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Supreme Court Evenly Split on Public Sector Agency Fees

By Matthew Bodie

After the Supreme Court left its public-sector union "agency shop" precedents intact in its 2014 *Harris v. Quinn* decision, it seemed that the underlying constitutional structure might remain undisturbed for some time. By taking certiorari from the Ninth Circuit's fast-tracked opinion in *Friedrichs v. California Teachers Association*, however, the Court signaled that it had no plans to take a breather. The oral argument in *Friedrichs* reflected a Court that had considered most of the basic issues and was prepared to consider the doctrinal, economic, and practical ramifications of prohibiting mandatory agency fees under the First Amendment.

The divide on the Court was fairly straightforward: the Justices most skeptical of agency fees focused on the relationship between the employees and the union, while the Justices who evinced sympathy for fees looked to the relationship between the employees and the state employer. For the agency-fee skeptics, the core problem is that the government requires individuals to provide funding to an outside organization on matters of public concern. The issues that come up in collective bargaining for public school teachers matter to the public. As Justice Scalia stated: "The problem is that everything that is collectively bargained with the government is within the political sphere, almost by definition." In one exchange, Chief Justice Roberts asked the California solicitor general for an example of a bargaining issue that was not a public policy question. When the general answered "mileage reimbursement rates," the Chief Justice pointed out that the rates were public expenditures and thereby "always a public policy issue." If it is, in fact, impossible to differentiate collective-bargaining expenses from funding for political speech or other First Amendment activities, then the framework established in *Abood v. Detroit Board of Education* would seem to collapse.

Petitioners and several of the Justices also focused on the compulsion to subsidize speech as particularly problematic. Contrasting the agency-fee situation with a state employer's regulation of public employee speech,

continued on page 10

The Gig Economy and the U.S. Labor System

By Nicholas Murray and Taylor Ball

An increasing number of companies are using web- and app- based programs to expand the role of independent contractors in the modern workforce. Studies indicate approximately 600,000 workers, or 0.4 percent of U.S. employment, are working with an online intermediary in the new gig economy. This number is indicative of a larger trend toward freelancing. A 2014 study found that one in three American workers, or 53 million people, are freelancing. New America cites estimates that nearly half of the 145 million employed Americans will work in similar conditions in ten years. This growth of the gig economy—also known as the on-demand, or sharing economy—has created a challenge to of the United States' current two-tiered labor system.

In the U.S., there are generally two types of relationships for workers: (1) employees; and (2) independent contractors. The former designation is for employees who typically dedicate at least the majority of their workday to a single organization, often filling a discreet role. The latter designation applies to workers who perform their jobs with little supervision and offer their skills to the entire market, often dividing their working hours between several employers.

Courts and agencies employ several different tests to determine whether a worker is an employee or independent contractor. Under all of the tests, however, an important factor is the level of control exerted by the employer. In *Alexander v. FedEx Ground Package Sys., Inc.*, a group of FedEx drivers filed suit against the company, arguing FedEx misclassified them as independent contractors. The trial court ultimately held in the delivery company's favor, finding that the drivers were independent contractors as a matter of law. The Ninth Circuit, in August 2014, overturned that trial court's decision, finding that the drivers were in fact employees. Of particular importance to the court was the amount of control FedEx maintained over the drivers. Specifically, under FedEx's operating agreement, the company had broad authority to dictate the way drivers carried out their jobs. For example, the company expected the drivers to work certain hours. It also required drivers to follow FedEx's rules regarding uniforms, vehicle appearance, and safety standards.

App-based companies have become a recent focus in misclassification litigation. This notion of control is one of the key issues technology companies face today when engaging workers in the gig economy. In 2013, drivers filed lawsuits against Lyft and Uber in federal court in California. Each case is premised on the theory that the drivers were misclassified as independent contractors. The drivers point to aspects of control maintained by the companies, such as professional dress requirements and inspection requirements of drivers' personal cars—misclassified the drivers as independent contractors. Meanwhile, the companies claim that the drivers, work under minimal supervision, offer their skills to the entire market, and may work infrequent hours, often for multiple companies.

