar to suit because California had waived immunity by virtue of provisions in its constitution. The Court stated that while a general waiver of sovereign immunity may be sufficient for state court, it is not sufficient to waive the immunity guaranteed by the Eleventh Amendment. The waiver must specifically state the intention to be subject to suit in federal court.

The Court also rejected the argument that Congress abrogated immunity when it enacted the Act. The Court requires that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court and that there be an unmistakably clear language in the statute for a suit to proceed in federal court. Further, in absence of an unequivocal waiver, the Court could not find California

to have waived constitutional sovereign immunity, and that the mere acceptance of funds, California could not be found to have consented to suit in federal.

Age Discrimination in Employment Act

On January 11, 2000, the Supreme Court in *Kimel et al. v. Florida Board of Regents*,[31] held, by a 5-4 vote, that Congress does not have the power under § 5 of the Fourteenth Amendment to make the Age Discrimination in Employment Act (ADEA)[32] applicable to the States. The issue arose as a result of Congress' 1974 amendments to the ADEA in which Congress expanded the scope of the definition of the term employer to include the States.[33]

Kimel was a consolidated appeal in which a divided Court of Appeals of the Eleventh Circuit held that the ADEA does not abrogate the States' Eleventh Amendment immunity. The Supreme Court granted certiorari in order to address a conflict among the Federal Court of Appeals on this issue. The Court concluded, after a review of the legislative scheme, that the language in the ADEA made it "unmistakably clear" that Congress abrogated the States' immunity.[34] Having reached this conclusion, the Court next addressed whether Congress had the authority to pass such legislation. The Court restated that age classification statutes are subject to a rational basis test under equal protection analysis,[35] and that there was a lack of evidence of widespread discriminatory treatment by States on the basis of age. Therefore, applying the test of "congruence and proportionality" in *City of Boerne*,[36] the Court, concluded that the ADEA is not "appropriate legislation" under § 5 of the Fourteenth Amendment. The Court stated that:

> A review of the ADEA's legislative record as a whole, then reveals, that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry (citation omitted), Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.

Finding that the scope of the Act overbroad, and no evidence to support the problem it sought to address, the Court found that the ADEA's attempt to abrogate the States' sovereign immunity to be invalid.

Equal Pay Act

In *State University of New York v. Anderson*,[37] and *Illinois State University*, No. 98-1117, the Supreme Court vacated rulings of the second and seventh courts of appeals, respectively, which had rejected claims that the states were immune from private suit under the Equal Pay Act. In both cases, the courts had concluded that Congress intended to abrogate the States' sovereign immunity and that the legislation was an appropriate exercise of powers under § 5 of the Fourteenth Amendment. The Supreme Court remanded these cases in light of its decision in *Kimel v. Florida Board of Regents*, *supra*.

Americans With Disabilities Act[38]

In *Muller v. Costello*, 187 F.3d. 298 (1999) the Second Circuit Court of Appeals affirmed a district court decision holding that the ADA represented a valid exercise of congressional authority under § 5 of the Fourteenth Amendment and was an abrogation of the Eleventh Amendment. Finding that Congress intended the ADA to be applicable to the States,[39] the Court applied *Seminole* and stated that for Congress to exercise its power in this context under the Fourteenth Amendment, it must identify the conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.

The Court stated that Congress passed the ADA to combat irrational discrimination against persons with disabilities, and that the equal protection clause protects against class or group distinctions based upon invidious discrimination, even if no suspect class or fundamental right is implicated. It therefore held that the ADA is a proportionate and congruent response to the discrimination that Congress sought to prohibit.

False Claims Act

The Supreme Court granted certiorari in *Vermont Agency of Natural Resources v. U.S. Ex Rel Stevens*, as to whether a State is a "person" subject to liability under 31 U.S.C. 3729(a) of the False Claims Act,[40] and whether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting State.[41] In that case, the second circuit Court of Appeals held that a State is a "person" within the meaning if the Act and that the *qui tam* suit brought by Jonathan Stevens on behalf of the United States under the False Claims Act, was not barred by the Eleventh Amendment.

The Agency received federal funding grants under the Clean Water Act and Safe Drinking Act which were used, in part, to pay salary expenses in connection with work performed under the grants. The suit alleged that the agency submitted expenses to the United States

falsely accounting for the federal funds received since the employees did not work the hours which were reported to the government.

With regard to the Eleventh Amendment defense, the Court stated that since the claims are designed to remedy wrongs to the United States of America, and in light of the substantial control that the government is entitled to exercise over such suits, the suit is in essence a suit brought by the United States and is therefore not barred by the Eleventh Amendment. The interests to be vindicated, in combination with government's ability to control the conduct and duration of the *qui tam* suit, persuaded the Court that the Eleventh Amendment does not bar such as suit. The Court reasoned that the government is the real party in interest since it is the injured party which receives most of the money, the suit is initiated in its name, its injury establishes the measure for damages, and the suit does not seek vindication of a private right.[42]

Conclusion

The recent Supreme Court decisions discussed above have changed the landscape of federalism and have adversely effected the rights of public employees to redress discriminatory treatment by the State. Cases pending before the Supreme Court regarding employment statutes portend further developments in this area.

Endnotes

1. As relevant to the discussion herein this Article provides as follows:

   > Article 1, section 8: The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
   >
   > . . . .
   >
   > 2. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

2. U.S. Consti., amend. XI states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."
3. 31 U.S.C. § 3729 *et seq.* (1994).
4. 29 U.S.C. § 206(d).
5. 42 U.S.C. § 12101 *et seq.*, as amended, (1994 ed. and Supp. III).
6. 119 S. Ct. 2240 (1999).
7. 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq.*
8. 517 U.S. 44, (1996).
9. While there has been a difference of opinion as to the scope of the doctrine of sovereign immunity, the Court in *Alden* recognized that the doctrine of sovereign immunity did not preclude the United States from instituting suit against the State of Maine. *See* Justice Brennan's dissent in *Employees v. Missouri Public Health Dep't*, 411 U.S. 279 (1973).
10. 116 S. Ct. 1114 (1996).
11. 209 U.S. 123 (1908).
12. 25 U.S.C. 2702 *et seq.* (1988).
13. A party must show an unmistakably clear intent on the part of Congress to abrogate state immunity. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Quern v. Jordan*, 440 U.S. 332 (1979); *Dellmuth v. Muth*, 491 U.S. 223 (1989).
14. 491 U.S. 1 (1989).
15. *Seminole Tribe of Florida v. Florida, supra*, at 28, quoting *Green v. Mansour*, 474 U.S. 64 (1985). In *Edelman v. Jordan*, 415 US 651 (1974), the court held a suit by private parties seeking to impose liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.
16. 209 U.S. 123 (1908).
17. 119 S. Ct. 2219 (1999).
18. 377 U.S. 184 (1964).
19. The Court also held that the legislation was not validly enacted by Congress under § 5 of the Fourteenth Amendment.
20. *Fitzpatrick v. Bitzer*, 427 US 445 (1976).
21. 42 U.S.C. § 2000e-2000e-17.
22. Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

    Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
23. *Supra*, note 20.
24. 119 S. Ct. 2199 (1999).
25. The Court stated that Congress in response to its decisions amended the statute to specifically insure that the States, their instrumentalities and officers are subject to suit in federal court for patent infringement. The statute specifically provides that the Eleventh Amendment does not provide immunity from suit in federal court.
26. *City of Boerne v. Flores*, 521 U.S. 507 (1997).
27. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank and United States, supra*, at 2207.
28. The Court reached this conclusion because there was no pattern of patent infringement, Congress did not consider the availability of state remedies or whether states conduct may amount to constitutional violation under 14th amendment , and that there was no evidence of widespread and persistent deprivation of constitutional rights needed to enact proper § 5 legislation.
29. 473 U.S. 234 (1985).
30. 29 U.S.C. § 79.
31. S. Ct. (2000).
32. 29 U.S.C. §§ 621-634 (1967).
33. The amendment contained in 29 U.S.C. § 630(b) states: "The term [employer] also means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State. . . ."
34. *Citing Dellmuth v. Muth, supra; Atascadero State Hospital v. Scanlon, supra*.
35. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). *See also* Elkan Abramovitz, *Qui Tam in the Supreme Court*, N.Y.L.J., January 4, 2000.

36. *Supra*, note 26.

37. No. 98-1845.

38. The Supreme Court has granted certiorari in *Florida Department of Corrections v. Dickson*, 98-829, to review whether the States are subject to the requirements of the ADA. Oral argument is scheduled for April, 2000.

39. 42 U.S.C. 12202 of the ADA provides that "a State shall not be immune under the Eleventh amendment to the constitution of the United States from an action in a federal or state court of competent jurisdiction."

40. 31 U.S.C. § 3729 *et seq.* (1994).

41. On November 19, 1999, the Court directed the parties to file supplemental briefs on the issue of whether a private person has standing under Article III to litigate claims of fraud against the government. Oral argument was scheduled for November 29, 1999.

42. For a more extensive discussion concerning *qui tam* suits and the Eleventh Amendment see, Stanley A. Twardy Jr. and Paulette Wunsch, *Will the U.S. Supreme Court Limit Qui Tam Suits Against States?* N.Y.L.J. October 5, 1999. *See also*, Elkan Abramovitz, *Qui Tam in the Supreme Court*, N.Y.L.J., January 4, 2000.

Philip Maier is the Regional Director of the New York State Public Employment Relation's Board's New York City office. In that role he serves as an administrative law judge, mediator and supervisor for cases in New York City, Nassau and Suffolk Counties.

The views expressed in this article are the author's and do not necessarily reflect those of any other employee, member or official of the Public Employment Relations Board.

CHANGES IN BRIEF

Norris H. Case has become associated with Morgan Lewis Bockius, LLP in New York City.

John M. Crotty, former Deputy Chairman and Counsel to PERB, has become Counsel to the New York State Union of Police Associations, Inc. He also continues to serve as a hearing officer and arbitrator from his office in Delmar.

Robert A. DePaula was appointed as Deputy Chairman and Counsel to PERB. Mr. DePaula previously served as the Deputy County Attorney for the City of Schenectady specializing in all aspects of the County's labor relations representation.

Charles Pergue has become a member of Vladeck, Waldman, Elias & Engelhard, P.C. in New York City.

Mark R. Reiss has become a principal in Lawlor, Buchalter & Abbott, Inc., Labor Relations Consultants in Long Beach.

In Print/In Sound

Because of the vast contributions of our members to publications and clarifications to the media, this special "sub-section" of Changes in Brief has been established. All section members are invited to contribute information about their publications or comments quoted by the press/or media which have occurred within the 6 months before any L&E newsletter deadline (see back cover for dates).

Laura H. Harshbarger, an attorney at Bond Schoeneck & King, LLP, recently published an article, "Employer Liability for Supervisor Harassment after *Ellereth* and *Faragher*" in the Spring 1999 volume of the *Duke Journal of General Law and Policy*.

Update on the Mentoring Program for Arbitrators

By Arthur Riegel

The Arbitrator Mentorship Program is alive and well. Currently there are several mentees going through the program. The Labor Arbitration and Collective Bargaining Committee is pleased to announce that two more mentees, Elizabeth Gill and Elizabeth Lubetkin, have successfully completed the program.

Elizabeth Gill, currently a partner in the firm of Timothy & Gill, LLP, which is located in Valley Stream, NY, is an alumna of Brooklyn College and St. John's School of Law. In addition to her legal training, Ms. Gill was also awarded an MSW degree by the New York University School of Social Work.

Upon graduation from law school in 1985, Ms. Gill joined the New York City Board of Education Office of Labor Relations and Collective Bargaining. Her duties there included serving as the Chancellor's Representative at third level grievance conferences, representing the Board of Education in a variety of forums, including PERB, and participating in the negotiations and drafting of collective bargaining agreements.

Ms. Gill's long-term goal was to become an arbitrator. In an effort to prepare herself to become an arbitrator, she served as a *pro bono* arbitrator for the Better Business Bureau, the New York City Civil Court, and the New York State Employment Relations Board.

She has also participated in a training program for new arbitrators sponsored by the New York State Relations Board, under the direction of Hezekiah Brown, the then chairman of the Board. In addition to her participation in our mentorship program, Ms. Gill has participated in training programs offered by EEOC and the Cornell School of Labor Relations.

Ms. Gill currently serves on the New York City Housing Authority's panel of fact finders and has been appointed to the panel of arbitrators of the New York State Employment Relations Board. Her mentors are: Richard Adelman, Janet Spencer, David Stein, and Rosemary Townley.

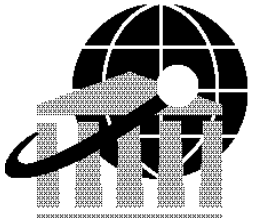
Elizabeth Lubetkin has been a practicing arbitrator and mediator for the past five years, though she has served as a neutral for much of her professional life. She worked as a manager and executive in both the public and private sector for the past 30 years. In her last position before becoming an arbitrator, she worked for the New York State Workers' Compensation Board and, while there, she designed the Alternate Dispute Resolution System for the Uninsured Employers Fund.

