

Long Island Chapter

Labor and Employment Relations Association

Newsletter

SHAPING THE WORKPLACE OF THE *FUTURE*



bug

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PRESIDENT'S PERSPECTIVE:

Richardson v. Commission on Human Rights: Choosing Between Arbitration and the EEOC

Regular readers of this Newsletter and attendees at Long Island LERA events know that we have given a great deal of attention to the interplay between contract arbitration and individual employment law rights. In fact, at our 2003 Spring Conference we presented a panel discussion entitled "Blurred Lines," which was devoted to that interplay.



Thomas J. Lilly, Jr.

On July 7, 2008, the Second Circuit Court of Appeals tried to add a bit of clarity to that blurry area of the law in a case called *Richardson v. Commission on Human Rights*. The *Richardson* case does add clarity for those within the Second Circuit, such as us Long Islanders. *Richardson*, however, is contrary to the view of the United States Equal Employment Opportunity Commission and to a decision from another federal appeals court. Nationally, therefore, the situation remains blurry.

In a unionized workplace, the same conduct may constitute a violation of the applicable collective bargaining agreement and an employee's individual statutory rights. For example, nearly every collective bargaining agreement forbids the employer from discharging an employee without just cause. If the employer discharges an employee based on race, the discharge violates both the collective bargaining agreement and the Civil Rights Act.

For the employee whose rights are violated, there are important advantages and disadvantages to both the collective bargaining grievance system and the individual rights statutory system. Under the grievance sys-

Upcoming Chapter Meetings

Please Add These To Your Calendar

Tues, Dec. 16, 2008, Nassau

Co. Bar Assn. Building-Mineola

Wed., Mar. 11, 2009

Black Forest Brew Haus-Farmingdale

Fri., May 8, 2009, Annual Conf.-NYIT

tem, the employee has the immediate assistance of her union representative. If the grievance is not settled, the union will bear the expense of any arbitration on her behalf. The arbitration will probably be concluded in a matter of months, rather than years, and the employer will bear the burden of proving just cause for the discharge. On the other hand, if she prevails in arbitration, her recovery will be limited to back pay minus interim earnings. Also, her union will have ultimate control over the arbitration strategy and any possible settlement.

Under the individual rights statutory system, the first stop for our hypothetical discrimination victim will be the EEOC and the relevant state agency with concurrent jurisdiction. The EEOC will invite the parties to mediate. If there is such a mediation, the employee will be unrepresented unless she retains her own counsel. Assuming there is no mediated settlement, she will eventually receive a right to sue letter from the EEOC. She may then begin the litigation process, with its extensive and expensive discovery and procedural system. If her claim survives the usual motion practice, she will eventually have her day in court. If she prevails at trial, her potential recovery is much greater than it would be in labor arbitration.

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**NLRB Panel Members
and Moderator:
L to R:
Clifford Chalet
Daniel Silverman
Richard Roth**

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Generally, a discrimination victim will be well advised to pursue her rights under both the collective bargaining agreement and the Civil Rights Act. The two parallel procedures then have the potential to influence each other in countless ways. For example, an employer would ordinarily be reluctant to settle the employee’s union grievance without also getting a general release that would cover the Civil Rights Act claim.

That brings us the *Richardson* case. In *Richardson*, the employer and the union agreed to a contract clause stating that claims of unlawful discrimination would not be grieved or arbitrated if the employee filed a civil rights claim with the relevant government agencies. Ms. Richardson filed such a claim. Her union then refused to arbitrate her wrongful discharge grievance. Ms. Richardson then sued both her union and her employer, alleging that by refusing to arbitrate her claim they had discriminated against her in retaliation for pursuing her rights under the Civil Rights Act. The EEOC agreed with Ms. Richardson. The Second Circuit Court of Appeals did not.

Writing for the court, Judge Walker stated that there are limits on what a union may agree to in collective bargaining, and that Ms. Richardson’ union could not have prospectively waived her substantive rights under the Civil Rights Act. Here, however, the union had merely forced Ms. Richardson to elect between either arbitrating her grievance or filing a civil rights charge. In the court’s opinion, it makes sense that the employer might not wish to arbitrate and litigate over the same discrimination claim, and it makes sense that the union might also wish to “deploy its scarce resources selectively.”

Because the EEOC and at least one other federal appeals court disagree with the Second Circuit, this issue will probably remain unsettled for some time to come. For now, however, employers here in the Second Circuit would be well advised to propose election of remedies provisions for their collective bargaining agreements. Whether unions should be anxious to agree to such provisions is a more complex question.

This is an unsettled area of law. Long Island LERA is here to help keep you abreast of changes as they occur.



**L.I. LERA Chapter
Scholarship Winner
Joan C.
Sommermeyer**

**L.I. LERA Chapter
Scholarship Winner Tamika Williams,
SUNY Old Westbury,
with chapter president Thomas Lilly, Jr
and scholarship committee chair
Richard Roth**



RING CONFERENCE

Spring Conference Features Panel on The Legacy of the Bush NLRB

by Amanda Barker, UPSEU, Chapter 2nd V.P.

Attendees at the LILERA Annual Spring Conference were treated to a panel discussion on the lasting effects of the National Labor Relations Board under the Bush Administration.