In *Cotter v. Lyft*, both parties asked the court to determine whether the drivers were employees as a matter of law. The court refused, stating that "[w]hether a worker is classified as an employee or an independent contractor has great consequences." Last month, Lyft agreed to settle the matter for $12.25 million, but the company has no plans to reclassify the drivers as employees.

In *O'Connor v. Uber Technologies*, the company faces a misclassification class action over tips. Late last year, the plaintiff's counsel asked the court for a bench trial on the issue of how Uber's drivers should be classified.

Some lawmakers and policy advisors believe that the traditional two-tiered labor system is too limited in the context of the gig economy and have proposed new models altogether for gig economy workers. For example, former Obama administration officials Seth Harris and Alan Krueger have teamed up to propose a new, third classification for gig economy workers. This new classification, they say, permits workers to take advantage of the relative flexibility of the independent contractor status—workers can more easily match their skills with market needs and choose how often to work and work for a variety of companies—while also providing workers the right to organize and take advantage of tax withholdings and certain civil rights protections enjoyed by employees. Their proposal does not include worker's compensation, unemployment insurance, and a minimum wage and instead presumes that such benefits could be ironed out in the collective bargaining process (the National Labor Relations Act excludes independent contractors from protection of the Act).

Similarly, the Seattle City Council recently enacted an ordinance permitting drivers for companies like Uber and Lyft to bargain collectively. Senator Mark Warner (D-VA) also has urged lawmakers to carefully consider a new classification, asking Congressional appropriators to fund the Bureau of Labor Statistics' contingent worker supplement. He also recently asked the U.S. Secretaries of Treasury, Commerce, and Labor to assess existing tax, census, and labor survey data to determine whether federal officials can generate better information about the size, scope, and growth in the gig economy.

As companies expand their operations through digital platforms the gig economy will continue to grow. What remains to be answered, however, is whether employers and employees will be able to work within the current binary labor system or whether legislators will move to a new model. ■

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Changes to Federal Discovery Rules May Complicate Disputes over Evidence in Employment Suits

By Raymond A. Wendell

On December 1, 2015, amendments to several of the Federal Rules of Civil Procedure took effect. The stated goal of the update is to promote speedy and efficient litigation, including during discovery. For labor and employment attorneys especially, it remains to be seen whether the result will be a more streamlined discovery process.

The Judicial Conference Committee on Rules of Practice and Procedure had worked on the new amendments since 2010. The Supreme Court adopted them on April 29, 2015. They apply to all cases brought after December 1, 2015, as well as to pending cases "insofar as just and practicable." The amendments encompass changes to a total of eleven different rules, but the significant changes made to Rules 26, 34, and 37 demonstrate that discovery reform was a major focus of the Committee.

The Committee amended Rule 34 to clarify the ways in which a party can respond and object to document requests. First, the amendments emphasize that objections must be stated with specificity. They also require parties to clarify whether responsive documents are being withheld on the basis of objections. Additionally, Rule 34 was amended to reflect the common practice of producing copies of documents rather than permitting inspection of records.

Rule 37 governs sanctions for breaches of discovery duties. It was amended to address the sanctions that are available against a party that has failed to take reasonable steps to preserve evidence stored electronically. Formerly, Rule 37 offered little guidance to courts considering punishments for such failures. The Committee Notes explain that the amendments seek to soften the harsh sanctions that courts were imposing in the absence of a clear directive from the Federal Rules. Under the new Rule, a court may presume that the evidence was unfavorable to the party that failed to preserve it only upon finding that the party destroyed the evidence intentionally. Otherwise, the court may only order whatever sanction is necessary to cure any prejudice against the opposing party.

But, the changes to Rule 26 are perhaps the most significant. First, Rule 26(d) was amended to allow parties to deliver requests for production of documents prior to the parties' Rule 26(f) conference, which are treated as having been served on the date of the conference. Second, for decades, discovery requests only had to be "reasonably calculated to lead to the discovery of admissible evidence." This standard is no more. The amendments to Rule 26 changed the formerly permissive standard for discoverable evidence to a flexible "proportional to the needs of the case" test. The new Rule 26 invokes six factors relevant to determining whether a party may obtain requested information through discovery.