In the mid-80s, Ms. Lubetkin was the Assistant Director of Labor Relations for Time, Inc. While in that position, she dealt with all grievances and utilized a form of grievance mediation, developed a Dispute Resolution procedure for non-union employees, assisted with contract negotiations, and worked with the legal department on research and strategy for arbitrations.

She brings to her role as arbitrator an in-depth knowledge of the process and an understanding and sensitivity to the people who appear before her. Ms. Lubetkin has heard a variety of cases including discharge, suspension, discipline, out of title work, contract jurisdiction, and interest arbitration. She finds the arbitration process rewarding and recognizes that the hearing is the last opportunity for the parties to present their positions and to seek a resolution to their problem. She stresses the importance of the written decision to be one which demonstrates that the parties' arguments have been considered and one which contains an understandable rationale for the award.

Ms. Lubetkin's mentors are: Richard Adelman, Daniel Collins, Randall Kelly and Martin Scheinman.

The Labor Arbitration and Collective Bargaining Committee wishes Elizabeth Gill and Elizabeth Lubetkin well in all their future endeavors.



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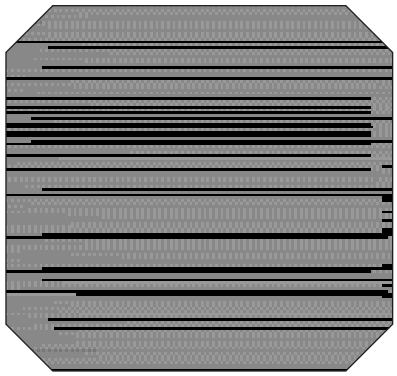

Dave Pellow presenting the
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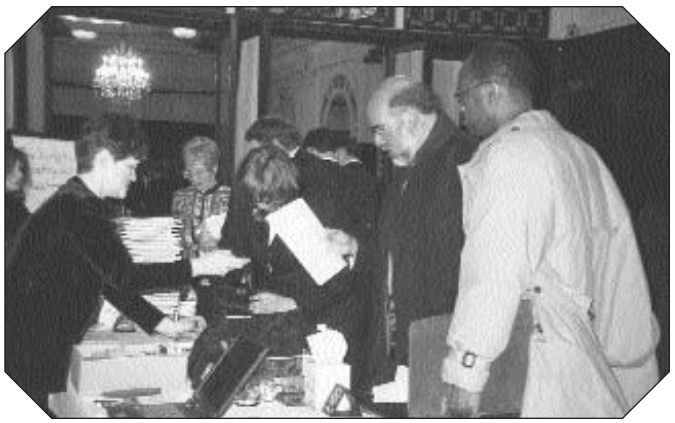
immediate past Chair
James Sandner



Rank and File and the Ivory Tower: The Emergence of Graduate Student Labor at American Universities

By Patrick McMurray

Introduction

Graduate student teaching fellows at American universities have arrived at a crossroads at the end of the twentieth century, occupying a peculiar niche in the business of higher education. Graduate fellows are regarded as being "betwixt and between"—they are something more than mere students, but they are also something less than full professors. As these graduate students pursue their Ph.D.s, they are responsible not only for their own independent research and coursework, but also for a significant share of the undergraduate teaching duties. Graduate students in Ph.D. programs almost universally pay no tuition, and they earn a modest living stipend by working as sort of "professors-in-training." The graduate students do most of the direct teaching of undergraduates, and they are responsible for grading papers, leading discussion sections, and holding regular office hours to answer questions from students. Meanwhile, tenured professors at most major universities have very limited interaction with undergraduates, and their teaching responsibilities are typically restricted to lectures.

Traditionally, the lean years of graduate school have been regarded as a harmless rite of passage for graduate students. After a few years of living in basement apartments and subsisting on TV dinners, graduate students could count on receiving their Ph.D.s and segueing into the relative comfort of tenured professorships. However, over the course of the past few decades, graduate students have grown increasingly discontent. Teaching responsibilities have become more unmanageable while living stipends have remained deficient. At the same time, the job market for tenured faculty positions has tightened significantly, so maligned Ph.D. candidates can no longer console themselves with the promise of guaranteed employment upon graduation.

In response to their discouraging predicament, graduate students at some universities have joined together to form labor unions. With names like the Graduate Employee Organization (GEO, at University of Massachusetts) and the Association of Graduate Student Employees (AGSE, at University of California at Berkeley), these burgeoning organizations have adopted the revolutionary rhetoric of the AFL-CIO and the UAW in an effort to improve their teaching and working conditions. Union organizers have come upon stiff opposition from university administrations. The administrators contend that graduate students are primarily "students" and that they should not be entitled to form unions because they are not truly "workers." This essay will explore some of the historical conditions which led to this graduate student uprising, and it will endeavor to elucidate whether a labor union mentality is appropriate in an intellectual environment.

Historical Background

Since the end of World War II, the conditions for graduate students pursuing advanced degrees at American universities have changed dramatically. As the Cold War with the Soviet Union intensified through the 1950s and 1960s, the American government poured unprecedented sums of money into its universities in an ambitious effort to fund research and development projects to compete culturally and scientifically with the Soviet bloc.[1] The result has been a prodigious increase in the number of Ph.D. degrees awarded to students each year. In 1958, as Cold War hysteria was approaching its peak, American universities awarded 8,773 Ph.D. degrees. By 1994, at the end of the Cold War, American universities were awarding more than 40,000 Ph.D. degrees each year. During that same epoch, the availability of tenured teaching positions at American universities remained stagnant, with an increase of only about 1,000 new tenured positions each year. This disparity between Ph.D. production and tenure availability was a result of the fact that most government money was allocated to fund long-term research projects in graduate programs, and not teaching positions.[2] Essentially, this transformation in the academy has effected a disproportionate detriment upon Ph.D. candidates in liberal arts and social science disciplines. Government funding for university research in technology and the physical sciences has not waned significantly in the post-WWII era, but funding for Humanities fellowships and teaching positions has been anemic for the past thirty years or so.

