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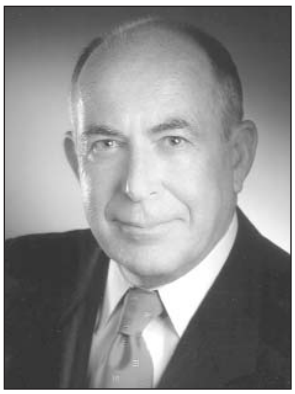
# L&E Newsletter

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

## A Message from the Outgoing Chair



Time seems to elapse faster or slower depending on the level of our interest and enjoyment. As the phrase goes—"time flies when you are having fun." Well, my term as Chair of the Labor and Employment Law Section seems to have roared by. What did we accomplish?

We initiated our Section's Web site and appointed an Executive Committee member (Gary Johnson) to serve as our Web site Coordinator. The Web site will become an increasingly important method of communicating with members and furnishing member services.

We appointed a Co-Chair (William Frumkin) to the Section's Membership and Finance Committee to give special attention to membership services. This will greatly assist Co-Chair Kayo Hull upon whose shoulders had fallen for a number of years the responsibility of all membership and finance activities for the Section.

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## A Message from the Incoming Chair

As I ponder the future of our Section and the honor of becoming its Chair, I am struck by the extraordinary qualities of our group. Labor and employment attorneys maintain practices and work in areas of subspecialization that often are built upon starkly contrasting ideological principles. We are scattered throughout one of the most diverse states in the country. Yet our members, who represent every viewpoint and every corner of the state of New York, form a group that works together, for the greater good of the profession, in harmony, with hearty collegiality, and with mutual respect. It is a privilege to be a part of the rare chemistry that exists within the Labor and Employment Law Section.

Our Chair Emeritus, Frank Nemia, recently reminisced about the challenge the founders faced in achieving recognition as a Section in the mid-1970s. Their efforts were met with resistance because of strong doubts that such a diverse group could form a functional entity. Our founders

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## Inside

**A Message from the Outgoing Chair**
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We have commissioned an online survey of our Section's membership which should be completed by the time you receive this *Newsletter*. The survey should prove to be a valuable instrument for helping to focus our Section's energies in ways most responsive to our members.

We have undertaken to strengthen the Section through the creation of an ad hoc Committee to review the Section's committees. This Committee was formed and began work in April with a mission of examining our committee structure to determine whether we have the committees and the structure necessary to meet the goals of our Section and the NYSBA as outlined in its Strategic Plan, and to determine whether a modified committee format might prove more effective.

We also reorganized the Section's Committee on Continuing Legal Education to provide a representative from each of the substantive standing committees, plus a number of at-large members to increase our efficiency and effectiveness in the planning of CLE programs.

The Section provided a number of outstanding CLE opportunities in the past year. With the CLE Committee under the direction of Rich Zuckerman acting as the engine for generating program content, Section members benefited from notably strong programs at the Fall Meeting held at Cornell University in October and the half-day Annual Meeting in New York City in January. The sessions had record attendance and, based on attendee evaluations, received very high marks for the quality of the subject matter and the presenters. On May 10, the Section once again joined with the New York State School of Industrial and Labor Relations and Region 3 of the National Labor Relations Board in presenting a one-day program in Buffalo, New York. This program featured the NLRB General Counsel as keynote speaker and an impressive list of speakers.

A number of our active committees have provided Committee and Section members with an opportunity to interact with government agency personnel throughout the year. The Committee on Equal Employment Opportunity Law (Alan Koral and Pearl Zuchlewski) has met on a regular basis throughout the year with substantive committee meetings and guests. Likewise, the Committee on Labor Arbitration and Collective Bargaining has had a number of significant meetings and the Committee on Labor Relations Law and Procedure conducted its annual session with the NLRB Regional Directors from Regions 2 and 29 in New York City this past January and a similar meeting with the Acting Regional Director from Region 3 in Buffalo on May 10.

Our *Newsletter* (Janet McEneaney) has maintained its high standards with informative and useful articles in each issue. This year the ad hoc Committee on Publications and Media (Judith LaManna) generated an update to the Section's membership directory which was distributed to each member. There is a considerable amount of work that goes into these publications which deserves our recognition.

I have been privileged to work with and serve an outstanding group of practitioners on our Executive Committee who give unstintingly of their precious time. Linda Castilla, NYSBA staff liaison to our Section, has provided ongoing support and institutional guidance and has been critical to the success of our Fall and Annual Meetings.

It is with great pleasure and a sense of optimism that I pass the baton to incoming Chair Jacquelin Drucker. Jacquelin has been active in Section leadership for a number of years, including service as Section Secretary, Chair of the CLE Committee and Co-Chair of the ADR Committee. The Section will be well served by her enthusiasm, energy and keen mind.

**Richard N. Chapman**

***Save the Dates***

**Labor and Employment Law Section**

**FALL MEETING**

**September 12-14, 2003**

**Chateau Laurier Hotel**

**Ottawa, Canada**

**A Message from the Incoming Chair**
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rose to that challenge and forged an organization that not only has worked productively, cohesively, and cooperatively for 27 years but also has grown to be one of the largest and most active Sections in the Association.

In those early days, the founders crafted a statement of purpose which continues to guide the work and structure of the Section. Article I, Section 2, which sets forth our mission, was adopted in 1976 and has been modified only slightly over the years, primarily to confirm and formalize the inclusion of employment law. It states as follows:

> The purpose of the Section shall be to bring together for furtherance of their mutual interests those members of the New York State Bar Association who are interested in labor and employment law; to examine the possibilities of improvement and reform in labor and employment law through legislation; to disseminate information and exchange ideas relating to the development and practice of labor and employment law, both substantive and procedural; and to further the education of the Bar and the public in labor and employment law.

These purposes are not simple and they are not easy. They are broad and, in their way and in their time, they were audacious. Yet year after year, program after program, project after project, and issue after issue, the Section has fulfilled these important purposes.

Now, through the processes initiated under Dick Chapman's able and insightful leadership, we have the tools and structure to examine the ways in which we may continue to excel in fulfilling these purposes, to avoid the risk of lethargy, and to move forward to fine tune and update the services we provide to our members and the profession. As I continue the initiatives that Dick began, I am immensely grateful for his efforts, sound judgment, and vision. I also am grateful to the former Chairs of the Section, who are constant sources of wisdom, enrichment, and continuity. It indeed is a testament to the character of the Section and the enduring importance of its purposes that so many of the founders and former Chairs remain integrally involved with and committed to the Section.

Throughout his term, Dick Chapman graciously and generously included me in many aspects of Section development and business, thereby ensuring a seamless transition. I hope to follow that example in working with Pearl Zuchlewski, who in January was voted Chair-Elect and will take office as Chair in June 2004. Pearl has tapped Michael Gold of Cornell University's ILR School to serve as Secretary-Elect. Michael will succeed Rick Rossein, our new Secretary, who already has proved to be a valuable and enthusiastic addition to the Section's leadership team.

For the immediate future, it is with delight that I remind our members of our Fall Meeting in Ottawa, Ontario, September 12-14, 2003. Richard Zuckerman and the CLE Committee are preparing an outstanding substantive program. Last year's programs were superb, and, following this tradition, the 2003 Fall Meeting will offer an abundance of sophisticated and important substantive topics. Our hotel, the exquisite Chateau Laurier, is located in the heart of Ottawa, a charming, culture-packed city. The activities being planned include a tour of the Parliament building on Friday morning, a reception and dinner at the Chateau Laurier Hotel on Friday evening, a reception on Saturday night at the Canadian Museum of Civilization, and opportunities on Saturday afternoon for tennis, golf, or a riverboat cruise on the Ottawa River. Our Section has a treasure in Linda Castilla and, once again, Linda has worked her magic to provide this wealth of wonderful events for the Fall Program.

Thanks to the efforts of Margery Gootnick, we are thrilled to have as our dinner speaker on Friday, September 12, The Honorable Alan B. Gold, Q.C., O.Q., LL.D. In an illustrious career spanning six decades, Judge Gold has served as Chair of the Quebec Labor Relations Board, Chief Justice of the Superior Court of Quebec, Governor of McGill University, Chancellor of Concordia University, and chief arbitrator and mediator in innumerable disputes, labor and otherwise. Judge Gold, a true Renaissance man and an unparalleled raconteur and wit, will offer insights and anecdotes based on his worldwide experiences in labor-management relations.

Future programs, too, are falling into place. As Dick observes in his column, time flies when you are having fun, and in a flash our 2004 Annual Meeting will be upon us: January 30, 2004, at the New Yorker Hotel in Manhattan. Planning for this meeting begins in the late summer, and CLE Chair Rich Zuckerman joins me in inviting suggestions and input for the program content.

Finally, I note that our Section bears a traditional and continuing obligation of inclusiveness in sharing its rare chemistry and rich opportunities. Our formal membership development and service projects are well underway, but I also call upon our active members to look for ways to encourage and include colleagues who may wish to become involved but are not sure how to proceed. Anyone interested in greater involvement should feel free to contact me or any member of our Executive Committee, and we will happily provide information about the many avenues the Section offers for contribution to our profession. The Section is an extraordinarily gracious gathering of professionals and eagerly welcomes new voices.

I am honored to serve as Chair of this remarkable group, and I look forward to working with our members and the Executive Committee in the months ahead.

**Jacquelin F. Drucker**

# From the Editor

With this issue, I thank Dick Chapman for his support of the *Newsletter* as his tenure as Section Chair comes to a close. It has been a pleasure to work with him. As you have seen in the previous pages, Jacquelin Drucker will have assumed the title by the time you read this *Newsletter*.

It has been remarked upon here before, that the focus in numerous publications and CLE programs has shifted from labor law to employment law issues. Nevertheless, practitioners continue to work with both and new developments continue to arise in the labor law arena.