Particularly interesting to labor and employment attorneys are the factors for determining whether a discovery request is "proportional to the needs of the case." Most of these factors were formerly listed in a different section of the same rule, 26(b)(2)(C), which gave courts discretion to limit otherwise allowable discovery requests if they determined that the burden outweighed the benefit. Seldom cited in their prior form, these factors now define the scope of discovery.

In determining whether evidence sought through discovery is "proportional to the needs of the case," parties and courts are to consider both the amount in controversy and the "importance of the issues at stake in the action." In many labor and employment cases, especially those involving individual employees, these two factors may cut in opposite directions. An employer may argue that discovery should be limited because the employee claims a relatively small amount of damages. The employee may counter that her claims also implicate broader societal issues, such as unlawful discrimination, therefore justifying more extensive discovery. But as many labor and employment attorneys know, the societal significance of a legal claim is often in the eye of the beholder.

The amendments to Rule 26 changed the formerly permissive standard for discoverable evidence to a flexible "proportional to the needs of the case" test.

Other factors also have special relevance in the labor and employment context. The parties' relative access to relevant information and their relative resources can be used by employees to push for more extensive discovery. Meanwhile, employers can point to another factor, the burden of responding to a discovery request in relation to its benefit, in an effort to minimize their discovery obligations. Thus, while the Committee Notes contemplate that the new standard will enable parties to resolve their discovery disputes without court intervention, the factors for consideration provide so much room for disagreement that they could potentially have the opposite effect: greater room for argument might lead to more time spent meeting and conferring and briefing motions to compel.

The recent amendments to the Federal Rules offer both management-side and employee-side labor and employment lawyers new strategies for navigating the discovery process. In particular, the factors listed in the new Rule 26 for determining the scope of discoverable evidence in any given case make way for creative legal arguments. As part of discovery, parties will have to analyze the financial and substantive stakes of the case, the parties' relative resources and access to evidence, and the burdens and benefits of each discovery request. In light of these conflicting factors and the flexibility of the standard for resolving them, labor and employment attorneys might question whether the new rules will actually have the desired effect of streamlining the discovery process. ■

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THE SECTION

By Wayne N. Outten

In my column for the winter issue, the focus was on our Section's great CLE meetings and conferences, including the Standing Committee Midwinter Meetings. During the past several months, Chair-Elect Gail Golman Holtzman and/or I attended all of those Midwinter Meetings. During those travels, Gail and I were consistently impressed by the people we encountered. So, this column is about the people who help make our Section as successful as it is in its programs and activities.

We have a long history of hard-working, dedicated and effective leaders, including a remarkable succession of Chairs. At a recent Section event, I had the pleasure of recognizing and thanking two Chairs from long ago—Bernard Ashe (1982-83) and Bernie King (1987-88—as well as our most recent Chairs—Joyce Margulies, Joel D'Alba and Stewart Manela—for their contributions. In addition to me, the current members of the Strategic Planning Committee (SPC) are Gail Golman Holtzman, Chair-Elect; Don Slesnick, Vice Chair; Joe Tilson, Vice Chair; and Joyce Margulies, Immediate Past Chair, all of whom have been working tirelessly on behalf of the Section. Our Section's future is in great hands.

Next, we have the Section Council, which consists of the five SPC members, the Secretary, the Secretary-Elect, three Delegates to the ABA House of Delegates, two Section Governance Liaisons, 12 Employer Members, 12 Union & Employee Members, and three Members-at-Large. Council Members contribute hundreds of hours each year to attending Council meetings and serving as liaisons to committees and task forces, plus other leadership activities. The commitment of time, energy, talent and judgment by these people is extraordinary.

The Section has 15 Standing Committees, 25 Administrative Committees and 5 Task Forces. Each Standing Committee holds a Midwinter Meeting in addition to other activities; the Administrative Committees run all Section-wide programs and activities; and the Task Forces undertake special short-term projects. Each of those committees and task forces is led by several co-chairs from relevant constituencies; some committees also have vice chairs, program chairs, administrative chairs and/or subcommittee co-chairs. These committees and task forces also have several liaisons from the Council. In total, about 300 Section members serve as leaders in our committees and task forces, and some members serve in multiple roles (e.g., serving as co-chair of both an Administrative Committee and a Standing Committee). The sheer volume of work performed by these members for the Section and its committees and task forces is amazing, to say nothing of the quality of the resulting programs and activities.