A stagnant market for tenured teaching positions, coupled with an overabundance of graduate student labor, caused universities to become increasingly reliant upon graduate teaching assistants and part-time faculty for much of the post-WWII era. The result was that graduate students and adjunct faculty were doing more and more teaching while their yearly stipends did not increase. The dearth of funding allocated to Humanities graduate teaching fellowships caused widespread disaffection among graduate students at universities across

the country. In response to this dissatisfaction, graduate students and part-time members of faculty at the University of Wisconsin-Madison amalgamated to form the first graduate student labor union in 1969: The Teaching Assistants' Association (TAA). The University of Wisconsin TAA was formed to give graduate students and part-time faculty collective bargaining power to negotiate with University administrators for more lucrative stipends and improved resources for teaching and research.[3]

Since those heady days of 1969, graduate students at universities across the nation have persistently attempted to replicate the successes of the Wisconsin unionization effort. Graduate students at all American universities have historically faced a common set of difficulties: demanding coursework, onerous teaching schedules, limited health-care benefits, meager annual stipends, and scant representation in the administration. The material sacrifices of graduate school always seemed reasonable, however, since graduate students could traditionally count on suffering for only a few years before graduating into the relative comfort of a tenured professor position. Plus, tuition was free, so graduate students only had to contend with modest living expenses. However, as the job market for tenured positions has become tighter and the number of disenfranchised Ph.D.s has grown, graduate student frustration has crystallized into a *bona fide* student insurgency. Today, there are graduate student unions at 23 American universities, compared with only 12 unions just three years ago.[4]

The statistics put forward by the graduate student unions are thought provoking. The unions claim to have approval of two-thirds of the 100,000 graduate students in universities nationwide, so the sheer numbers are significant. The unions also claim that part-time faculty and graduate students are responsible for more than half of the teaching hours at American universities each year.[5] The proportion of part-time faculty at American universities has skyrocketed from 22% in 1975 to 47% in 1995, according to the U.S. Department of Education.[6] Anemic annual stipends keep the majority of American graduate students around the poverty line. Disgruntled graduate students see unionization as a possible remedy to these calamities.

The 23 graduate student union locals which have been successfully organized so far hang together in a loose confederation called the Coalition of Graduate Employee Unions (CGEU), which was formed in 1992 to bring national cohesion to the piecemeal graduate student unionization effort.[7] The new graduate student unions typically receive guidance and administrative assistance during their formative years from established industrial unions, such as the United Auto Workers (UAW), which has organized student labor at the University of California-Berkeley, University of Massachusetts, and New York University; and the Hotel Employees and Restaurant Employees International Union (HERE), which represents student labor at Yale University. The established unions galvanize the new graduate student unions by giving them assistance with membership drives, resistance techniques, protest strategies, and educational efforts.[8] Graduate students at organized universities have demonstrated their commitment to improving graduate conditions with a series of demonstrations, such as teach-ins, grades strikes, and traditional picket lines, that have attracted a good deal of national media attention and occasional public criticism.

As of October 1999, only graduate students at state universities have been legally permitted to form labor unions. This is because certain state legislatures have recognized graduate students and part-time faculty members as state employees, giving them the right to form labor unions. For example, the California Public Employment Relations Board recognized graduate students in the University of California (UC) system as state employees in December 1998. Graduate students voted to unionize at UC-Berkeley, UC-Los Angeles, and UC-San Diego shortly thereafter.[9] Similarly, the graduate students at the University of Kansas-Lawrence were recently given state employee status under the Kansas Public Relations Act, and they quickly voted to unionize as well.[10]

The situation at private universities is more difficult, however. Private universities have persistently categorized graduate assistants as students, and not as *bona fide* university employees. This has been problematic, since a labor union cannot be legally recognized if its membership does not consist of actual workers. Graduate students at private universities cannot be given state employee status by a state statute or board—they must be given employee status by the Federal government, under the auspices of the National Labor Relations Board (NLRB). As of October 1999, the NLRB has yet to offer a definitive ruling on the status of graduate students at private universities. The NLRB hearings are ongoing, and graduate students will not be legally authorized to move forward with unionization efforts until the full NLRB board makes its final ruling.[11]

Almost without exception, unionization efforts among graduate students at private universities have faced persistent resistance from university administrators. At the heart of the debate is a fundamental question: Are graduate students primarily *students* or are they *workers*? University administrators have adhered to the traditional conception of the role of graduate assistants, which suggests that their interest in teaching is primarily academic, not economic: "(Graduate) students are regarded as apprentices, both scholars and educators in the making, with tenured faculty wielding considerable power over their futures. Teaching is seen as part of

the training for a life in the academy. The modest wages are almost a bonus."[12]

The converse of the administrations' conservative stance is articulated cogently by Dan Bender, an organizer of the Graduate Student Organization Committee (GSOC) at New York University: "In this (NLRB) hearing, NYU is trying to blur the lines between what we do in order to get our stipends and what we do in pursuit of our degrees."[13]

The following pages will attempt to address some of the issues surrounding graduate student labor organization. The debate is governed by questions of class, race, gender, and common sense: Does the labor/management analogy hold up in the Academy? Is the rigidity of a union shop anathema to the diversity and openness of a university? Is zero-sum collective bargaining too adversarial for the ivory tower? Will economic antagonisms destroy the professor/apprentice, student/teacher synergy? Should graduate students depend upon the good will of university administrations to achieve a living wage? Are graduate students really *workers* in the rank-and-file sense of the word?

Arguments in Favor of Graduate Student Unionization

The two-thirds majority that has voted in favor of graduate student unionization suggests that most graduate fellows are profoundly dissatisfied with the *status quo* at American universities. Overwhelming workloads, low pay, and instability have conspired to bring graduate students and their universities into direct conflict over the propriety of organized student labor. The most persistent criticism of the student labor movement has been the skeptical claim that graduate student work is not truly work. Proponents of student labor have countered this criticism with several persuasive arguments. According to Elizabeth Bunn, a vice president of the United Auto Workers, university administrators have intentionally blurred the distinctions between graduate *work* and graduate *study* to make *all* graduate student endeavors look like study:

> We have never accepted the argument that there is a difference between the universities and other kinds of workplaces when the issue is work. The workers are not asking to be paid for their work as students. They are asking to be paid fairly when they work as employees of the universities.[14]

Essentially, graduate students contend that they have a sort of dual status; they are students as well as workers. The union argument is that graduate students go to class and conduct research in pursuit of their Ph.D. degrees, and they teach undergraduates in pursuit of their annual stipends. As graduate student union members see it, the substantive teaching work they perform for the universities cannot be denied. To the graduate sensibility, their work is substantial and their compensation should be substantial as well.

The graduate student unions also point out that many state legislatures have already legally recognized graduate students as official state employees. The duties performed by graduate students at state universities are nearly identical to the duties performed by their counterparts at private universities, and so it seems unfair that only private school graduate students should be denied the right to form unions.