Richard Roth, the panel moderator, began the morning discussion with some background about the current Board. There are only two sitting members on the Board. One is Chairman Peter Schaumber (a Republican appointee of President Bush) and Wilma Liebman, (a Democrat appointed by President Clinton.) Mr. Roth was of the opinion that the Board's current shift to the right was begun in the Reagan years and had become even more entrenched during the current Bush Administration.

Panelist Daniel Silverman, a former Director of NLRB Region 29, called today's National Labor Relations Board "an agency in deep crisis." Mr. Silverman cited the collapse of the board caseload from 40,000 cases 10 years ago to a little over half that in 2007. Of the unfair labor practice cases brought before the board, most are deferred to arbitration, and the board utilizes a liberal standard as far as accepting those arbitration awards with little or no oversight.

Additionally, of the thousands of duty of fair representation cases brought before the board each year, a large majority are dismissed as being without merit. Today, there are only about three or four unfair labor practice hearings completed in each region of the country. According to Mr. Silverman's assessment, these statistics lead to the very real conclusion that the current board has virtually "eliminated any supervision of labor relations during the term of the collective bargaining agreement" in this country.

A summary of recent major board decisions regarding the definition of a supervisor and the ability of employees to organize with card checks also emphasized the fact that the NLRB has been leaning toward protecting employers. According to Mr. Silverman, the litmus test which the board seems to be using to decide cases is "What is good for the employer?" The only time he said the board seems to tilt toward employees these days is when it feels unions are encroaching on employee rights.

Thomas Lilly, Jr., union attorney and current President of LILERA, echoed many of Mr. Silverman's sentiments as the next panelist. He went a step further to emphasize a polarized board when he highlighted the plight of one Republican board member originally appointed by President Bush who was not reappointed based on the fact

that he took the side of graduate teaching assistants when he voted to allow them to join unions. This dismissal would have a chilling effect on other board members according to Mr. Lilly, as they now took notice of the ramification of "voting the wrong way." Looking at a scorecard of the recent cases, labor lost in all, with the Democratic minority dissenting.

Mr. Lilly also wondered where the Board's supposed expertise is in applying the statute to cases in what should be a neutral, or non-partisan, manner much the way any judge would, or should. He also used Board Member Liebman's own characterization of the current NLRB in her recent testimony before a Senate Committee when she saw the board not so much as "see-sawing" depending on its make-up, but "sea-changing" under the current board as it overturns long-standing labor rules promulgated over the years.

The question we must ask, according to Mr. Lilly, was whether or not people appointed to agencies "believe in the fundamental values of the act that created the agency." Implicit in the answer, of course, is the assumption that would allow them to put aside partisan ideologies and apply the law they are charged with enforcing in the spirit in which it was intended. By the results of cases decided under the Bush NLRB, Mr. Lilly opined, that the answer to the above question for them would be "no."

Management attorney, Clifford Chalet, was the next panelist to speak and he was charged with the task of defending the board's decisions as mere interpretations of the Act and not necessarily based on ideological leanings. In preparation for the panel, Mr. Chalet told the audience that he went to the NLRB website to scan recent press releases to see if there has been a pattern that can be viewed as an anti-labor legacy. He went back to June of 2004 and the IBM case (ruling non-union employees did not have Weingarten rights) as the moment when the current board began to overrule many of the decisions of its predecessors. The four years preceding that time he pointed out, contained carry-overs from the Clinton era.

While seemingly anti-labor on the surface, Mr. Chalet believed there are ways of looking at the decisions in a neutral vein as mere interpretations of the act rather than as a partisan trend towards infringing on labor. Using the IBM decision as an example, Mr. Chalet wondered whether unions should have taken that decision to limit non-union employee rights in disciplinary

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situations as a catalyst to go out and organize. He also pointed to the Dana Corp. decision that essentially allows for a 45-day cooling off period after an employer voluntarily recognizes a union as a means to protect employees from "sweetheart unions" that might be so management friendly as to be able to secure voluntary recognition from the employer to the detriment of employees.

For there to be a legacy Mr. Chalet offered, the observer would also have to answer the question of whether these cases would have a lasting impact. As the board changes, so does the law. This could be said to be true of any agency charged with enforcing the law. He also wondered if the country should be more worried about a legacy arising from the current U.S. Supreme Court with lifetime appointees rather than arbiters with five year term limits.

In all, it was a spirited discussion but depending on which side of the theoretical aisle you sat on, you could at least be happy that the sun was out and that it was Friday.

LI LERA WEBSITE www.lilera.org

With the technical assistance provided by Executive Board member Tom Wassel (and some help from his firm, Cullen and Dykman) the following things are available for your perusal:

- Benefits of joining our chapter
- Executive Officer Roster
- National LERA constitution
- Dates and locations of upcoming meetings
- A membership application
- The last three newsletters
- Links to LERA national and other websites

Please take a look and let us know if there are any suggestions that will make the site more useful to those who consult it.

ANNOUNCEMENTS, NOTICES

If you have an announcement or job posting that you would like to have published, send it for consideration to our editor at:

jerryarb@optonline.net

CORRECTIONS FROM MEMBERSHIP DIRECTORY

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