In addition, we recognize and appreciate our members who serve ably as liaisons between our Section and other entities in the ABA. Speaking of the ABA, we are fortunate to have the services of three exceptional delegates from our Section to the ABA House of Delegates, Keith Frazier, Cynthia Nance and Don Slesnick, and of a veteran Section leader as our designee to the Board of Governors, Bernie King.

And how about our 27 treatises, published in collaboration with Bloomberg BNA? All lawyers who practice in our field benefit enormously from these treatises, some of which were started several decades ago and some are of more recent vintage. (Ideas for new books are always welcome!) These treatises are renowned for both their quality and their balance. Check out the treatises at **www.americanbar.org/laborlaw**. Imagine the immense amount of time and energy involved each year by the editors, authors and contributors who produce new editions and supplements of these treatises, the vast majority of whom receive zero compensation for their work. As the saying goes, there is no free lunch: these treatises are the product of many thousands of hours of work each year by our members. Hooray for them!

Our Section is well-known for producing consistently excellent and balanced CLE programs. Our Annual Section Conference alone involves about 350 speakers and moderators. Add to that the presenters at the ABA Annual Meeting, the 15 Committee Midwinter Meetings, and dozens of webinars each year. In total, close to one thousand people contribute their time and talent each year preparing for and delivering CLE sessions and producing top-quality written materials.

Last but certainly not least is our Section staff. We are very fortunate to have as our Director the incomparable Brad Hoffman, who never ceases to amaze us all with his quiet leadership, attention to detail, and

continued on page 8

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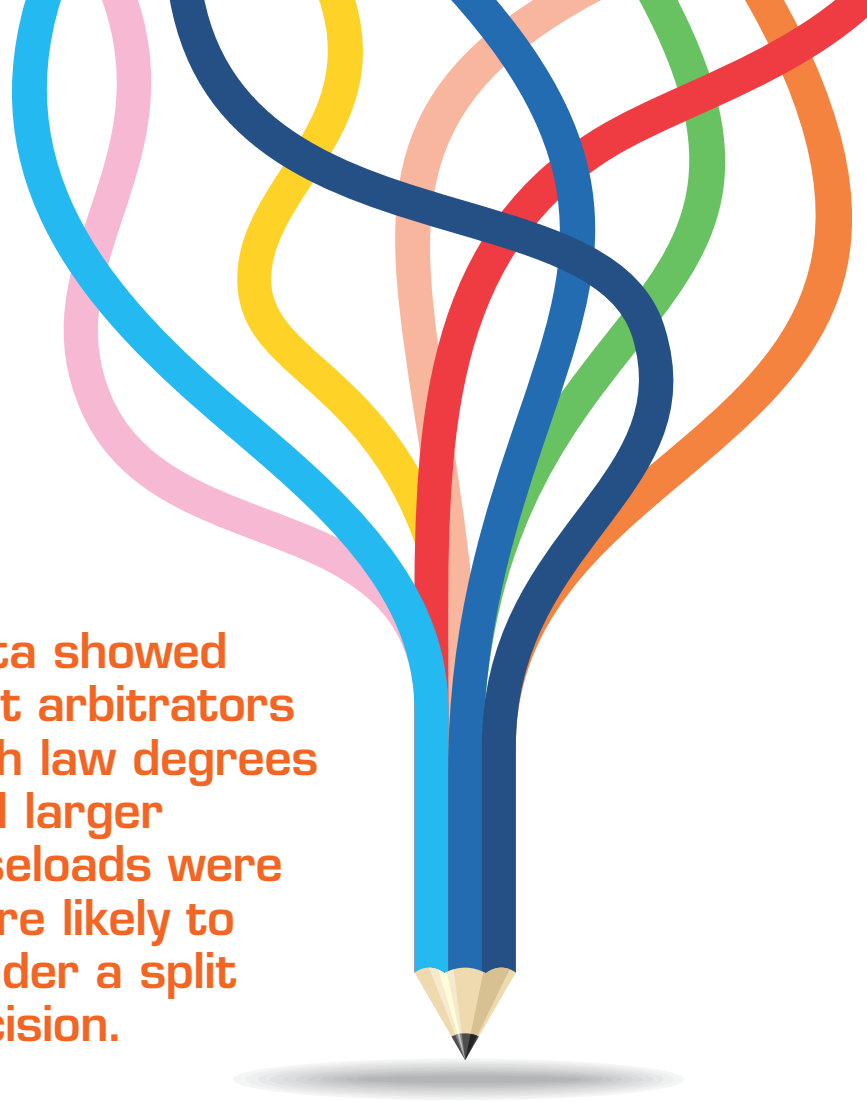
Data Informs Outcomes in Arbitrations