University administrators have relied heavily upon intellectual traditions to justify their persistent reluctance to acquiesce to student unionization efforts. As the standard argument goes: Graduate students didn't require union representation a generation ago, so why should graduate students require a union today? Graduate students contend that conditions at graduate schools have changed radically over the course of the past generation, and so university administrations should respond to those transformations. A generation ago, graduate students point out, graduate and undergraduate enrollment was significantly lower, so the Academy could accommodate virtually any Ph.D. who was willing to continue working as a teacher. During the past few decades, however, the focus of university life has shifted to research and scholarly work. Today, universities are primarily interested in retaining tenured faculty for their research and writing skills in order to galvanize the university's prestige. The daily grind of teaching has generally been relegated to graduate fellows and part-time faculty. Dr. Tay Chronister, a professor of Education at the University of Virginia has said, "We assess the quality of a faculty member, correctly or incorrectly, through the quality of publications and grants they can bring in. We don't build our national reputation on teaching."[15]

Conchas Gilberto, a member of the Graduate Employee Organization at University of Michigan-Ann Arbor, concurs: "This is a research institution where very little is placed on teaching but more on research and publishing. Undergraduates understand that we do most of the teaching."[16]

Teaching has become a secondary priority on the agenda of tenured faculty for the past few decades, while undergraduate enrollment has continued to boom. The result has been that the entire enterprise of college teaching has been relegated to part-time employees. Graduate student unions argue that the Teaching Assistants of a generation ago were truly "assistants"—their work supplemented the professors' teaching. Today, while tenured professors are absorbed with research projects that keep them out of the classroom,

graduate teaching fellows take on a much larger educational responsibility than they did a generation ago. As graduate responsibilities have expanded, however, their compensation has continued to hover just above the poverty line. Graduate student unionization efforts aspire to eradicate that disparity.

At the end of the day, the most persuasive argument in favor of graduate student unionization is the low pay. There is anecdotal evidence of graduate teaching assistants at the University of Nebraska-Kearney being paid $1,125/semester for a class that meets three times each week. That works out to about $3.75/hour, a rate far below minimum-wage standards.[17] While this is an extreme example, conditions at most graduate programs are not much better. Teaching Assistant contracts, particularly at non-unionized universities, typically do not include a yearly increase for the rising cost of living. Graduate students are often compelled to obtain their own health care insurance, and family members are almost never covered by the few health plans offered to graduate teaching fellows.[18] At Yale University, Teaching Assistants in 1995 earned an annual stipend of $9,380, which is about $2,000 below the annual cost of living in New Haven.[19]

Arguments Against Graduate Student Unionization

As passionate as graduate teaching fellows have been in their crusade for unionization, university administrators have been just as ardent in their opposition to the union movement. From an administrator's perspective, there are manifold reasons to resist student unionization. First, increasing graduate student stipends and benefits would create a significant economic burden for universities. The typical Ph.D. candidate at an American university pays no tuition, and most administrators view the graduate student stipend not as compensation for teaching but as a grant which allows students to pursue their studies without an outside job. There is even a vocal minority of graduate students that shares the administrative view. David Legg, a Ph.D. candidate in Sociology at Yale University and co-founder of Graduates Against Unionization (GAU), has said, "Being a TA (Teaching Assistant) is a part-time apprenticeship that happens to offer money."[20] University administrators posit that because the graduate fellows' interest in teaching is primarily academic, and not economic, to recognize a graduate labor union would be nonsensical.

Union opponents also fear that a graduate student labor union would undermine the synergetic fellowship that has traditionally existed between graduate fellows and tenured professors. Much of the graduate union rhetoric places Teaching Assistants in direct competition with the professors who should be their mentors and collaborators. In March 1999, Yale's Graduate Employee Student Organization (GESO) released a media statement which declared that graduate fellows teach 70% of undergraduate classes.[21] Graduate students have also paraded signs bearing such slogans as "Our Work Makes Yale Work" during pro-union demonstrations. Such bold public assertions have drawn criticism and skepticism from administrators and professors. A particularly fervent rebuke was printed as a *Yale Daily News* editorial at the height of Yale's graduate unionization drive: "Academic contributions can not be measured on a stopwatch … That a few dozen graduate students 'Make The University Work' is about the most foolish and egotistical claim that could be made at Yale, home to some of the world's most esteemed scholars."[22]

University administrators have also expressed doubt that graduate unionization would be a good thing for all graduate students. A university is a diverse place by definition, so it seems unlikely that a single organization could effectively represent the concerns and priorities of such a heterogeneous group as graduate students. The proliferation of anti-union organizations at some universities (such as the Graduates Against Unionization group at Yale) suggests that the rigid structure of an intellectual "union shop" does not appeal to all graduate students.

At the heart of the administrations' anti-union stance is a singular idea: A university is nothing like a factory. Opponents of graduate unionization postulate that the graduate students who are attempting to forge labor unions are nothing like the rank-and-file laborers that have traditionally filled union halls. Ph.D. candidates at American universities are an elite group, so it seems unreasonable to compare their petty grievances to the historical struggles of America's industrial laborers. For example, the recent collaboration between the UAW and graduate student unions seems to many administrators to be an uneasy alliance of rank-and-file and *bourgeoisie*. A brief history of the United Auto Workers, entitled "A New Movement Is Born: Courage in Hard Times" reveals a significant incongruity:

> Treated Like Dirt: [When the UAW was founded, in 1936] Auto work was rough and unstable. You worked from January to September or October, and then, when the companies spent months retooling for the next year's models, you were on the street—with no unemployment pay, no way of knowing if you'd be called back in January.[23]

Opponents of graduate unions wonder: What does the roughness and instability of auto work have to do with graduate students? Skeptics speculate that the UAW recognizes its waning power in post-industrial America, and that the union is only interested in gradu-

ate labor as warm bodies to increase the UAW membership rolls. Administrators are loath to acknowledge that graduate students are actually workers, but even if they *are*, their compensation is more than adequate. Graduate students only teach eight or nine months out of the year, and their annual stipends are enough to pay for rent and food. After all, even if the annual stipends seem a little paltry, graduate students are still getting a free education, which is worth at least $20,000/year.[24]

The labor/management analogy as it exists in union shops also does not appear to apply to the university. Labor unions have historically been formed in response to existing antagonisms between wealthy management and disadvantaged labor. Just as the UAW was organized because auto workers were "Treated Like Dirt," the AFL-CIO represents similar concerns: "On the job and in policy debates, we are committed to seeing that working families, not just rich CEOs, benefit from our labor."[25]

Union opponents assert that this is where the labor/student analogy breaks down. Labor unions in most wage sectors have a clear reason for being—laborers are trying to earn as much as they can while employers are trying to pay them as little as possible. Workers in those situations clearly require collective bargaining power to ensure that they are not abused by management and "rich CEOs". Universities, however, are nonprofit organizations without a wealthy management class. The median annual salary for a university professor (the academic equivalent of industrial management) in the state of New York was $49,500 in 1997, a far cry from any "rich CEO" category.[26]

University administrators are not the only observers with reservations about the legitimacy of the student unionization movement. The rank-and-file members of some sponsor unions (such as HERE and UAW) also oppose student unionization. For example, the Hotel Employees and Restaurant Employees (HERE) International Union currently operates two union locals at Yale University. HERE Locals 34 and 35 represent Yale's maintenance workers and clerical workers, respectively. Locals 34 and 35 have had an extremely adversarial relationship with the University administration over the course of the past several decades, and they have gone on strike repeatedly (in 1941, 1953, 1968, 1971, 1974, 1977, 1984, and 1996).[27] HERE has helped Locals 34 and 35 gain significant improvements through its strength and resistance, and the Yale maintenance and clerical unions are recognized as two of the strongest union locals in Connecticut.