With that in mind, I asked Frank Flaherty, well-known labor and employment attorney from Nassau County, to begin a new column to raise and comment on matters in traditional labor law practice. My injunction to him was simply, "do whatever you think will be of interest," and I was delighted with the result. Please let Frank know if there is a particular subject you'd like him to cover in his column.

Matt Siebel has written a timely article about New York's new "Labor Neutrality Law," incorporating developments that occurred just before copy was submitted in mid-April. We also have an article by Elizabeth Becker and Charles Diamond on how attorneys can assess class-wide claims of unfair employment conditions. As always, I thank Phil Maier for the biannual PERB Update and John Gall for his Ethics Matters column.

On April 21, 2003, the Supreme Court granted *certiorari* in *General Dynamics Land Systems v. Cline*,[1] an ADEA case that may tell us whether an employer has the right to discriminate in favor of older employees within the protected class. There are some interesting aspects to this case, including the fact that it takes place in a union setting.

The United Auto Workers and General Dynamics entered into a collective bargaining agreement that took effect on July 1, 1997. Under the previous contract, the company provided full health benefits to retired workers with 30 years' seniority. Under the new contract, the company was no longer required to provide full benefits to retirees, except that employees 50 years of age or older on July 1, 1997, remained eligible to receive full health benefits upon retirement.

Dennis Cline and 195 other employees obtained a determination from the Equal Employment Opportunity Commission that the new contract adversely affected General Dynamics employees who were between the ages of 40 and 49 on July 1, 1997. They then filed suit under the ADEA[2] and the Ohio Civil Rights Act,[3] claiming that providing health benefits only to employees over 50 years of age was illegal age-based discrimination. Each plaintiff was between the ages of 40 and 49 on July 1, 1997, and thus protected under the ADEA.[4]

The district court dismissed the suit, finding that under the Employee Retirement Income Security Act of 1974 (ERISA),[5] health benefits at retirement are part of a "welfare benefit plan" which the company was not obligated to provide. Therefore, it concluded, it would have been permissible to withhold retiree health benefits from all employees under the contract. Further, although the court found that the contract created two classes of employees based solely on age, it concluded that the ADEA does not recognize claims for "reverse discrimination." To do so, it examined not only the language of the statute but also its legislative history.

The Sixth Circuit reversed, with a dissent by Judge Williams that raised the issue of collective bargaining in this case, which was not mentioned in the majority's opinion. The issue, the majority said, was whether the ADEA provides a cause of action for employees within the protected class who claim that their employer's actions were discriminatory because they gave more favorable treatment to older employees within the class.

The Sixth Circuit took issue with what it termed the district court's "interpretive" reading of the ADEA.[6] Referring to the language of the statute, the Court of Appeals found the ADEA provides simply that an employer may not discriminate against any worker age 40 or older on the basis of age and that those younger than 40 are not protected.[7] "To reach the conclusion for which the defendant argues, and that was found persuasive by the district court," the majority wrote, "we would be required to hold that the plain language of § 623(a)(1) and § 631(a) [of the Act] does not mean what it says when it refers to 'any individual,' but means, instead, 'older workers.'"[8] The district court's reading of the statute, said the majority, led it to conclude that the statute only prohibits discrimination against those in the protected class who are older than the favored employees. "If Congress wanted to limit the ADEA to protect only those workers who are *relatively* older," the majority wrote, "it clearly had the power and acuity to do so. It did not. Whatever the policy justifications for holding otherwise, we are bound by the plain language of the statute and have no occasion to look outside of the text."[9] Therefore, it found, the ADEA prohibits the contract provision bargained by the parties.

In his dissent, Judge Williams cited *Hamilton v. Caterpillar, Inc.*,[10] in which the Seventh Circuit found that "the ADEA 'does not protect the young as well as the old, or even, we think, the younger *against* the older.'"[11] Citing the language of the statute, Judge Williams stated he believes Congress intended to prohibit employers from discriminating against older workers, as opposed to younger ones, because "the older a person is, the greater his or her needs become. Therefore, a 50-year-old worker may need more protection or more benefits than a 40-year-old worker."[12]

He also believes that the ADEA was not intended by Congress to "interfere with the collective bargaining process or with collective bargaining agreements. The courts should not stand watch over labor unions who represent employees of a company and interfere with their negotiations with employers."[13] The dissent is concerned with the possibility that seniority and early retirement programs bargained for by unions could be rendered invalid.

Considering the split in the Circuits, the language of the statute and the fact that this is a condition of employment bargained for by a union, it will be most interesting to see what the Supreme Court makes of this case.

## Endnotes

1. 296 F.3d 466 (6th Cir. 2002); cert. granted, No. 02-1080 (4/21/03).
2. 29 U.S.C. §§ 621-634.
3. Ohio Rev.Code § 4112.99.
4. The plaintiffs divided themselves into three groups: the "Cline group" is composed of 183 current General Dynamics employees who are no longer eligible for full health benefits upon retirement; the "Babb group" consists of 10 employees who retired prior to July 1, 1997, in order to receive full health benefits; the "Diaz group" includes employees who retired after July 1, 1997, and are ineligible for health benefits.
5. 29 U.S.C. § 1002(1), (2)(A).
6. *General Dynamics Land Systems v. Cline*, 296 F.3d 466, 474 (6th Cir. 2002); cert. granted, No. 02-1080 (4/21/03).
7. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996).
8. *General Dynamics* at 474.
9. *Id.* at 475.
10. 966 F.2d 1226 (7th Cir. 1992).
11. *Id.* at 1227 (quoting *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988). "Age is not a distinction that arises at birth. Nor is age immutable." *Id.*
12. *General Dynamics* at 476.
13. *Id.* at 476.

**Janet McEneaney**

# Request for Articles

If you have written an article, or have an idea for one, please contact *L&E Newsletter* Editor

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

# Is New York's Labor Neutrality Law Preempted by the NLRA?

By Matthew Siebel

On September 20, 2002, Governor George E. Pataki signed into law legislation designed to ensure that State monies cannot be used to either encourage or discourage employees from engaging in union organization activities.[1] This law, commonly referred to as the "Labor Neutrality Law," was actually an expansion of a preexisting section of the New York Labor Law, section 211-a, enacted in 1996 for the same purpose.[2]

## New York's Labor Neutrality Law

Prior to the 2002 amendments, section 211-a prohibited the use of State monies from being "used or made available to employers to train managers, supervisors or other administrative personnel regarding methods to discourage union organization." Effective December 29, 2002 the following important changes were added to section 211-a:

- A statement of purpose was added indicating that, when state funds are appropriated for a particular purpose but are instead used to encourage or discourage union organizing, the "proprietary interests of this state are adversely affected." Section 211-a(1).
- The definition of prohibited uses was expanded to include (i) the hiring of attorneys or consultants or other contractors to "encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive," or (ii) hire employees or pay the salary of employees "whose principal job duties" are to encourage or discourage such activities. Section 211-a(2).
- Part Three of the new law requires employers to keep detailed records of the expenditures of state funds received sufficient to show that these funds have not been utilized for a prohibited purpose. Section 211-a(3).
- A violations section was added which allows the Attorney General to apply for an order enjoining or restraining the commission or continuation of an alleged violation. Upon the finding of such a violation, a court may order the return of the funds and impose a civil penalty not to exceed $1,000. For a knowing violation, or previous violation within the last two years, a penalty of $1,000, or three times the amount of money unlawfully expended, whichever is greater, may be imposed.[3] Section 211-a(4).

For the reasons discussed below, it is likely that section 211-a will soon be subjected to an examination as to whether or not this law is preempted by the National Labor Relations Act (NLRA).[4]

## NLRA Preemption Doctrines

The NLRA itself contains no express preemption provision and courts have generally been reluctant to infer the invalidation of state laws on this ground.[5] However, federal case law has evolved such that the actions of states will be deemed preempted by the NLRA under two circumstances. These two situations have become known as the *Garmon* and *Machinists* preemptions.

### The *Garmon* Preemption

In the case of *San Diego Building Trades Council v. Garmon*,[6] the California Supreme Court entered judgment imposing an award of damages upon a union for picketing despite the fact that the NLRB had declined to exercise jurisdiction over the issue. In overruling this decision, the Supreme Court stated that Congress has entrusted the administration of the labor polices exclusively to the NLRB.[7] The Court held that only this body has the procedure and expertise to deal with issues that arise under the NLRA.[8] As such, the preemption theory that evolved from *Garmon* directs that state laws or regulations will be preempted by the NLRA if the activities which the state seeks to regulate are actually or arguably protected by Section 7 of the NLRA or prohibited by Section 8.[9] Stated another way:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[10]

### The *Machinists* Preemption

In the case of *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*,[11] the Supreme Court approached the NLRA preemption issue from another perspective. Here, an employer filed a charge with the NLRB when its employees refused to work overtime during contentious negotiations. The NLRB subsequently dismissed the charge on the ground that the complained of activity did not violate the NLRA. Unde-

terred, the employer then filed a charge with the Wisconsin Employment Relations Commission which issued a cease and desist order to the union. In enforcing this order, the Wisconsin Supreme Court held that although the activity in question was neither protected nor prohibited by the NLRA, it constituted an unfair labor practice under state law.

The Supreme Court reversed the Wisconsin Supreme Court, holding that a state's activity may be preempted by the NLRA even if the activity in question is not protected or prohibited by the NLRA. In so holding, the Supreme Court focused upon the fact that Congress intended certain types of activity to be unregulated by both the federal and state government:

> a particular activity might be "protected" by federal law not only when it fell within § 7, but also when it was an activity that Congress intended to be "unrestricted by *any* governmental power to regulate" because it was among the permissible "economic weapons in reserve, . . . actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[12]

Here, the Supreme Court held that the union in question had exercised its right to utilize economic self-help and that the power to use such weapons has not been and should not be regulated. As such a course of action is not prohibited by the NLRA, the Supreme Court held that the economic weakness of the employer to use similar weapons does not justify state aid that is contrary to federal law.[13] Therefore, the state cannot not be permitted to regulate the economic weapons a party has at its disposal and such matters should be left to the free play of the market.[14]

### The Proprietary Interest Exception

The *Garmon* and *Machinists* preemption doctrines are expressly premised upon the supposition that a state has improperly attempted to regulate conduct in some fashion. However, where no such regulation has occurred, the courts have likewise not exercised their preemption discretion.

