Long Island Chapter

Labor and Employment Relations Association

Newsletter

SHAPING THE WORKPLACE OF THE *FUTURE*

LERA

bug

December 2009

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PRESIDENT'S PERSPECTIVE:

Beverly E. Harrison, J.D., President

I am pleased to announce that Hezekiah Brown, a founding member of our chapter will MC our 30th anniversary celebration on December 2, where two major figures in the field of labor and employment relations will join us. The recipient of the prestigious Robert W. MacGregor Labor Relations and Community Service Award is Martin F. Scheinman, Esq., who has arbitrated/mediated over 7,500 matters involving such areas as employment contracts, commercial transactions and ERISA claims, and compensation, severance, racial, ethnic, and sexual discrimination claims. This award recognizes professionals in the field of labor relations who have given unstintingly of their time through their community service activities. Marty, a long standing member of our chapter, recently established the Sheinman Institute at Cornell University to help educate the next generation of neutrals. (See photo below).

Our keynote speaker at the celebration will be the scion of the well-known (in arbitration circles) Gershenfeld family. (See photo and bio in next column). Joel, president of our national organization, is the Dean of the School of Labor and Employment Relations at the Univ. of Illinois (one of the alma maters of our president and editor).

The party is at the Nassau Bar Association. Join us as we celebrate this milestone in our chapter's history.

Upcoming Chapter Meetings

Wed., Dec. 2, 2009
30th Anniversary Celebration
Nassau County Bar Assoc.
Mineola

Wed., Mar 10, 2010
Black Forest Brew Haus
Farmingdale

Fri., May 7, 2010,
Annual Spring Conference
New York Institute of Technology

Wed., June 10, 2010
Nassau County Bar Assoc.
Mineola

Wed., Dec. 7, 2010
Nassau County Bar Assoc.
Mineola

Joel Cutcher-Gershenfeld

Dean, School of Labor and Employment Relations

University of Illinois

Joel Cutcher-Gershenfeld is Professor and Dean of the School of Labor and Employment Relations at the University of Illinois, which provides leadership on labor and employment matters at state, national and international levels by advancing theory, policy and practice. Joel is an award winning author who recently compiled the annotated edition of the Douglas McGregor's 1960 man-

Continued on Page 4

Taking Back the Worker's Law: How to Fight the Assault on Labor Rights (Ithaca, NY: Cornell University Press, 2006), Ellen Dannin

Reviewed by Dr. Richard E. Dibble, New York Institute of Technology

The often maligned NLRB has a critical role to play in supporting and protecting worker's rights and unions. In ***Taking Back the Worker's Law: How to Fight the Assault on Labor Rights*** (Ithaca, NY: Cornell University Press, 2006), Ellen Dannin, a law professor at Penn State and formerly an NLRB trial attorney, demonstrates how this can be done.

Dannin explains that judges have emphasized common law concepts of property rights, employment-at-will and the master-servant relationship; this, along with their lack of familiarity with the realities of the workplace, has led to remedies to NLRA violations that erode the protections promised by that law. In short ". . . 'judicial interpretations' have 'amended' the law to put a heavy thumb on the employer's side of the scale." (p. 5)

Not surprisingly, unions have learned to avoid the NLRB whenever possible and have sometimes denigrated it publicity. This is exactly the wrong approach according to Dannin. The NLRA uniquely embodies values that support worker's rights and the NLRB is the single institution that is empowered to protect those rights. Her solution is for unions to pursue a creative and aggressive litigation strategy that is designed "to persuade the NLRB and judges to impose remedies that promote NLRA policies." (p. 53)

She demonstrates how this can be done by focusing on such key issues as bad faith bargaining, bargaining to impasse, striker replacements, right to association, access to property, and mutual aid. Dannin offers explicit recommendations for handling job property issues, on how cases should be structured and argued, how to develop the evidentiary record, and how to frame issues in a way that it makes it easier for the Board and the courts to adopt remedies favorable to workers and consistent with the NLRA. She cites successful and unsuccessful examples to illustrate her points. She suggests underutilized approaches, such as use of contempt charges; explains the importance of the wording of cease and desist orders; provides advice to unions in how to handle the signing of authorization cards, conduct of election campaigns, and document employer motive so that future charges to the NLRB will be stronger; and argues that unions need to be more aggressive in identifying ULPs and filing charges, and in publicizing charges and Board decisions, and, no surprise, supporting a better funded and strong NLRB.

Dannin's discussion of the values articulated in the NLRA is refreshing and enlightening, especially since these values have so often been neglected; her analysis of how enforcement of the law has been weakened over recent decades is a familiar story, but effectively told. The author's recommendation of a litigation strategy and guidance on specific tactics is instructive for both union leaders and labor attorneys. While the litigation strategy proposed by Dannin is essential to taking back the worker's law it is only a part of "a comprehensive campaign to replace our Society's values with those of the NLRA" (p. 79) and that is the more formidable challenge.

President Beverly Harrison presenting Certificates of Appreciation to Thomas Lilly,Jr. (left) and Thomas B. Wassel for their excellent presentation on Ricci v. DeStefano,the New Haven firefighters case, at our September 14 meeting.

Lessons of Ricci v. DeStefano—How to Navigate Between a Rock and a Hard Place

by Thomas B. Wassel, Esq., Cullen and Dykman LLP

At our chapter meeting of September 14, the following was one of the presentations made for CLE credit for our members.

Background of Title VII

There are two types of Title VII violations:

1. Disparate Treatment
2. Disparate Impact

Disparate Treatment occurs when an employer treats a particular person less favorably than others because of a protected trait. In this type of situation, it requires establishment of a discriminatory intent or motive.