By Oleg V. Nudelman



Data showed that arbitrators with law degrees and larger caseloads were more likely to render a split decision.

Panelists at the 9th Annual Labor and Employment Law Conference in Philadelphia shed new light on employment and labor arbitration proceedings by relying upon data linking the diversity and professional backgrounds of arbitrators with arbitration outcomes. Attendees of the "How Arbitrators' Backgrounds Influence the Decision-Making Process" panel learned of important differences between the backgrounds of employment and labor arbitrators and were asked to consider what the legal profession can do to help increase the diversity of the arbitrator pool.

Alexander Colvin, Professor of Conflict Resolution at the Cornell University School of Industrial and Labor Relations, opened the panel by discussing the results of his survey of over 1,100 employment arbitrators who had rendered at least one arbitration decision over the past ten years. Professor Colvin found that only 49% of employment arbitrators work as full-time neutrals. This is a clear contrast with labor arbitrators, where a full-time arbitration practice predominates.

Notably, of the majority of employment arbitrators who arbitrate cases on a part-time basis, 61% work as private counsel for employers, while only 30% represent employees. Professor Colvin's research raises the question of whether there is a need to increase the diversity of the employment arbitrator pool by encouraging more attorneys with experience representing employees to serve as neutrals.

Professor Colvin also noted that employment arbitrators are much less likely to have completed an apprenticeship or received government training in arbitration than the broader population who are members of the National Academy of Arbitrators. In light of that, there may be a value to expanding credentialing programs for employment arbitrators.

Professor Laura Cooper of the University of Minnesota Law School presented findings of research from over 2,000 labor arbitration decisions in discipline and discharge matters rendered over a 24-year period. Her study found that employers won in 44% of discipline and 52% of discharge cases, while unions won in 27% of discipline and 19% of discharge cases. She categorized the remaining decisions as splits, meaning that the employee received less than the union originally sought or a discharge was reduced to a reprimand.

Professor Cooper found notable correlation between labor arbitrators' educational attainment and workloads and arbitration outcomes in discharge disputes. Her data showed that arbitrators with law degrees and larger caseloads were more likely to render a split decision, perhaps recognizing nuances in the facts of a case, than those with bachelor's degrees or high school-level education, or those with smaller caseloads. She concluded that most labor arbitrators feel underused and would prefer to have a larger caseload, and that those with less experience tend to favor employers to a greater extent. She believes her data also show that in discharge cases, arbitrators who have issued less than 50 awards ruled in the employers' favor 58% of the time, while those with more than 50 awards in the record gave employers the win in only 51% of cases.

Alan Symonette, a full-time labor and employment arbitrator in Philadelphia, offered a practitioner's perspective on the quantitative research presented to the audience by the academics. Arbitrator Symonette urged audience members to recognize economic realities and remember that arbitrators must consider their ability to earn a living when making professional decisions. In particular, he explained that labor arbitrators are required to refrain from being advocates for labor or management if they wish to serve on AAA or Federal Mediation and Conciliation Service panels. For arbitrators who wish to remain active in private practice, this requirement presents a significant barrier to entry into the labor arbitration field.

Arbitrator Symonette reported it likewise is difficult for employment arbitrators to sustain an independent income purely through serving as a neutral. Given that survey data shows most part-time employment arbitrators represent employers in private practice, the question arises whether the economic realities of the employment arbitration field impact the fairness of the arbitration process.