HERE is currently subsidizing the Yale graduate students (GESO) in their crusade for union recognition, and many members of Locals 34 and 35 are not happy about it. Many of the HERE rank-and-file view Yale graduate students as privileged transients, and they are unwilling to compromise their priorities for a graduate student union: "These workers argue the TA's are a transient work force headed for the comforts of tenure and have much less to lose from a painful strike. Most of all, they fear the Yale administration will refuse to recognize GESO, forcing the unions into an ugly, drawn-out strike."[28]

These sentiments are echoed by three members of Local 34 who wish to remain anonymous:

> "We're worried about our pensions and salaries, and all we hear about is GESO."
>
> "I never thought I would cross a picket line, but if the strike issue is GESO, I will."
>
> "[Local 34 members] don't feel comfortable putting their job security and health care on the line for a bunch of students."[29]

Conclusion

Clearly, there needs to be a transformation in the quality of graduate student life in the near future. Based upon the two-thirds proportion of graduate students that have cast votes in favor of unionization, it is clear that the American graduate population is generally dissatisfied with the *status quo*. It is clear that graduate fellows are more than mere students, and it is reasonable to suggest that the teaching duties they perform constitute *bona fide* "work." They may not work on assembly lines or on the backs of garbage trucks, but graduate students do perform a valuable service to their employers. Universities glean an obvious benefit from putting graduate fellows in the classroom. Administrators can justifiably pay a TA less than a full professor, and the tenured faculty is free to concentrate on the scholarly work and research that build the university's reputation.

The fact that graduate students are genuine "workers" is not enough to justify the formation of a graduate labor union, however. It seems likely that graduate students at private universities will soon be given the right to form labor unions—the current position of NLRB General Counsel Fred Feinstein, pending a final declaration from the full board, recognizes graduate fellows as university employees and temporarily acknowledges their right to form unions.[30] Hopefully, the pending NLRB decision will serve as a harbinger to university administrators across the nation. Graduate students have clearly expressed their dissatisfaction with the current state of affairs, so it seems unreasonable to contend that the student complaints are not valid. Likewise, administrators have recognized the disastrous effect that a work-for-pay union mentality might have in an academic environment. In order to prevent the culture of antagonism that might accompany student unioniza-

tion, administrators should put an end to their obstinate stance and acknowledge that graduate fellows are truly workers. A measure of compromise might alleviate the tension between students and administrators and preserve the integrity of the Academy.

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Patrick McMurray received the Dr. Emmanual Stein Memorial First Prize of the 1999 student writing competition. He will graduate from St. John's University School of Law in 2002. He is a graduate of Leominster High School (1993) and Yale University (1997).

ETHICS MATTERS:
Ethical Issues in Insurance Defense Work

By John Gaal

If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John Gaal at (315) 422-0121.

Over the past few years we have all experienced the dramatic increase in the role of insurance carriers in employment law litigation. With this trend promising to continue in the future, we must be sensitive to the fact that the involvement of carriers brings with it a number of ethical dilemmas, particularly for defense lawyers.

A threshold issue in insurance defense work necessarily focuses on the identity of the client when a lawyer is appointed by an insurance carrier to defend an insured. Many jurisdictions recognize the creation of a tripartite relationship in these circumstances, in which both the carrier and the insured are the lawyer's clients.[1] Even in those jurisdictions it is generally recognized that the greater ethical duty is owed to the insured. New York appears to be within the minority of jurisdictions which hold that the insured alone is the client.[2] Of course, in either type of jurisdiction, the lawyer is free to create by agreement an alternative attorney-client relationship. In other words, in jurisdictions using the tripartite model as the "default," a lawyer and insurance carrier may nonetheless agree that the lawyer will represent only the insured. Similarly, in New York, the carrier, the insured, and the attorney may agree that the attorney will represent both the carrier and the insured. So long as the "usual" rules for multiple representation are met, joint representation is permitted.[3]

Although multiple representation is permitted, it is probably the unusual situation in which it is wise. By specifically taking on the carrier as a client, in addition to the insured, the lawyer may be creating an unnecessary conflict for himself in other cases. For example, if a lawyer represents Client A and the Carrier in a particular matter, and that lawyer is subsequently approached by Client B to represent it in a coverage dispute it is having with that same Carrier, the lawyer cannot undertake that second representation without the consent of Client A, the Carrier and, of course, Client B. If, on the other hand, the lawyer only represents Client A in the original matter, and does not also represent the Carrier, there is no actual conflict in undertaking to represent Client B in its coverage dispute with that same Carrier, and the consent of the Carrier to the representation is unnecessary.[4] In addition, representing both the insured and the carrier can lead to numerous potential conflicts within the context of that particular representation. For example, if coverage issues arise, or there is disagreement between the insured and the carrier over litigation or settlement strategies, and the lawyer represents both the insured and the carrier, she can find herself in the midst of an untenable conflict, and may well have to withdraw from further representation of both clients.

The identity of the client in insurance cases is also of interest to the plaintiff's bar. Disciplinary Rule 7-104 prohibits a lawyer from communicating "on the subject of the representation with a party the lawyer knows to be represented by a lawyer in the matter," unless the other lawyer has consented (or the communication is otherwise authorized by law). Consequently, whether the plaintiff's attorney may communicate directly with the carrier's claims adjuster in an effort to bypass the insured's defense counsel and settle a case may well depend on who the defense lawyer actually represents.

Even beyond this threshold question, defense attorneys face a second, particularly troubling, ethical dilemma when confronted with a carrier's litigation defense guidelines. It is common for carriers to "impose" on defense counsel detailed guidelines for the handling of a case designed to control costs in the litigation process. These guidelines might include, for example, a requirement that no research above some stated minimum amount (e.g., 3 or 5 hours) be conducted on any issue without advance carrier approval; that the lawyer make use of a carrier's internal research bank whenever possible instead of conducting its own research; that the number or duration of depositions be limited to some predetermined levels; etc. Typically, these guidelines are imposed pursuant to the carrier's right, under its insurance contract with the insured, to control the defense of a matter.