In *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, ("*Boston Harbor*"),[15] an organization of nonunion contractors filed suit to enjoin the application of the Massachusetts Water Resources Authority's[16] bid specification requiring compliance with a labor agreement designed to assure labor stability. In rejecting the claim that this bid requirement was preempted by the NLRA, the Supreme Court explained:

> When we say the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*. A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation.*[17]

Thus, the Court drew a sharp distinction between "government as regulator and government as proprietor."[18] Only when the State acts in the former capacity will preemption be found. Here, because the state was simply protecting its proprietary interests, as any private owner could, neither the *Garmon* nor *Machinists* preemption doctrines applied.

## Is New York's Labor Neutrality Law Preempted by the NLRA?

Critics of New York's Labor Neutrality Law have claimed in part that this law interferes with an employer's right to communicate with its workers as guaranteed by Section 8(c) of the NLRA.[19] As such, these critics argue that section 211-a is preempted by the NLRA. This argument was recently successful before the District of California in the case of *The Chamber of Commerce of the U.S. et al. v. Lockyer.*[20]

In *Lockyer*, plaintiffs filed claims for declaratory and injunctive relief regarding California's enforcement of a law strikingly similar to New York's Labor Neutrality Law.[21] The California law prohibited the use of state funds to assist, promote or deter union organizing. The law also imposed bookkeeping requirements to ensure that state funds were not used for improper purposes and penalties for engaging in such prohibited spending. Plaintiffs in this case alleged, *inter alia*, that the statute was preempted by the NLRA.

Relying on both *Garmon* and *Machinists*, the court held that the California law was indeed preempted by the NLRA as "it regulates employer speech about union organizing, under specified circumstances, even though Congress intended free debate."[22] The court found such restriction impermissible because "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management."[23]

In reaching this decision, the California District Court explicitly addressed and rejected the argument

that the state was not acting in a regulatory capacity but in a proprietary capacity pursuant to *Boston Harbor*. In so holding the California District Court drew a distinction between the facts of the *Boston Harbor* case, which involved one specific job, to the all-encompassing California law.[24] The *Lockyer* Court also focused on the "rigid and undiscriminating manner" in which the state law actually operated and classified this law as strictly regulatory in nature.[25]

Although instructive, the *Lockyer* decision is obviously not binding upon a determination as to whether or not the New York Labor Neutrality Law is also preempted by the NLRA. However, this inquiry took its first steps from the hypothetical in October 2002.

By letter dated October 30, 2002, the Office of the General Counsel of the NLRB wrote to Linda Angello, Commissioner of the New York Department of Labor, concerning "serious concern" relating to New York's recently enacted Labor Neutrality Law. The specific purpose of this letter was to express the NLRB's concern that this law may be preempted by the National Labor Relations Act as it "will effectively regulate conduct that is intended by Congress to be free from governmental interference."

Following an examination of the recently amended Labor Neutrality Law, the NLRB's inquiry letter stated that "[t]hese provisions, taken together, appear to go well beyond New York's choice not to fund certain conduct as they interfere with rights under the NLRA to freely discuss labor relations during union organizing." In light of these concerns, the NLRB asked the New York Department of Labor to explain how the law could be enforced "consistent with established preemption law."

A joint response letter issued from the New York State Department of Labor and the New York State Department of Law, Labor Bureau on January 30, 2003. In essence, this letter maintains that section 211-a is not subject to either *Garmon* or *Machinists* preemption as New York is not regulating any conduct. Rather, pursuant to *Boston Harbor*, the law merely protects New York's proprietary interest in ensuring that public monies are spent for their intended purposes.

New York's response argues that section 211-a is truly neutral on its face as it prohibits the use of state funds to encourage as well as discourage union organization. While employers remain free to engage in activities that discourage unionization, they simply may not use state funds to do so. Also, the response letter states that the law is completely silent on the issue of free speech and only focuses on training and hiring of individuals using state monies. For example, the law does not proscribe other activities such as mandatory "captive audience" meetings.[26]

New York's response letter goes on to argue that *Garmon* preemption is inapplicable because section 211-a does not actually infringe upon an employer's free speech rights. Moreover, the letter notes that while such employer free speech is permissible under the NLRA, it is not a right affirmatively protected by the NLRA. Specifically concerning section 8(c), the letter argues that this section "does not provide for an affirmative protection of employer free speech that is enforced by the NLRB." Moreover, the letter states that even if the NLRA were so interpreted, "we are unaware of any claim that the NLRA protects the rights of employers to have the State subsidize their speech."

Concerning *Machinists* preemption, the response letter argues that there is no indication in the NLRA that Congress intended to preclude states from imposing restrictions upon the use of their own funds. In fact, the letter notes that Congress itself has frequently imposed such restrictions upon the receipt of funds.[27]

In summation, New York's response letter indicates that section 211-a is not regulatory in nature. Rather, the law is precisely the sort of proprietary activity that was held valid in *Boston Harbor*. Specifically, the State argues that it is doing no more than ensuring that its monies are being used for their intended purposes—not to discourage union organizing.

An even more recent development indicates that the State's arguments will be put to the test sooner rather than later. In early April 2003, a coalition of health and service associations led by the Healthcare Association of New York State, Inc. (HANYS) brought suit against George Pataki, Eliot Spitzer and Linda Angello in the United States District Court, Northern District of New York.[28] This complaint seeks declaratory and injunctive relief on the grounds that section 211-a, as amended, is, *inter alia*, preempted by the NLRA.[29] Concerning NLRA preemption, HANYS' complaint alleges that the NLRA "affirmatively protects an employer's right to express its views, arguments or opinions on unionization if such views do not contain any threat of reprisal or force or promise of benefit." Due to the restrictive nature of section 211-a, the complaint alleges that this law is preempted by the NLRA both because it "fall[s] within the field occupied by the NLRA" and because it "intrude[s] into areas that Congress intended would be unregulated by the states." In other words, the complaint alleges that section 211-a is invalid under both the *Garmon* and *Machinists* preemption doctrines.

## Conclusions

Prior and subsequent to its passing, New York's Labor Neutrality Law has received equal shares of praise and criticism. Critics of the law, particularly employers who are largely dependent upon state funds,

are of the opinion that this law is "neutral" in name only.[30] Such employers point out that section 211-a effectively prohibits them from communicating with their own employees concerning union-related issues. Employers also maintain that the law poses onerous record keeping requirements that will ultimately force them to prove a negative—that they have not spent state funds for prohibited purposes. On the other hand, proponents of the law, particularly powerful labor unions such as the SEIU and the AFL-CIO, maintain that the amendments to section 211-a simply level the playing field between employers and their employees. New York State itself has taken the position that the law does no more than protect its right to spend its own money as it sees fit. As indicated, it would appear that the NLRB may be less than receptive to this interpretation.

Regardless of any party's views on the law, it would appear that the stage is set for a judicial determination of whether or not the Labor Neutrality Law is preempted by the NLRA in the near future. As described above, this determination will hinge upon an examination of whether the law simply protects the state's ability to control the use of its own funds or constitutes a prohibited attempt to regulate conduct covered by the NLRA. In what can only be viewed as anticipation of this debate, the drafters of the amendments to section 211-a explicitly included language that the law is merely intended to protect the state's "proprietary interests." Unfortunately for the State, whether this simple statement is enough to survive judicial scrutiny remains to be seen. Moreover, given the apparent similarity of New York's Labor Neutrality Law and the law at issue in *Lockyer*, any New York ruling that does not find preemption will require a clear departure from the decision and rationale reached in this case.

## Endnotes

1. Chapter 601 of the Laws of 2002, McKinney's Labor Law, Ch. 31, Art. 7, § 211-a, "Prohibition against use of funds."
2. The "Justification" section for the Bill Summary of A.11784, which together with S.7822, became the amendments to § 211-a, indicate that amendment was necessary as "[t]he present law has not proven effective in ensuring that funds are utilized for the programmatic purpose contemplated."
3. The 2002 amendments to § 211-a also direct that the commissioner shall, in the future, "promulgate regulations regarding the form and content of financial records required pursuant to this section." § 211-a(5).
4. 29 U.S.C. 181 *et seq.*
5. *Building and Construction Trades Counsel of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("Boston Harbor"),* 507 U.S. 218, 224 (1993).
6. 359 U.S. 236 (1959).
7. *Id*. at 242.
8. *Id.*
9. *Id*. at 244.
10. *Id*. at 245.
11. 427 U.S. 132 (1976).
12. *Id*. at 141, quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 488–489 (1960).
13. *Id*. at 148–149.
14. *Id*. at 144.
15. 507 U.S. 218 (1993).
16. An independent state government agency.
17. *Id*. at 226–227 (emphasis in original).
18. *Id*. at 227.
19. "[T]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."
20. 225 F. Supp. 2d 1199 (C.D. Cal. 2002).
21. California Assembly Bill 1889 adding California Government Code § 16645.
22. 225 F. Supp. 1199, 1205 (C.D. Cal. 2002).
23. *Id*. at 1204, quoting *Linn v. United Plant Guard Workers of America, Local 114,* 383 U.S. 53, 62 (1966).
24. *Id*. at 1205.
25. *Id*. at 1205, quoting *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 287 (1986).
26. This argument is somewhat questionable given that the "Justification" section of the A.11784 Bill Summary specifically indicates that the bill was enacted following a legislative hearing in which several health care workers described being "forced to attend several mandatory anti-union meetings on company time, and against their will. . . ."
27. *See, e.g.,* 29 U.S.C. § 1553(c)(1) and 29 U.S.C. § 2931(b)(7). It is worthy of note, however, that this line of reasoning was explicitly rejected by the Lockyer court which held:

    > Such restrictions may show Congress approves of federal restrictions in those areas, but that is not inconsistent with the doctrine of preemption. If anything, it supports the view that Congress intended to regulate the field, and Congress, rather than the states, will impose the restrictions if they are to be imposed. *Lockyer*, *supra*, at 1205–1206.