Arbitrator Symonette highlighted the differences in how labor and employment arbitrators typically enter the field, and the legal profession's power to enhance the diversity of the arbitrator pool. Labor arbitrators generally serve apprenticeships while performing other outside work or earning retirement income. Completion of an apprenticeship is the gateway to being accepted by parties as a possible labor arbitrator. Employment arbitrators, on the other hand, tend to earn reputations through their advocacy work.

Ultimately, attorneys' choices in selecting arbitrators play a tremendous role in limiting the diversity of the arbitrator population. Simply altering the tendency to select more recognizable names off of panel lists may go a long way toward broadening the backgrounds of arbitrators. ■

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College and University Instructors Organizing in Record Numbers

By Tyson Roan

More than 20,000 workers across the country have formed unions at colleges and universities in the past four years, with petitions pending that seek to organize 7,000 more. This explosion of organizing activity has provided the National Labor Relations Board with an opportunity to revisit important issues, and its recent decisions may extend bargaining rights to broad categories of higher education employees who have historically been excluded from coverage under the National Labor Relations Act.

Teachers gather to protest against education cuts at Chicago State University in Chicago, April, 2016. SIPA VIA AP IMAGES

The surge in worker organizing at colleges and universities tracks these institutions' increased reliance on non-tenure track faculty, often known as adjuncts or contingent faculty. Many colleges and universities have moved away from an employment model centered on full-time positions to one that instead relies on contingent positions that are less expensive to staff and offer the institutions more flexibility.

This move away from permanent, full-time positions is particularly pronounced within higher education. In 1969, contingent faculty occupied only about 20% of all faculty positions. Now, part-time and full-time contingents fill more than 70% of all positions.

Unlike their full-time counterparts, these workers are typically hired to teach a particular course and paid on a per course basis, often with no benefits and no expectation of continued employment beyond the course that they are teaching. They frequently teach classes at multiple different colleges and universities during an academic term. The median annual compensation for a part-time contingent faculty worker, who often has a terminal degree, is $16,200. It is estimated that one quarter of these workers are enrolled in at least one public assistance program.

These workers are joining unions in droves, with a large majority of the recent organizing aimed specifically at adjunct instructors. Beyond contingent faculty, unions are seeking to organize full-time faculty, both tenure and non-tenure track, various support personnel, and graduate students. Nearly all graduate student organizing has occurred at public colleges and universities since the Board's 2004 decision in *Brown University*, 342 NLRB 482 (2004), which held that graduate students are not covered by the Act. But, that may soon change. The Board recently invited briefs on whether it should overrule *Brown University*. If the Board decides to overturn *Brown University* and extends coverage of the Act to graduate students, intensified organizing efforts aimed at the more than 250,000 unorganized graduate students nationwide is likely to follow.

Perhaps the most significant recent Board decision in the higher education context, however, is *Pacific Lutheran University ("PLU")*, 361 NLRB No. 157 (2014). In *PLU*, the Board reexamined the analysis that it should employ pursuant to two key Supreme Court cases.

First, the Board reexamined when it should exercise jurisdiction over religious educational institutions, pursuant to the test developed by the Supreme Court in *NLRB v. Catholic Bishop*. A divided Board focused its analysis on the nature of the employees' duties, rather than just looking at the religious nature of the institution. Pursuant to *PLU*, the Board will exercise jurisdiction over bargaining units containing faculty from religious colleges and universities unless the schools hold out these employees as performing a specific religious function. The Board cautioned against an intrusive inquiry into the institution's actual religious beliefs. Instead, focus is on widely available documents that demonstrate, for example, that faculty members are required to integrate the school's religious teachings into their coursework, serve as religious advisors, propagate religious tenets, or participate in religious training. Absent such evidence, the Board's majority determined that employees of religious institutions are "indistinguishable from their counterparts at universities that do not claim any religious affiliations or connections" and are covered by the Act.

In *PLU*, the Board also confronted criticisms of its prior decisions analyzing whether faculty members are managers not covered by the Act pursuant to the Supreme Court's *NLRB v. Yeshiva University* decision. In an effort to develop a more workable, predictable analytical framework, the Board examined faculty's managerial control and effective recommendations in the following categories, giving greater weight to the first three areas than the last two: (1) academic programs, (2) enrollment management policies, (3) finances, (4) academic policies, and (5) personnel policies and decisions.