Lawyers often lose sight of the fact that, despite the requirements of the underlying insurance contract, the lawyer has an independent ethical obligation with respect to their representation of a client which must be met in all cases. While New York recognizes that a lawyer and a client may agree to certain restrictions on the scope of the lawyer's representation (and thus, by insurance contract, the carrier can stand in the client's shoes with respect to setting those restrictions), the lawyer has an overriding obligation to provide "competent" representation.[5] Accordingly, a lawyer may not

agree to limit its representation to such a degree that it will impair his or her ability to meet that obligation.[6]

As a result, a defense lawyer faced with insurance litigation guidelines has certain obligations it must meet in order to fulfill its duty to its client, the insured. First, it must independently disclose to and discuss with the insured the requirements of any carrier-imposed litigation guidelines. Relatedly, the lawyer must obtain the client's consent that she abide by those guidelines. Neither the fact that the insurance contract discloses the carrier's "right" to control the defense nor that it provides the insured's "consent" to that arrangement is relevant. The lawyer's duty is independent of that contract and the lawyer may not rely on that pre-existing disclosure as the necessary consent. Naturally, the disclosure to the insured should not only detail the specific nature of the guidelines, but also the potential impact of those guidelines on the representation to be provided, whether the insurance policy actually commits the insured to accept those restrictions, and the implications to the insured of a decision not to consent to the guidelines. (If the lawyer initially undertook the representation of both the insured and the carrier, she likely cannot even have this discussion with the insured because this issue, itself, creates a potential conflict, given the insured's and the carrier's diverse interests in the guidelines.) If the insured fails to provide consent to the guidelines, the lawyer's options are to withdraw from the representation, continue the employment and risk the carrier's nonpayment of legal fees, or petition a court to instruct the carrier to pay reasonable fees despite non-compliance.[7]

The lawyer's obligation to the client does not end with the client's consent. Even with consent, a lawyer cannot agree to limitations on its representation of a client which will impair her ability to provide competent representation.[8] Thus the lawyer must independently review the guidelines and determine whether the restrictions contained therein are such that they prevent her from providing a competent defense. If that is the case, she may not undertake the representation, regardless of the client's desires. Presumably, the lawyer should make this independent analysis before even seeking consent from the client, and if she concludes that competent representation cannot be provided in the face of the carrier's restrictions, consent should never be sought.

Some jurisdictions seem to have taken a very hard line in this area, and have indicated that it would be unethical for a lawyer to undertake representation in a case in which the carrier's guidelines purport to reserve to the carrier the ultimate right to determine the scope of services to be provided by the lawyer.[9] New York seems to be a bit more lenient, suggesting that the issue is not so much what is actually in the guidelines, but rather how the lawyer handles their application in a given situation.[10] Thus it may be permissible to undertake representation despite guidelines which indicate that control rests with the carrier, so long as when specific issues arise the lawyer is in fact guided by her own determination of what is appropriate representation and not the decision actually made by the carrier. Thus, for example, a lawyer may be permitted to represent an insured in a case in which the carrier's guidelines require the attorney to make use of the carrier's legal research bank, so long as the attorney in fact independently reviews the research provided by that bank and, if she determines that it is not adequate for the representation at hand, undertakes on her own the necessary research required to provide competent representation.[11]

Despite this apparent ability in New York to make a determination regarding compliance with carrier guidelines as issues arise, prudence certainly dictates that defense counsel address concerns over defense guidelines with the carrier at the start of the representation, and attempt to negotiate changes to the guidelines as needed. The lawyer also would be well advised (assuming client consent) to explicitly notify the carrier that while she may endeavor to comply with the guidelines, she retains the right to provide competent representation regardless of the limitations of those guidelines. Especially in cases where the lawyer represents only the insured,[12] it might be necessary to remind the carrier that the imposition of guidelines which are so onerous as to interfere with competent representation may constitute a failure on the carrier's part to provide its contractually required defense of the insured.[13]

Insurance defense work is replete with ethical issues. The above reflect just a few of the issues you may have to confront when you undertake an insurance case. Unfortunately, with the growth of employment practices liability insurance, it is an area with which most of us will have to become far more familiar.

Endnotes

1. *See, e.g., State Farm Mutual Automobile Insurance Company v. Federal Insurance Company*, 72 Cal. App. 4th 1422 (1999).
2. *American Employers Ins. Co. v. Globe Aircraft Sp.* 205 Misc. 2d 1066 (Sup. Ct., N.Y. County 1954); NYSBA Opinion 716 (1999); NYSBA Opinion 721 (1999); *see also* Restatement of the Law Governing Lawyers § 215 (Proposed Final Draft No. 2 (1998).
3. Disciplinary Rule 5-105(C) permits multiple representation where a disinterested lawyer would believe that a lawyer could competently represent the interests of both parties, there has been full disclosure of the implications of the joint representation to all of the parties concerned, and all of those parties consent to the representation.
4. To the extent undertaking representation on behalf of Client B adverse to the Carrier could potentially have some adverse impact on the representation of Client A, albeit indirect, there

might be a need to disclose the proposed representation to Client A and obtain its consent.

5. NYSBA Opinion 721. *See also* DR 5-107(B) ("A lawyer shall not permit a person who . . . pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services.").
6. *Id.*
7. NYSBA Opinion 721; *see also Nelson Electrical Contracting Corp. v. Transcontinental Insurance Co.*, 231 A.D.2d 207 (3d Dep't 1997).
8. NYSBA Opinion 721.
9. Rhode Island Opinion 99-18 (lawyer may not ethically agree to guidelines which have the effect of directing and regulating counsel's independent professional judgment); Wisconsin Opinion E-9901 (lawyer cannot accept restrictions or limitations on the defense of claims that are so financially or otherwise burdensome that they would prevent lawyers from satisfying their ethical obligations to their clients); *In re Youngblood*, 895 S.W.2d 322 (Tenn. 1995)("Any policy, arrangement or device which effectively limits, by design or operation, the attorneys professional judgment of behalf of or loyalty to the client is prohibited by the Code").
10. NYSBA 721.
11. Of course, even beyond the lawyer's ethical obligations, she remains liable to a client for malpractice if she fails to provide competent representation, and the insurance company's guidelines are not likely to provide a defense.
12. Again, if the lawyer actually represented both the insured and the carrier, the inherent conflict between their interests in this area would preclude the lawyer from resolving this issue with the insured.
13. *See Dynamic Concepts, Inc. v. Truck Insurance*, 71 Cal. Rptr. 3d 882 (1998); *cf. Nelson Electrical Contracting v. Transcontinental Insur.*

John Gaal is a partner in the firm of Bond, Schoeneck & King, LLP In Syracuse, New York, and is an active Section member.