Disparate Impact was not originally contained in Title VII. It was enunciated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and then codified in the Civil Rights Act of 1991. It affects facially neutral practices that produce a disparate impact on the basis of a protected trait. The touchstone is "lack of business necessity." If an employment practice which operates to exclude minorities cannot be shown to be related to job performance, the practice is prohibited. On the other hand, if the employer shows that the practice is job-related, then the burden shifts to the plaintiff to show a legitimate alternative that would have resulted in less discrimination.

Facts in *Ricci v. DeStefano*

The City of New Haven, Connecticut wanted to rely on objective examinations to find qualified candidates for promotion in its fire department. The City Civil Service Board ("CSB") required promotion by "rule of three" based on ranked lists of applicants who pass a test. There was a collective bargaining agreement between the city and the firefighters' union which required applicants for promotion to lieutenant and captain positions to be screened using written (60 per cent weighting) and oral (40 per cent weighting) exams.

New Haven hired IOS, an Illinois company specializing in test design, to prepare an exam. IOS did research, which included job analysis, ride-alongs, and other due diligence to design the test. In addition, the city chose test assessors from outside the state, because of previous testing problems. The city also refused to show the test to current supervisors for fear of security lapses. On the lieutenant examination, the pass rates were: 25 of 43 whites; 6 of 18 blacks; and 3 of 15 Hispanics. The top 10 candidates were eligible for promotion, all were white.

Similarly, on the Captain examination the pass rates were: 16 of 25 whites; 3 of 8 blacks; and 3 of 8 Hispanics. Nine candidates became eligible for promotion, 7 whites and 2 Hispanics. The City's legal counsel advised that statistical evidence of disparate impact, standing alone, could constitute a serious claim of racial discrimination.

The City conducted hearings. Numerous parties testified both for and against certification of the results, differing on whether the results would open the City to a disparate impact claim. There was political pressure brought to bear to invalidate the exams. (The concurring opinion and dissenting opinion go into great detail concerning the impact of such pressure; the majority opinion does not focus on it.)

The Union asked the CSB to perform a validation study on the exam to determine whether it was job-related. The City chose not to. Ultimately, a motion to certify the results was denied on a 2-2 vote.

Supreme Court Decision

The Supreme Court recognizes a tension in Title 7: the City's action, designed to avoid a disparate impact claim, was clearly disparate treatment, i.e. intentional discrimination (it was based on the racial results of the tests), and therefore was illegal unless a defense was available. The Supreme Court rejects the argument that avoiding unintentional discrimination can never justify intentional discrimination.

On the other hand, the Supreme Court rejects the notion that a mere good faith effort to comply with disparate impact analysis excuses disparate treatment. Instead, the Supreme Court holds that disparate treatment is impermissible under Title VII "unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."

The Employer may make affirmative efforts to be sure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. Once the process has been established and employers have made clear their selection criteria, they may not invalidate the test results (unless they meet the "strong basis in evidence" test.) In this case, while there was a *prima facie* case of disparate impact,there was no "strong basis in evidence".

Lessons of *Ricci* for employers

It is essential to do the prep work and test vetting *before* committing to a test. The opportunity to modify or even toss out a testing methodology is before, not after, the test is given.

The testing methodology should test actual job-related knowledge and skills. Questions that are more in the nature of general knowledge or intelligence measuring, not directly related to work needs, should be avoided.

Continued on Page 4

Continued from Page 3

If possible, consult with the Equal Employment Opportunity Commission concerning the test. Advanced "blessing" of the testing criteria may help insulate the Employer from any later claims of disparate impact. It is a good idea to get the input of the community (if at all) during the prep process. Once the test is taken, "community input" on whether the test is valid smacks of political pressure and is more likely to taint any final decision. Once the test is finalized and given, review the results. Unless there is a statistically disparate result, the grades should be certified.

If there is a *prima facie* disparate result, engage professional test evaluators to validate the test. If the evaluators conclude that the test was job related and not discriminatory on its face, the results should be accepted. If the contrary conclusion is reached, this may constitute a "strong basis in evidence" to toss out the results.

Continued from Page1

agement classic, *The Human Side of Enterprise* (McGraw-Hill, 2006). He is co-author of *Valuable Disconnects in Organizational Learning Systems* (Oxford University Press, 2005), *Lean Enterprise Value* (Palgrave, 2002), *Knowledge-Driven Work* (Oxford University Press, 1998), *Strategic Negotiations* (Harvard Business School Press, 1994). Joel is co-author or co-editor of three additional books, as well as over eighty-five articles on new work systems, labor-management relations, negotiations, conflict resolution, organizational learning and change, public policy, economic development, and engineering systems. He is the 2009 President of the Labor and Employment Relations Association (LERA). Prior to coming to the University of Illinois, Joel served as a Senior Research Scientist with a joint appointment in MIT's Sloan School of Management and MIT's Engineering Systems Division, as well as an Associate Professor at Michigan State University. He holds a Ph.D. in Industrial Relations from MIT and a B.S. in Industrial and Labor Relations from Cornell University.

ANNOUNCEMENTS, NOTICES

NEW MEMBERS OF OUR CHAPTER

Peter A. Korn, Arbitrator
New Rochelle, NY 10804

Carol M. Hoffman, Attorney
Syosset, NY 11791

Chumi Diamond, Clerk of the Nassau County Legislature
Mineola, NY 11578

Gigo George
Elmont, NY 11003

Howard M. Wexler, Attorney
Garden City, NY 11530

2010 MEMBERSHIP DUES ARE DUE NOW

Checks for $40.00 should be made payable to LI LERA and should be mailed to:

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The Long Island LERA Newsletter is a quarterly publication of the Long Island Chapter of the Labor and Employment Relations Association.

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