In addition to *PLU*, other developments at the Board have also played a role in the recent organizing gains within higher education including the Board's new election rules and its recent guidance on the use of electronic signatures for obtaining proof of worker support for unionization, especially among adjuncts, who are often on the move and much easier to communicate with electronically than in person. And, the Board's decision in *Specialty Healthcare* has enabled unions to focus organizing efforts on single department bargaining units within a larger college or university.

Even with the recent efforts to organize workers within higher education, there are still close to a million unorganized instructors throughout the country. Sustained organizing efforts among these workers is likely to continue, and these efforts will likely be accelerated by recent Board decisions extending coverage of the Act to hundreds of thousands of additional higher education employees. ■

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Roadmap to Workplace Equality

By R. Nelson Williams

At times, few topics are as hotly-contested as race. This was true during the lively panel discussion entitled "Workplace Equality and Race: Roadblocks and Routes to a Better Outcome" moderated by Juan Williams of Fox News Channel at the Section's 9th Annual Labor and Employment Law Conference in Philadelphia.

Panelists Kevin Woodson of Drexel University, Charisse Lillie of the Comcast Corporation, Gail Heriot of the University of San Diego School of Law, and Natalie Norfus of the Burger King Corporation explored the complexities of racial identity in the workplace and barriers to success. "Workplace equality is now at the center of today's civil rights efforts," said Williams. The panelists, in turn, provided their perspectives on best practices for achieving equality in the workforce.

Some of the panelists expressed concerns of unequal access to opportunities and resources. Norfus explained that although diversity is a "journey" and not a "destination," businesses need to make sure that they are applying the same standards to their employees. Woodson echoed that sentiment. He cautioned that many young black professionals "aren't being pulled into positions to succeed" and are not given access to work and experiences that foster success. He advised that this is particularly true in the law firm setting.

According to Lillie, workplace equality really has to be "diversity plus" to be effective. In other words, while having an overall commitment to diversity is important, businesses must focus on creating an environment of inclusion if they truly want to make advancements in workplace equality. She explained that cultivating a space where minorities feel they are part-of-the-fold positively impacts retention, which in turn will allow more minorities to obtain leadership positions and break down barriers to success. While many businesses conduct exit interviews, she believes they also should conduct "stay interviews." She explained that companies should "have conversations with employees about what's going on, and why they are staying."

That perspective was not unanimous. For Heriot, the key to workplace equality begins not at the workplace, but with education. "Some of our policies are backfiring on us," she stated. Referencing empirical evidence, Heriot suggested there would be more professionals of color if race-based preferential admissions practices were not in place. Although Heriot stated that black students tend to "cluster" toward the bottom of their class in institutions where race-based admissions practices occur, she followed up by saying that these clusters occur wherever there is preferential treatment based on non-academic criteria, such as preference for legacy students, irrespective of race.

Woodson was less persuaded by that empirical data. He cited historically black colleges and universities, noting that students do not tend to feel social discomfort in those spaces, which leads to a positive impact in their academic performance. Woodson emphasized that even when individuals come from the same colleges and universities, they can have different experiences that affect them, which can lead to schisms in performance and worldview.

The panelists discussed best practices for helping business leaders embrace diversity initiatives. Norfus cautioned that the legal discussion should not guide the diversity discussion. In her experience, when lawyers discuss "violations of the law," business leaders can start to shut down. She recommended that lawyers and diversity professionals try to find common ground with business members outside of the diversity context. She explained that "once you establish that relationship, the diversity conversation comes easier."

Lillie advised that change must be top-down. She said that senior leaders must recognize the importance of diversity in the workplace for it to be taken seriously. Because companies are generally profit-driven, she emphasized that there is an important business case for diversity initiatives. She emphasized that there is evidence that when a team is diverse, "you get better business results," including the performance of work in ways that are consistent with a business's customer base.

The panelists discussed the role of mentoring in increasing diversity and the traits of effective mentorship. Norfus noted mentorship is a two-way street. She agreed that sometimes associates are not getting good advice or mentoring from partners. However, she said associates also need to be self-reflective and ask for feedback when they are not getting it. She advised that if associates are not seeing desired work, cases, or promotions, then they should ask partners why. "Employees have a responsibility to take ownership of their careers and seek the opportunities to take them to the places they want to go," she added. Lillie further explained that sometimes mentors are afraid to give honest feedback, which she believes only does a disservice to the mentee.