28. *Healthcare Association of New York State, Inc., et al. v. Pataki, et al.* (No index no. as of 4/21/03).
29. The complaint also alleges that § 211-a is preempted by the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq*. and violates the First Amendment to the United States Constitution as well as the Procedural and Substantive Due Process provisions of the Fourteenth Amendment to the United States Constitution.
30. HANYS' complaint refers to § 211-a as the "Employer Gag Law."

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# Assessing Class-wide Claims of Unfair Employment Conditions

By Elizabeth Becker and Charles Diamond

## Claims of Unfair Conditions of Employment Are Common

Class action litigation under Title VII of the Civil Rights Act poses unusual challenges for the development of forensic evidence. This is particularly true when an employer is alleged to have practiced discrimination against a class of employees at multiple sites. Variation in the pervasiveness of the practices, the number of class members, and the size of the sites themselves make statistical identification of the presence of these practices problematic. Discrimination may be practiced at some sites and not others, and with varying levels of intensity from site to site. Off-the-shelf statistical techniques such as an analysis pooled across branches might mask discriminatory behavior practiced in one branch by more favorable outcomes in other branches. On the other hand, if individual branches are examined separately, small sample sizes with high standard errors may make a statistically significant finding of discrimination difficult to discern.

Increasingly, the search for the cause of unequal outcomes due to discrimination has drawn away from issues of all or nothing access to jobs or promotions. Today, claims of discrimination emerge ever more frequently from indirect employment practices that are more difficult to observe and measure. These claims assert that discrimination manifests itself in unequal conditions of employment for protected groups of employees. These unfair working conditions allegedly diminish productivity, thereby adversely affecting present and future career development. Diminished productivity then leads to fewer career opportunities and lower compensation, *pari passu*.

## Financial Services Firms Face Claims of Unfair Practices

The recent flood of discrimination cases brought against financial services firms for allegedly unfair distribution of referrals and accounts is a good example. In large retail brokerage firms, referrals and account assignments are considered important in building a successful book of business. The sentiment was perfectly captured by salesman Dave Moss, portrayed by actor Ed Harris in the movie *Glengarry Glen Ross*, who lamented, "It's the leads. The whole thing is the leads. You understand me? You can't sell to a void. . . . You get a lead, you get a person. I'll go in there and sell 'em." Many of these firms have had facially neutral pay-for-performance compensation formulas that reward production or the total value of transactions completed. Nonetheless, plaintiffs in class action litigation against a number of these firms have alleged that gender or race pay disparities arose because employer-directed inputs to the underlying production were skewed against members of the protected class. American Express Financial Advisors, Merrill Lynch and Willis Group Holdings are among the firms facing these types of allegations.

In a different context, comparable complaints about the limiting effects of unequal employment conditions have been raised against major package delivery companies and the distribution services of large retail providers. Minority delivery drivers at FedEx, UPS and Interstate Brands have raised complaints of racially biased assignments of delivery routes. In these complaints, minority drivers allege that they tend to be assigned to less desirable routes more often than non-minority drivers. The assignment to less desirable routes is alleged to adversely affect the ability of the minority drivers to perform well, thereby compromising other more concrete employment opportunities, such as promotion and growth in pay.

## Claims of Unfair Working Conditions Pose Complex Data and Statistical Issues

Statistical assessments of claims involving discriminatory working conditions pose unique challenges. First, some employment practices are quantifiable, while others may be too difficult or costly to measure. For example, the assignment of accounts in brokerage firms is likely to be quantifiable, as data on account assignments are likely to be maintained for the very purpose of tracking commissions. Shares of referrals or sales leads, resources spent on training, the relative size of administrative budget support, monetary resources devoted to career counseling and shares of advertising budgets may also be quantifiable. However, claims of poor office location or window size will be much more difficult to quantify. The first challenge in a statistical assessment of such claims, therefore, is to develop a framework, or methodology, to quantify employment outcomes that are credibly related to tangible job consequences.

A greater challenge lies in identifying appropriate statistical approaches to assess the unique nature of the claims arising in these cases. Statistical techniques tradi-

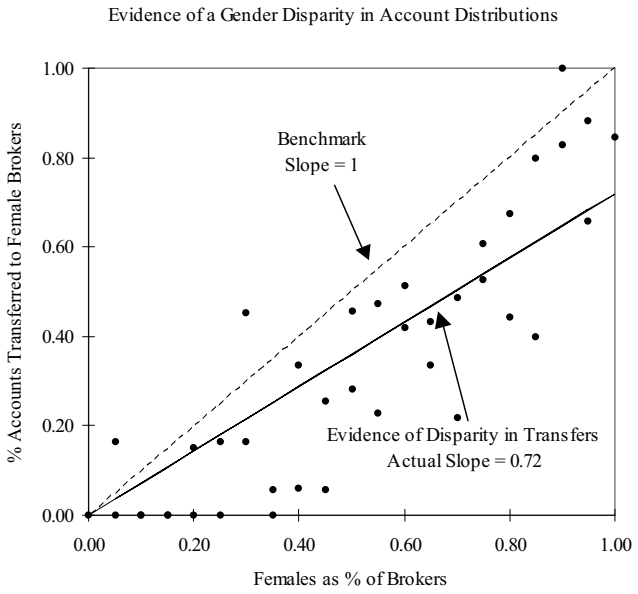
tionally applied to discrimination claims have analyzed either data that are continuous and incrementally observed, such as compensation data, or data that are dichotomous, such as "yes or no" hiring selections from a fixed pool of applicants. The former can easily be assessed with well-established regression techniques and the latter with familiar random selection models evaluated with chi-square or Fisher's exact statistics.

Claims of disparate employment conditions are unlikely to fit neatly into either statistical paradigm. Suppose, for example, a tenable claim is made against a retail brokerage company that managerial discretion at the branch locations leads to gender disparities in reassignments of the accounts of brokers leaving the firm. The account reassignments, while incrementally observed as the number of accounts, are drawn from a fixed pool of accounts available for reassignment to all brokers within each branch office. A simple regression of account reassignments made to each broker would fail to capture variation in the number of accounts available to be reassigned within a particular broker's branch or the numbers of other brokers in that branch also eligible to receive transferred accounts. An analysis pooled across branches might also mask discriminatory behavior practiced in one branch by more favorable outcomes in other branches. On the other hand, if individual branches are examined separately, small sample sizes with high standard errors may make a statistically significant finding of discrimination difficult to discern.

## Increasingly Sophisticated Statistical Models Are Necessary

Although the pool of accounts available for reassignment may be fixed, an application of traditional random selection models of "yes or no" selection from that pool is also inappropriate. The issue is not whether each female broker received any account that was reassigned. Female brokers may, in fact, have received at least some reassigned accounts. The issue is whether they received a fair share of reassigned accounts, and if not, whether any observed shortfall represents statistically significant evidence of disparate outcomes. What is needed is an analytical method appropriate for assessing equality of shares of productive resources distributed from a fixed pool of resources. We have recently used such an approach to determine whether a gender bias exists in the reassignment of client accounts across various branch offices of a major retail brokerage company.

Absent discrimination we expect, on average, the proportion of accounts reassigned to female brokers to match the proportion of females among brokers employed in each branch. That is, we expect female brokers to get a fair share of accounts. For example, we would expect that if 40 percent of the brokers in a branch were female then, on average, 40 percent of the reassigned accounts would be transferred to female brokers. The graph below depicts this expected relationship as a simple 45-degree line. This line, with an intercept at zero and a slope of one, matches pairs of values in which female brokers in each branch receive a share of reassigned accounts that exactly matches their representation in each office.




In reality, random variation in account reassignments from branch to branch may yield pairs of values that lie off the 45-degree line. That is, in some branches, female brokers may get a share of transferred accounts that is somewhat less than their representation, and in other branches they may get more. For example, in one branch where women represent 40 percent of brokers, they may receive 20 percent of available accounts. In another branch where women represent 40 percent of brokers, they may receive 60 percent of the accounts.

## Testing Claims of Discrimination with Sophisticated Regression Analysis

If the claims of discrimination were valid, these actual observations would tend to lie below the 45-degree line. That is, the proportion of account transfers to women would generally be less than the representation in each branch. Regression analysis of these shares can inform us whether deviations from the expected proportionate pairing of account transfers to female broker representation show a sufficiently strong pattern that we should infer discriminatory reassignment of accounts across the branches.

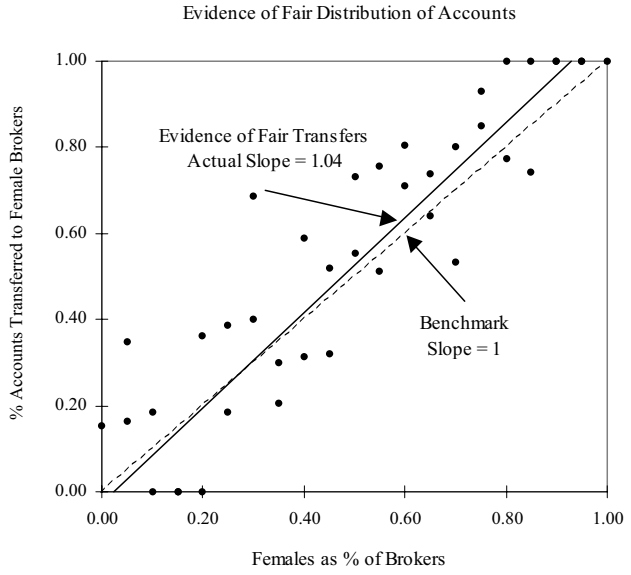
A regression line fitted through the observed data from the branches captures the actual relationship

between the percent of reassigned accounts received by female brokers relative to their representation in each branch. The regression fits a line that minimizes the sum of squared deviations of each data point from the line. Some of these observations must lie above the estimated regression line and others below it. A simple regression computes an intercept with the y-axis as well as a slope of the line calibrated to minimize deviations from the line. It is in this sense the best fit for the data. The fitting process requires that roughly half the data points will lie above the regression line and roughly half will fall below it.