1999 Student Essay Contest Winners of the Dr. Emmanuel Stein Memorial Award

The Labor and Employment Law Section is proud to announce the winners of the 1999 Dr. Emmanuel Stein Memorial Award Law Student Writing Competition.

First Prize was awarded to **Patrick McMurray**, St. John's Class of 2002 for his article, "Rank and File and the Ivory Tower: The Emergence of Graduate Student Labor at American Universities" which appears in this *Newsletter*. Second Prize was awarded to Brian A. Caufield, Touro Class of 2001, for his article "The Americans with Disabilities Act." Third Prize was awarded to Ms. Robin Audobon, St. John's Class of 2001, for her article, "*Migneault v. Peck*: An Open Door for Plaintiffs Seeking Redress for Age Discrimination Against State Employers in State Court."

Entries are presented anonymously for review. This year's judges were Michael I. Bernstein, Louis Di Lorenzo and Howard Edelman.

Member Directory 2000

The year 2000 edition of the L&E Member Directory will be generated from the previous directory "file" and the information you have provided to the NYSBA. We wish to use your business address and information in that Directory.

You have an option to select a coded designation to represent your area of work. A useful listing appears in the back of the Directory, "sorted" by designation, for making referrals of Section members. You may elect to designate as Agency, Union, Individual, Management or Neutral or you may choose to be without designation.

To assure that your accurate business information appears in the L&E Directory and/or to assure you have a coded designation, please copy the form below, complete it and mail it to:

MIS Department
New York State Bar Association
One Elk Street
Albany, New York 12207

Full member name: _____

If your full name has changed, give former name: _____

Firm name: _____

Firm address: _____

Business address: _____

Business telephone: _____

E-mail address: _____

Designation: Agency, Individual, Management, Union or Neutral

(**Circle one**. If no selection is made, your previously selected designation, if any, will be used or none will be assigned.)

You will not receive a direct mailing seeking this information.

Please respond by June 15, 2000.

Please Mark Your Calendars and Set Aside Friday, May 19, 2000 In Order to Attend

A Labor Law Conference

Jointly Sponsored By Region 3, NLRB/Cornell University/Labor and Employment Law Section of the New York State Bar Association
Hearthstone Manor
Buffalo, New York
8:15 A.M. to 4:00 P.M.

Panel Topics Will Include:

- The Appropriateness of Interim Injunctive Relief under Section 10(j) of the National Labor Relations Act;
- Salting: A bona fide approach to organizing, or a harassment tactic;
- Supervisory issues in the health care industry;
- Alternative methods for resolving disputes, and the duty of fair representation;
- The contingent workforce, joint employer and single employer issues.

Luncheon—Guest Speakers
NLRB—John C. Truesdale
and Member—Peter J. Hurtgen

***Conference attendees will be able to earn CLE credit—More details to follow

Thursday and Friday
May 4th and 5th, 2000

Employment Law Litigation Institute

Sponsored by the Labor and Employment Law Section of the New York State Bar Association and Albany Law School/Union University

Location: Albany Law School

The Labor and Employment Law Litigation Institute will devote its entire 2000 program to Pretrial Litigation skills in an employment discrimination setting. We will cover everything you ever wanted to know about the preparation of both plaintiff and defendant claims in employment cases.

The program will include:

- Overview of State and federal statutes, regulations and case law on sexual harassment, disability, equal pay/Title VII and age discrimination
- Discovery Tactics
- How to prove both economic and compensatory damages
- Ethics
- Summary Judgment
- Settlement/Mediation

FOR ALL PRACTITIONERS

Watch Your Mail for More Information and Registration Materials!

For Your Information

Notice! Prize $ Has Been Doubled!

2000 ACADEMIC WRITING COMPETITION—LAW STUDENTS!

Submissions are being accepted for the 2000 Law Student Academic Writing Competition. Papers of all three prize winners will be distributed at the January 2001 Annual Meeting of the Section. The Section reserves first rights to publish winning articles, in edited format, in the *L & E Newsletter*.

TOPIC and FORMAT: Any current issue involving labor or employment law. There is no page restriction but submissions should be double-spaced and use of an endnote format is appreciated. A copy on 3½" floppy disk, preferably in Microsoft Word or WordPerfect 5.1, should be available if requested.

ELIGIBILITY: All law school students.

PRIZES: The winner of the Dr. Emmanuel Stein Memorial first prize will receive $1,000 and will be invited to the Fall 2001 Section Meeting. Second prize is $600 and third prize is $400.

RESTRICTIONS: Articles must be original from the applicant. They must not be submitted for publication anywhere else or previously published. Only one entry per applicant.

JUDGING: The evaluation standards will be organization, originality, quality of research and clarity of style.

TO ENTER: Send your entry to: Academic Writing Competition, Labor and Employment Law Section, New York State Bar Association, One Elk Street, Albany, NY 12207-1096.

Include a cover letter with your entry stating your name, mailing address and phone number (both school and permanent), Social Security number, name of school with year of graduation, and that the competition restrictions have been met.

DEADLINE: Postmarked no later than November 1, 2000.

Winners will be announced in late 2000.

FUTURE MEETING DATES

2000 Employment Law Litigation Institute
Albany Law School
May 4-5, 2000

CLE Seminar
Employment Law for the Corporate Counselor and the General Practitioner
Spring 2000

2000 Fall Meeting
October 29-November 2
South Seas Plantation
Captiva Island, Florida

2001 Fall Meeting
September 14-16
The Sagamore
Bolton Landing, New York

2002 Fall Meeting
October 3-5
Cornell University
Ithaca, New York

2003 Fall Meeting
September 11-14
Chateau Laurier
Ottawa, Canada

2004 Fall Meeting
September 30-October 3
Otesaga Hotel
Cooperstown, New York

2005 Fall Meeting
October 21-26
Long Boat Key Resort
Florida

Section Committees and Chairs

You are encouraged to participate in the programs and on the Committees of the Section.
Feel free to contact any of the Committee Chairs for additional information.

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Persons interested in writing for the *L&E Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *L&E Newsletter* are appreciated.

Publication Policy: All articles should be submitted to me and must include a cover letter giving permission for publication in the *L&E Newsletter*. We will assume your submission is for the exclusive use of the *L&E Newsletter* unless you advise to the contrary in your letter. Authors will be notified only if articles are rejected. Authors are encouraged to include a brief bio and a head and shoulders black and white photograph with their submission.

For ease of publication, articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect 5.1. Please also submit two hard copies on 8-1/2" x 11" paper, double spaced; maximum length is ten pages and shorter articles are welcomed. For further mechanical requirements you may want to call me.

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