If the claims of discrimination were valid, and the actual observations tended to lie below the benchmark 45-degree line, then the slope of the fitted regression line would be less than unity. Increases in the representation of females among brokers in a branch would not be matched by proportionate increases in the assignment of transferred accounts to those women. In other words, the fitted regression line would have a flatter slope than the 45-degree benchmark. For example, a slope of 0.72 would indicate that increases in female representation are matched less than one-for-one with increases in account transfers. Such a relationship, if statistically significantly different from unity, would provide evidence of adverse gender disparities in this employment condition.

## An Application of the Technique

Observe the path of the fitted line we actually estimated for our client. The intercept was estimated to be – 0.019. This value was very close to, and insignificantly different from, zero. The estimate of the slope of the regression line was 1.045. This value was very close to,




and not statistically different from, unity. Indeed in our analysis, the regression line and the 45-degree benchmark lay almost on top of one another, which is the predicted result in the absence of discrimination. This analysis indicated a lack of statistical evidence for the merits of the claim that women were treated unfairly in the distribution of accounts.

The overall pattern of fairness in access to productive resources is relevant to the merits of the claims. However, it is not necessarily informative of the commonality and typicality issues at the heart of class certification in Title VII employment discrimination cases. This statistical approach for analyzing the fairness of the shares of productive resources has a distinct advantage in addressing questions relevant to class certification as well. Those issues can be investigated by a review of the dispersion in outcomes across the proposed class. For example, in this case, we can see that although there may be no strong overall pattern of gender differences in account assignments, potential problems may exist in some branch offices. The identification of branches far below the 45-degree benchmark would be helpful to the court in properly defining and limiting a class to the locations where problems might actually exist.

## Conclusion

Claims of class-wide discrimination based on unequal shares of productive resources call for statistical approaches that have not commonly been used in employment discrimination cases. Parties in lawsuits will increasingly need to rely upon expertise in more complex statistical and economic models to confront an array of challenged employment practices that are far more subtle than most previously challenged practices. The use of these more subtle analyses is critical for an accurate assessment of adverse impact on protected groups.

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# LABOR MATTERS
# Labor Law, Labor Law—Where Art Thou?

By Frank Flaherty

For current practitioners of labor and employment law, the labor law segment of the practice is generally in pica type, while employment law is in BOLD CAPITAL LETTERS. This change has come very gradually, with the mid-60s and the enactment of Title VII of the Civil Rights Act being a probable starting point. The distinction has been enhanced by a variety of federal and state statutes.

Coincident with the growth of these employment statutes has been the slow but continuing decrease in the numbers and, to a much lesser degree, the political impact of organized labor. As our society has been transformed from basic manufacturing to a service-oriented economy, American labor unions have witnessed during the past 25 years a continuing decrease in employees represented both because of an inability to organize and defeats in representation elections. With this as a backdrop, there has been a concomitant drop in activity involving the National Labor Relations Board and those attorneys who practice before it.

Our legal profession today does its research on computers, using Lexis, Westlaw and other services, many times to the total exclusion of a law library. Therefore, the areas devoted to the various hard copy texts can easily be overlooked. A walk through the stacks of a law school library shows that since 1966, the following new series have been published: Americans with Disabilities Cases (12 volumes), Fair Employment Practice Cases (88 volumes), Individual Employment Rights Cases (17 volumes).

During this same period (1966-2002), we have seen the Labor Relations Reference Manual (LRRM) grow from Volume 61 to 169—108 volumes—while at the same time the Labor Arbitration Reports grew from Volume 46 to 116—another area of what I would describe as classical labor law. It is clear that even with the great growth of employment law practice, the classic labor law issues have not diminished—whether before the courts, the NLRB or in arbitration. Therefore, it was deemed appropriate, and maybe even necessary, to devote some space to what is happening in this area of the law that you may find of interest for your practice.

On December 17, 2002, the President swore in four new members of the NLRB and another was sworn in for a second term, giving the Board a full complement of five members for the first time in more than two years. When I first became active in the practice of labor law, all practitioners were conscious of who were members of the NLRB and their political party affiliations. Over the past two decades, the Board has frequently operated with less than a total complement of five members. How many of you can name the current membership—or even one member? (The answer is at the end of this article.)

*"On December 17, 2002, the President swore in four new members of the NLRB and another was sworn in for a second term, giving the Board a full complement of five members for the first time in more than two years."*

In recent months, a Board decision and a Circuit Court decision were rendered that may be of interest to the labor practitioner: *Victor's Cafe 52, Inc. & Hotel & Restaurant Employees L. 100*.[1] This case involved a compliance hearing and the calculation of back pay. The General Counsel argued before the Administrative Law Judge that the improperly discharged employee's back pay should be calculated at the busboy's rate rather than the lower-rated expediter's wage.

At the hearing before the ALJ, the complainant admitted he had offered to pay $1,000 for testimony by co-workers that supported his claim for the higher pay. This offer was deemed excessive by the Board and precluded the award of back pay at the higher busboy's rate.

The three-member panel also addressed a claim by the General Counsel that the ALJ acted improperly by criticizing the GC and trial strategy utilized. In addition, the GC also sought the remand of the case for decision to another judge.

The Panel issued three separate but concurring decisions supporting the ALJ's decision, but each provided a "slap on the wrist" for his unjudicial and intemperate remarks directed to the General Counsel, since his decision "could raise doubt as to the integrity of the Board's decision-making processes."[2] Although intemperate remarks by a judge are rare, they do occur and the Board members' concern for even the appearance of partiality or bias in this case is noteworthy.

In *RAVEN Services Corp. v. NLRB*,[3] the Fifth Circuit reviewed an NLRB order which was founded on whether an "impasse" had been reached in collective

bargaining negotiations. This is an issue that arises frequently and is fraught with peril for the parties involved.

In this case, the union was certified by the NLRB in December 1992. Negotiations occurred in 1993 and again in 1994, but without achieving a first agreement. In August 1994, the employer declared an impasse and unilaterally imposed the proposals it had made in negotiations, which included a broad management rights clause. The union challenged the appropriateness of the impasse, but in November 1994, the ALJ found for the employer.

In the latter part of 1996, the union sought to reopen negotiations and requested certain information from RAVEN, but their requests were rejected. In addition, the employer made certain unilateral changes, including the layoff of two employees. In August 1997, the union filed an unfair labor practices charge against RAVEN. The ALJ found several violations of the Act in December 1997, and in June 2000 (two and a half years later), the NLRB affirmed.

The Fifth Circuit devotes substantial effort to examining the employer's defenses, including the 1994 valid impasse (which doesn't last forever), a belated argument that the union no longer enjoyed the support of the majority of its members and, finally, the need for back pay and its calculations. In conclusion, the court examined the need for an enforcement order and carefully rejected the employer's objections.

This entire issue of impasse is like so many other things in life: timing, timing, timing!

And finally, the answer to the earlier quiz about the membership of the NLRB. The present members are:

Robert J. Battista (R), Chair
Peter C. Schaumber (R)
Dennis P. Walsh (D)
Alex Acosta (R)
Wilma B. Liebman (D)

### Endnotes

1. 338 NLRB No. 90, 171 LRRM 1217 (11/22/02).
2. *Id.* at 1222.
3. No. 01-60976, 171 LRRM 2606 (5th Cir. 12/18/02).

**Frank Flaherty is engaged in the private practice of labor and employment law, with offices in Garden City and Southampton, NY. He has represented major corporations in all aspects of labor and employment law and is a graduate of Fordham College and St. John's University School of Law. An active member of the ABA, NYSBA and the Nassau County Bar Association, Frank also provides pro bono services to Catholic Charities and the Kings County District Attorney's Office.**

## For Your Information

**Ken Thompson**, **Douglas Wigdor** and **Scott Gilly**, formerly with Morgan Lewis & Bockius, have founded a new law firm, **Thompson Wigdor & Gilly LLP**. The firm has a boutique practice focused on employment law. Background and contact information on the firm is on its Web site, www.twglawyers.com

The firm of **Sabin, Bermant & Gould, LLP**, announces that **Patricia A. Clark** has become a member of the firm and **Steven J. Gerber**, **Cody J. Harrison**, **Vincent LaSpisa**, **Hared E. Schlosser** and **Marnie W. Zebrak** have become associated with the firm.

**Keith Corkan** has become Partner and Head of the Employment Department at the **Rosenblatt firm** in London.

# PERB Update

By Philip Maier

The following is a summary of recent decisions of the Public Employment Relations Board (the "Board"). This article reviews decisions issued during the period October 2002 through April 2003.

## Jurisdiction/Deferral

***State of New York (Division of State Police),*** 35 PERB ¶ 3031 (2002)—The Board granted motion for an interlocutory appeal to review an ALJ ruling declining to defer a charge pursuant to *Herkimer County Board of Cooperative Educational Services*.[1] The charge alleged a violation of §§ 209-a.1(a), (c) and (d) by denying PBA access to an employee during an investigatory interview concerning an incident in which the employee had been involved. The Board granted interlocutory review because extraordinary circumstances were present since the case presented new deferral issues. The Board restates that it does not defer § 209-a.1(a) specifications unless the facts are purely derivative of an alleged § 209-a.1(d) violation. That the contract may contain language that mirrors or is substantially similar to rights arguable guaranteed by the Act is not sufficient to warrant deferral of an independently alleged § 209-a.1(a) violation. If a charge sets forth a cognizable violation of § 209-a.1(a), inquiry ends and the charge should not be deferred. The ALJ reversed insofar as he found it necessary to analyze applicability of *Weingarten*. Decision not to defer was affirmed. (See below, *New York City Transit Authority*, 35 PERB ¶ 3029 (2002).)

## Discrimination and Interference

***County of Monroe and Monroe County Sheriff,*** 36 PERB ¶ 3006 (2003)—The charge alleged a violation of § 209-a.1(c) when employer ceased granting the union president a second day of release time in retaliation for the exercise of protected rights. The parties agreed, after settlement of grievance and improper practice charge, that he would have two release days. The parties then agreed that, after schedule changed, he would get second release day if request submitted one month in advance. Requests were granted for over a one-year period. Requests were not approved after no-confidence vote taken by the PBA membership regarding the sheriff and PBA executive board recommended that the membership reject fact-finder's report. The union sought to amend the charge to add specification that the county violated § 209-a.1(d) by changing a past practice. The Board affirmed denial by the ALJ because it would add a substantive claim otherwise barred by the four-month statute of limitations, which would have been a new issue. The Board affirmed finding of a violation since the timing and circumstantial evidence shifted burden to the county, and the proffered reasons were pretextual. The Board also stated that willingness to bargain was irrelevant. Post-conduct actions may be relevant if they show a continued course of conduct that relates back to the conduct in question. Willingness to negotiate subject matter of an action alleged discriminatory is not, in absence of rescission of other conduct, relevant.

***Sherburne-Earlville CSD,*** 36 PERB ¶ 3011 (2003)—The Board reversed an ALJ decision finding a violation of the Act when the district discontinued the practice of permitting unit employees to borrow tools and equipment. The charge was filed on behalf of the custodial portion of the unit, and was relevant to that subset of the unit. The Board then determined whether the practice was unequivocal, and existed for a substantial period of time so as to give rise to the reasonable expectation that it would continue. The Board held that while the practice existed for a substantial period of time, it was not unequivocal and therefore could not give rise to the expectation that it would continue. The practice was not expressed in full and definite terms since it was dependent upon the subjective determinations of the supervisor as to which employee would be lent the equipment and which tool. The Board additionally stated that the practice fails on the ground that the district did not acquiesce in the practice, nor did it authorize, ratify or condone the practice. The Board stated that specific authorization, ratification or condonation of a practice is needed to attribute liability to an employer. The Board distinguishes case from *Town of Huntington*,[2] which involved an interference allegation and a situation in which the employer representative was acting in a capacity specifically directed by the employer. No evidence of actual or implied delegation of authority existed here. Supervisor was a first-line supervisor and not a policy maker. The district was unaware of this practice. The district was not liable for unauthorized acquiescence.

***New York City Transit Authority***, 35 PERB ¶ 3029 (2002)—The Board affirmed a decision of an ALJ which held that *Weingarten* rights extend to employees within the jurisdiction of the Act. The undisputed facts were that an employee was directed to respond in writing to an allegation that he made a racial remark, and was denied union representation when responding. *Weingarten* held that an employee has a section 7 right under the NLRA to refuse to submit to an investigatory interview when union representation has been requested, when the employee reasonably fears that the investigation may result in discipline. The Board stated that the

absence of the words "concerted activity" from section 202 of the Act compels a conclusion that *Weingarten* is inapplicable. It did not find persuasive the fact that legislation was pending to assure *Weingarten* rights, or that CSL 75 accords some employees such rights, to be persuasive that the right does not exist. The Board stated that there is no clearer expression of participation in a union than by a request for representation under these circumstances.

***County of Nassau,*** 35 PERB ¶ 3045 (2002)—The Board affirmed an ALJ decision finding that employee was not promoted due to his filing of grievances and pursuing them to arbitration. The Board held, consistent with prior cases, that grievance activity constitutes protected activity under the Act. The Board also found that the record supported the conclusion that the county agents were aware of the protected activity, and that the business reasons offered by the county for not promoting the employee were pretextual. The Board modified the remedy, however, finding that the employee did not have a vested right to the position. It therefore ordered that the employee be considered for placement on the promotion list without regard to his protected activity.

***Board of Education of the CSD of the City of New York (Baez),*** 35 PERB ¶ 3044 (2002)—The Board affirmed an ALJ decision dismissing a charge alleging that the employer violated §§ 209-a.1(a) and (c) by retaliating against Baez for filing grievances. The Board affirmed the decision dismissing the charge at the close of Baez's case, stating that even giving her all favorable inferences, she failed to sustain a *prima facie* case. The record did not show any evidence that the district's actions were improperly motivated or that they were in retaliation for protected activity.

***Transport Workers Union of America, Local 100,*** 36 PERB ¶ 3020 (2003)—The Board reversed an ALJ decision which found a violation of § 209-a.1(a) of the Act when an employee's employment was threatened with termination after he had been subpoenaed to testify in a disciplinary arbitration in behalf of a TWU member. The TWU representative subpoenaed an employee on behalf of a grievant. The subpoenaed employee told the representative that he was threatened with termination, and the representative and the NYCTA thereafter entered into a settlement on behalf of the grievant in which the grievant and the TWU released all claims they may have had in connection with the grievance. The Board held that the waiver language in the settlement stipulation barred the TWU from bringing this action. There is a presumption that the parties to a contract intend to bind not only themselves but also their personal representatives. The Board found a knowing waiver of rights because the settlement resulted from good faith negotiations and the TWU was aware of the alleged threat.

***State of New York (SUNY-Oswego)***, 36 PERB ¶ 3017 (2003)—The Board affirmed finding of an ALJ who held that employee was given poor evaluations because he sought, and received, assistance from his union. He was demoted as a result, and then resigned. The Board held that the state violated § 209-a.1(a) and (c) when supervisors considered the employee's protected activity and evaluated him negatively because of it. The Board modified the remedy and, instead of reinstating him, found that he was not constructively discharged since his working conditions were not intolerable. The ALJ's order was reversed insofar as it ordered that he be reinstated to the position he held while he was being evaluated.

## Representation

***Town of Ulster***, 36 PERB ¶ 3006 (2003)—The Board affirmed an ALJ decision granting the town's application to designate the municipal bookkeeper, Ann Mitchell, as confidential. Mitchell has sole access to the town's financial records, is primarily responsible for compiling budget data, utilizes documents by budget head concerning expenses and revenue, including projected staff increase and decreases. She discusses this collected data with the town supervisor. She reports to him daily and they discuss budget data, and he seeks her input regarding budget and staffing issues. She prepares final budget document. In accordance with *Town of Dewitt*,[3] the Board found that Mitchell assisted a manager in the delivery of services, and acted in a confidential capacity to the supervisor. An employee is confidential who is privy to reductions of personnel, transfers and layoffs, which have a considerable impact on labor negotiations. Additionally, she knows the town's negotiations proposals before they are exchanged with the union. The Board concluded that she serves in a confidential capacity, and, though she did not yet perform them, they are already part of her duties.

***State of New York,*** 36 PERB ¶ 3007 (2003)—Petition remanded to the Director for a determination of managerial status of employee. Pursuant to agreement between the state and PEF, titles may be initially designated as managerial or confidential and then subject to challenge. Director directed the state to put on evidence. A unit placement petition is a mini-representation proceeding, requiring a non-adversarial investigation and application of the statutory uniting criteria. In a unit clarification petition, however, the petitioner has the burden to demonstrate that the at-issue title has a community of interest with the other positions in the unit. The record does not reveal the nature of when and how the position was created, does not clarify the theory under which PEF proceeded, or why the state proceeded first with its proof.

***Buffalo Police Benevolent Association,*** 35 PERB ¶ 3039 (2002)—The Board adopted an ALJ report and recommendation dismissing strike charge. The ALJ held that while police officers had not voluntarily applied for transfer to particular units prohibiting their participation in the city's new transfer procedure, they had not defied directions to perform assigned duties nor had they withheld services. The CBA contained transfer procedures, but the city adopted new criteria for transferring to the narcotics unit. The PBA thereafter adopted its resolution. The Board stated that the declination of the invitation to volunteer, or to request a transfer, cannot be equated with the failure to obey a direction or the withholding of required services. There was no work stoppage or slow down shown, and the city could satisfy its staffing needs by acting pursuant to the CBA.

## Good Faith Bargaining

***Capital Region BOCES***, 36 PERB ¶ 3004 (2003)—The Board reversed an ALJ decision which held that the assignment to teachers of an additional class resulted in an increase in the number of preparation periods and therefore an increase in workload. Teachers were assigned a course to be taught once a week for 72 minutes or in two periods of 36 minutes each. Teaching the course requires two hours preparation each week. The Board stated that it has held that in certain circumstances an increase in workload could constitute a mandatory subject of negotiations but, in this case, the assignment does not establish an increase in workload sufficient to bring the assignment within the scope of mandatory negotiations. The assignment was made during the workday, and the amount of preparation time was not dictated by BOCES, but was within the discretion of the teachers. The Board stated that it is possible that the decision may have increased preparation time, reduced free time and affected a number of other mandatory subjects. This would give rise to impact bargaining. A demand for impact bargaining had not been made, and the charge was dismissed.

***City of Rochester***, 36 PERB ¶ 3003 (2003)—The union alleged violation of §§ 209-a.1(a) and (d) when the city unilaterally implemented an overtime detail and refused to negotiate the overtime criteria and/or the impact of such criteria and denied the president the right to work the overtime detail. The procedures for the assignment of overtime to those who are eligible is a mandatory subject of negotiations. On this record, the city established, however, that its actions were consistent with the established practice by which overtime has been made available for similar events. The Board therefore dismissed the refusal to bargain aspect of the charge. The 209-a.1(a) specification, which was plead as an amendment, was dismissed by the Board since insufficient facts were alleged in the amendment, which, if proven, would establish a violation of the Act. Since the ALJ had dismissed the amendment as untimely, decision in this regard was affirmed on different grounds.

***Dryden CSD,*** 36 PERB ¶ 3005 (2003)—The union alleged a violation of § 209-a.1(d) when the non-unit cafeteria manager made certain renovations to the middle school cafeteria. In a second charge the union alleged that a retired employee performed welding work which was exclusive unit work. The ALJ dismissed the first charge at the close of the union's case, but found a violation on the second charge. No exceptions were taken to the first charge and the Board therefore did not consider it. The Board reversed the finding of a violation on the second charge finding that the evidence did not demonstrate that the work had been exclusive unit work. In order to find exclusivity, the Board stated that it has relied upon the concept of a discernible boundary. In order to find such a boundary, it has looked to the nature, location and frequency of the work unit employees perform. In this matter, the evidence showed that the welding had been performed by a unit member for a limited time, ten years prior to the alleged transfer of work. The Board stated that this was insufficient frequency to establish the work as exclusive. Additionally, the Board did not find that a discernible boundary could be drawn around the type of welding the employee did and the type performed by non-unit employees.

***Great Neck Water Pollution Control Dist.***, 36 PERB ¶ 3013 (2003)—The Board affirmed an ALJ decision which held that the district violated § 209-a.1(d) of the Act by unilaterally discontinuing the past practice of allowing unit members to use a building on premises during break times. The use of the building had been continuous for more than a ten-year period, and was not based upon a contractual right. Due to certain damage in the building, the district advised the union that it would close the building to members if the damage continued. The building was thereafter unilaterally closed to unit members. The Board held that the use of the building was a mandatory subject of bargaining which constituted a past practice, and that an employer can not act unilaterally. The Board rejected the contentions that the union had agreed to the change and that the union had the obligation to demand negotiations.

***City of Poughkeepsie,*** 36 PERB ¶ 3014 (2003)—The Board reversed decision of an ALJ, and found that certain demands which the union sought to submit to interest arbitration were non-mandatory. The at-issue demands related to General Municipal Law (GML) § 207-a benefits and the procedures concerning eligibility and light duty assignments. In *City of Watertown*,[4] the Board held that a PBA demand which acknowledged the city's right to make an initial 207-c eligibility determination and requested that any such dispute proceed

to arbitration, was a substitute appeal procedure to avoid an article 78 proceeding and was a mandatory subject of bargaining. In this matter, the union sought arbitration of the employee's underlying GML claim. The demands, in essence, sought a *de novo* review, and are a procedure for a determination on the merits. The demands sought not a review of the city's determinations of eligibility, termination and light duty assignments, but of the employees' underlying claims, which infringes upon the authority vested exclusively within municipalities.

***State of New York Dept. of Correctional Services (Groveland Correctional Facility),*** 35 PERB ¶ 3030 (2002)—The Board reversed an ALJ decision and dismissed a charge alleging a violation of a past practice allowing employees to convert accrued sick leave absences to accrued leave without prior approval. Practice in issue affected only one facility among many. Employees of DOCS, however, are within units defined on a state-wide, rather than facility-by-facility basis. The evidence produced by the union in its direct case however only related to one facility, rather than a unit-wide basis. The union had therefore not established a *prima facie* case and the charge was dismissed.

***City of New York,*** 35 PERB ¶ 3034 (2002)—The Board affirmed an ALJ decision holding the following: *Cohoes* decision applies to determine scope petitions pending before it which involve the city of New York; the New York City Code and Charter constitute special laws making the following clauses in parties CBA related to discipline prohibited subjects of bargaining—Disciplinary Records and Disciplinary Procedures, Pilot Program—Oath, Bill of Rights and Modification of Patrol Guide. A demand to increase the Variable Supplement Fund was non-mandatory since it amounted to a demand to change existing legislation. *Cohoes* being applicable to the proceeding, allowed the following non-mandatory items in the CBA to be submitted to the arbitration panel—hours and overtime; vacation; fixed post duty, meal scheduling, funding applications. Demand for schedule was able to be submitted since it was not vague and related to hours, sick leave demand could also be submitted distinguishing *City of Rochester*.[5] The Board also held that in order for BCB to be in substantial compliance with the Act, §209-a.1(e) is applicable to the city as part of 209-a, in the context of both scope of bargaining disputes and improper practice charges.

***County of Nassau,*** 35 PERB ¶ 3036 (2002)—The Board affirmed an ALJ decision holding that the county violated the Act when it unilaterally discontinued the past practice of assigning vehicles to employees on a twenty-four hour basis, including for their personal use. The Board restates traditional criteria for establishing a past practice. While a past practice will generally be viewed as one affecting the whole unit, where a practice is title-specific it need not affect the whole unit for an enforceable past practice to be found. Where a practice pertains to a subject of unit-wide concern, it is to be tested on a unit-wide basis.

***Erie County Water Authority***, 35 PERB ¶ 3043 (2002)—The Board affirmed an ALJ decision finding a violation of § 209-a.1(d) when the Authority unilaterally subcontracted the exclusive work of replacing and testing water meters at commercial pit locations. Unit employees regularly installed, repaired and replaced ARB meters as necessary. The Authority decided to replace all meters over a 17-year period with a meter using newer technology, and to have a private contractor do the majority of the replacing. The work was defined as the installation of radio frequency meters, and the tasks involved are essentially the same as the tasks involved in the installation of the older meters. The additional tasks were incidental to their installation, and not a basis to distinguish the work. The use of different equipment is also insufficient to defeat exclusivity.

***Port Jefferson Union FSD***, 35 PERB ¶ 3041 (2002)**—** The Board affirmed an ALJ decision finding that the district violated § 209-a.1(d) of the Act by subcontracting educational testing to a private psychiatrist. The Board determined that the work performed is the initial evaluation of students to determine whether they are eligible for an individual assistance plan. The unit members had performed this work, except when some were performed not at the district's direction. Those instances, since they were not at the district's direction, do not breach exclusivity. Other instances were too inconsequential to affect exclusivity. Discernible boundary and core component analysis not needed since the work did not create a sufficient inroad in the exclusive work that was performed.

***Cold Spring Harbor CSD,*** 36 PERB ¶ 3018 (2003)—The Board reversed an ALJ decision and held that the district did not violate 209-a.1(d) of the Act by unilaterally assigning the unsupervised teaching of students to two teaching assistants who are non-unit members. The Board found that the charge was timely, since the employee organization must have knowledge of the challenged act, not merely some members. The Notice of Claim was also timely filed, since it was filed by the union within 90 days of learning that the work had been transferred. The Board found that the teaching assistants were not assigned the work, but that there was a misunderstanding of the assignment. The evidence does not compel a finding that the district specifically, or by acquiescence, assigned unit work to the teaching assistants.

## Duty of Fair Representation

***Organization of Staff Analysts (Smith),*** 35 PERB ¶ 3033 **(**2002)**—**The Board affirmed a decision of an ALJ dismissing a charge alleging a breach of the DFR be found from OAS' failing to respond to Smith's letter. The Board found that the facts showed that the union in fact responded, and reiterated that the duty to respond is analyzed in light of the reasonableness of the employee's request, and the manner in which the union responded. Finding the union's response to be reasonable, the Board could not find that the union acted in an arbitrary, discriminatory or bad faith manner.

***New Rochelle Federation of United School Employees, Local 280 (Sobie),*** 35 PERB ¶ 3035 (2002)—The Board affirmed an ALJ decision dismissing a charge alleging that the union violated the DFR when it refused to proceed to arbitration regarding entitlement to a service increment based upon its mistaken interpretation of the CBA. There was no evidence of animus, and the proposed interpretation of the CBA clause was not the only possible interpretation.

***United Federation of Teachers, Local 2 (Oparaji),*** 35 PERB ¶ 3042 (2002)**—**The Board affirmed the decision of an ALJ dismissing a charge at the close of the charging party's case alleging that the UFT breached the duty of fair representation by not filing certain grievances on his behalf, and not continuing to further process other grievances. The Board stated that when a credibility determination exists due to conflicting testimony in the charging party's case in chief, it is appropriate to make a credibility determination. The ALJ found that the UFT representative, called as a witness in the charging party's case in chief, did not act in an arbitrary manner, and did not receive the grievances that Oparaji alleged were sent to him. Since the UFT did not act in an arbitrary, discriminatory or bad faith manner, the charge was dismissed.

***CSEA, Local 100* (*Paganini),*** 36 PERB ¶ 3006 (2003)—The Board affirmed an ALJ decision which dismissed a charge alleging that the union violated § 209-a.2 (c) of the Act by failing to file a grievance on his behalf concerning the city's failure to grant him time off. CSEA investigated his claim that he had been allowed such time off in the past, and found it to be unsupported. The Board limited its review to the record, rejecting Paganini's attempt to present evidence to the Board which was not in the record below. The Board stated that the CSEA undertook a good faith review of the grievance and that its decision was not arbitrary, discriminatory or made in bad faith. A union does not have the duty to process every grievance as long as it investigates it and informs the grievant of its determination.

***United Federation of Teachers (Fearon)***, 36 PERB ¶ 3009 (2003)—The Board affirmed an ALJ decision which dismissed a charge alleging that the union violated § 209-a.2 (c) of the Act by failing to represent her at Step 1 of the grievance process and by not responding to her requests for representation in a Step 2 grievance. The Board reiterates that a union has a wide range of discretion in deciding whether to pursue a grievance, and it was Fearon's action which caused the confusion which led the UFT to not pursue her grievance.

***United Federation of Teachers* (*Siegel*),** 36 PERB ¶ 3019 (2003)—The Board affirmed an ALJ decision which dismissed a charge alleging that the union violated § 209-a.2 (c) of the Act by denying her request to process her grievance to arbitration, did not properly process her internal union appeal of that denial, and renounced its settlement of her appeal. The Board stated that the record is clear the UFT investigated Siegel's complaint, and that the UFT entered into an agreement with the employer to resolve a matter that Siegel had brought to its attention. The manner in which issue was resolved was not arbitrary, discriminatory or taken in bad faith. The UFT violate its duty of fair representation by the way it processed her grievance, or in its consideration of the merits of her grievance.[6]

***Utica Teachers Assoc. (Dietz)***, 36 PERB ¶ 3021 (2003)—The Board affirmed an ALJ decision which dismissed a charge alleging that the union violated § 209-a.2 (c) of the Act by failing to consult with Dietz over the terms of a disciplinary settlement, thereby permitting certain counseling memoranda to be placed in his file without his knowledge. Dietz had contacted the union to discuss the matter, and he was advised that certain letters could not be challenged. The union nevertheless contacted the district and reached an agreement to modify the memoranda and it was placed in Dietz's file without further discussion with him. The Board reaffirmed its prior holdings that a union may settle a grievance without an employee's participation as long as it is not done in manner that violates the Act.

## Practice and Procedure

***District Council 37, AFSCME (Ziegler),*** 36 PERB ¶ 3012 (2003)—The Board denied exceptions on procedural grounds which were not timely served on another party. The Board has consistently held that timely service is a component of timely filing.

***Transport Workers Union, Local 100 (Brathwaite)***, 36 PERB ¶ 3010 (2003)—The Board denied exceptions on procedural grounds which were not timely served on another party. The Board has consistently held that timely service is a component of timely filing.

***Transport Workers Union, Local 100 (Abraham***), 36 PERB ¶ 3008 (2003)—The Board reversed the ALJ as to the timeliness defense, but would have otherwise affirmed on the merits. In a duty of fair representation

case, the period of limitations runs from the date the union performed or failed to perform the complained action. A party may file a charge within four months of the date the party knew or should have known that the request had not been granted. Abraham should have known that his hearing was not being adjourned more than four months prior to the filing of this charge. His ignorance of internal rules regarding adjournment requests does not toll the limitations period. Additionally, the TWU's actions do not evidence any animosity, discrimination or bad faith.

***State of New York (Unified Court System),*** 35 PERB ¶ 3032 (2002)—The Board denied motion for interlocutory leave to appeal the granting of a motion to intervene and denial of a motion to recuse. The Board stated that no extraordinary circumstances or severe prejudice were present to invoke its jurisdiction. The grant of the motion to intervene can be sufficiently reviewed at the conclusion of the proceeding. The Board also denied the appeal regarding the motion to recuse. The matter was assigned to another judge for hearing, which cured any purported prejudice by the conference ALJ. Any concern can also be addressed at the conclusion of the proceeding. The Board stated also that statements made in settlement conferences are made with a view toward resolving matters, and such statements are inadmissible in hearings of such cases. The Board further stated that perhaps the charging party would have been better served by the prosecution of the charge rather than the making of interlocutory appeals which fall far short of the standard to review such decisions.

***Organization of Staff Analysts (Smith),*** 35 PERB ¶ 3046 (2002)—The Board denied a motion for reconsideration since the motion was not based upon newly discovered evidence. Arguments that the decision is incorrect are properly addressed to a court reviewing the decision.

***County of Nassau,*** 35 PERB ¶ 3040 (2002)—The Board found that the county complied with section 203.6 of the Rules governing the termination of a local PERB. The county had adopted an ordinance repealing an earlier ordinance establishing the local PERB, which was approved, posted, and published. The Board therefore rescinded its order which approved the procedures of the local board.

***Town/City of Poughkeepsie Water Treatment Facility,*** 35 PERB ¶ 3037 (2003)—The Board dismissed exceptions which were not timely served on all parties. The Board states that while in the past it did so at the urging of one of the parties, Board stated filing requirements with respect to service of exceptions on all affected parties at time they are filed with the Board should not be dependent upon the urging of one of the parties. Defect in service cannot be cured by failure to object or respond.

## Endnotes

1. 20 PERB ¶ 3050 (1987).
2. 26 PERB ¶ 3073 (1993).
3. 32 PERB ¶ 001.
4. 30 PERB ¶ 3072 (1997) (subsequent history omitted).
5. 12 PERB ¶ 3010 (1979).
6. 338 NLRB No. 90, 171 LRRM 1217 (11/22/02).

**Philip L. Maier is the Regional Director for the New York City office of the New York State Public Employment Relations Board. He also serves as Administrative Judge and Chief Regional Mediator for the agency. He is a graduate of Vermont Law School.**

# ETHICS MATTERS
# Recent Developments in Surreptitious Tape Recordings

By John Gaal

A recent decision from New York State Supreme Court for Kings County warrants reviewing the ethical rules applicable to counsel's involvement in surreptitious tape recordings in employment cases.

Historically, a lawyer's secret tape recording of conversations was considered unethical, even if otherwise lawful. For example, in New York State Bar Association Opinion 328 (1974), the Committee on Professional Ethics held that it was unethical for a lawyer to personally tape record conversations without the consent of all parties to the conversation, even if recording was lawful without that consent. Similarly, the ABA Committee on Ethics and Professionalism, in Formal Opinion 337 (1974), held that it was unethical for a lawyer to secretly record conversations. And a short time later, in Informal Opinion 1320 (1975), the Committee went further and held that it was unethical for a lawyer to suggest that his or her client engage in secret, although otherwise lawful, recordings. This prohibition on secret lawyer recordings was not universally accepted, and a number of ethics opinions held that, so long as legal, this conduct was not unethical.[1]

More recently, the ABA reevaluated and reversed its position. In Formal Opinion 01-422 (2001), the Committee on Ethics and Professional Responsibility held that surreptitious recording by a lawyer, where otherwise lawful and if not accompanied by false denials of such recording, is not unethical. To date, the New York State Bar Association has not revisited this issue and NYSBA Opinion 328 remains its formal position.

Presumably in those jurisdictions in which a lawyer's secret recording of conversations is not unethical, it similarly is not unethical for that lawyer to advise his or her client on such activities. This would include suggesting to the client that secret recordings be made. However, in those jurisdictions, such as New York, where the lawyer is not permitted to engage in this conduct directly (at least according to the NYSBA Committee on Professional Ethics), the lawyer's counseling of a client may be more constrained. In NYSBA Opinion 515, the Committee on Professional Ethics opined that, despite the *per se* rule of ABA Opinion 337, it is permissible for a lawyer to counsel his or her client on the legality of secret recordings to be undertaken by that client. Although the NYSBA Opinion is not entirely clear on this point, it seems to sanction only advising a client on this subject if it is raised in the first instance by the client. The Opinion implicitly suggests that it might not be appropriate for a lawyer, in the first instance, to raise the issue of secret recordings with his or her client.

The latest development in this area comes from a decision issued by the Hon. Herbert Kramer of the New York State Supreme Court for Kings County. *Mena v. Key Food Stores Co-Operative, Inc.*[2] involved an employment discrimination claim brought against Key Food Stores. In the course of this race case it became known that the plaintiff had secretly tape recorded a number of telephone and in-person conversations between her and other Key employees, which recordings included a number of extremely damaging racial remarks made by Key managers. It also became known that the plaintiff recorded these conversations with the knowledge of and assistance from her lawyer. The defendants, based on these surreptitious recordings, moved to suppress the contents of the tapes and to disqualify plaintiff's counsel.

*"Presumably in those jurisdictions in which a lawyer's secret recording of conversations is not unethical, it similarly is not unethical for that lawyer to advise his or her client on such activities."*

Judge Kramer denied the defense motion. His decision begins with recognition that the ethical standards of conduct contained in the Model Code in New York are really just that—ethical standards created by the profession for the purpose of self-policing. They do not have the force of law and, as a result, a violation will not necessarily have a corresponding consequence in the context of ongoing litigation. After reviewing the history of the profession's treatment of the issue of surreptitious recordings, as outlined above, the Court concluded that the plaintiff's attorney's assistance to his client in accomplishing the recordings provided no basis for either the suppression of the evidence or the disqualification of counsel. Although it is not explicitly addressed, it appears that the Court would have reached this result regardless of whether resort to secret recordings was raised first by the client or instigated by the lawyer. The Court did, however, at least leave the door ajar, slightly, for the possibility that if the lawyer had instigated the secret recordings at a time when the

lawyer knew the individual being recorded was represented by a lawyer, there *might* be an ethical violation which presumably could lead to disqualification. Such a result would be based upon DR7-104(A), which prohibits a lawyer from communicating with a represented party on a matter related to the representation, and DR1-102(A)(2), which prohibits a lawyer from circumventing a Disciplinary Rule through the actions of another. But even then, the Court indicated, such a violation would not provide a basis for suppressing the tape evidence.

In light of this decision and the recent ABA Formal Opinion 01-422, it appears that it is permissible for a lawyer to advise a client with respect to secretly recording conversations to be used as evidence in an employment discrimination case. Moreover, while there might still be some issue as to whether the lawyer's instigation of such recordings is ethical, the resulting evidence will likely remain admissible in the underlying proceeding. Thus *Mena* affirms the existence of a potent weapon in the plaintiff's arsenal and the need for defense counsel to make sure its clients are aware of this possibility.

### Endnotes

1. *See, e.g.*, Maine Professional Ethics Commission of the Bd. Of Overseers of the Bar Op. 168 (1999); Utah State Bar Ethics Advisory Op. Committee No. 96-04 (1996); Oklahoma Bar Ass'n Op. 307 (1994). Among those rejecting this *per se* rule was the New York County Bar Association, in New York County Lawyers' Ass'n Committee on Professional Ethics Op. 696 (1993).
2. 2003 N.Y. Misc. LEXIS 231 (March 20, 2003).

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Thank you for your cooperation.

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