In concluding the discussion, Williams asked the panelists for the solution that they believe will bring workplace equality. Heriot reemphasized that education will help solve the problem. Offering a sociological perspective, Woodson stated that segregation is the problem and that race will always matter until that changes. Lillie stated that roadblocks are education, inherent bias, and real bias, and that "the way you overcome them is through training and acknowledging the problem." ■

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Tips on Affinity Groups

By Brittany L. Johnson

Affinity groups, or Employee Resource Groups ("ERGs"), provide employees who have been historically underrepresented in the workforce or who are members of protected classes the opportunity to network with one another and find mentors and sponsors within a company. They also provide employers with the ability to recruit and retain diverse employees and to boost employee morale.

At the 9th Annual Labor and Employment Conference in Philadelphia, panelists Matt Murphy of the Equal Employment Opportunity Commission in Washington, DC, Laura Schnell of Eisenberg & Schnell LLP in New York, NY, and Stafford Woodley of Pepsico in New York City discussed the pros, cons, and importance of affinity groups for companies, as well as the roles affinity groups can play in the employee-management relationship.

Murphy and Woodley emphasized that companies with affinity groups should have written policies regarding the creation of and participation in affinity groups. The panelists explained that such policies, when followed, help companies be consistent and avoid discriminatory actions. To show how such policies would be helpful in guiding managers, the panelists discussed *Flood v. Bank of America*, in which the First Circuit held that Bank of America violated Title VII and Maine's human rights law prohibiting discrimination based on sexual orientation. In that case, a low-level Bank of America manager prevented an employee from attending a LGBT affinity group meeting, but did not deny or prevent employees from attending other types of affinity group meetings. The Court found that the manager did not have a business reason, such as the employee's uncompleted work assignments, for denying the employee the opportunity to attend the LGBT affinity group meeting.

Affinity groups can serve as an early warning sign to management that its employees believe they are not being treated fairly.

Written policies also can help companies avoid unfair labor practices. Under Section 8(a)(2) of the National Labor Relations Act (NLRA), an employer may not "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." In other words, company-sponsored affinity groups must not rise to the level of company-dominated unions, and it is important for high-level management and human resources officials to be cognizant of this limitation. Additionally, as the panelists explained, employers with certified or lawfully recognized unions should be careful to ensure that they do not conduct direct dealing in or resolve grievances through affinity groups. Doing so could rise to the level of bad-faith bargaining under Section 8(a)(5) of the NLRA.

Panelists noted that affinity groups can serve as an early warning sign to management that its employees believe they are not being treated fairly. Employees can discuss and share their experiences in affinity groups. They can use affinity groups as a forum to voice concerns and to effect change. Knowing about issues can helps management make effective change in a way that leads to more diverse workplaces. Affinity groups also can help ferret out unlawful discrimination, as companies are legally obligated to take action when a manager learns about instances of unlawful discrimination during affinity group meetings.

Schnell cautioned that affinity groups, if not run properly, can stifle productivity and camaraderie among employees, especially if the meetings turn into unproductive "venting" sessions. She emphasized that the weak policies or the lack of policies altogether regarding affinity groups and the failure of management to follow such policies can lead to meritorious discrimination claims.

In the end, the panelists agreed that affinity groups supported by strong policies tailored toward the individual needs of a company and its employees are beneficial. The panelists concluded the discussion by emphasizing that when affinity groups are created and conducted for the true purpose of providing a safe space for employees to network and to aid in the professional advancement of employees, both the company and employees benefit. ■

Brittany L. Johnson (*BLJ@cohmlaw.com*) is an associate at Colleran, O'Hara & Mills L.L.P. in Garden City, NY. She is a YLD Fellow to the Section's Employee Benefits Committee and a member of the ABA Young Lawyers Division.

From the Chair

continued from page 4

unflappable demeanor. Brad has worked for the ABA for nearly 30 years and has been our Director since 2006. Since 2006, Chris Meacham has served as Assistant Director, always providing gentle guidance and unerring support—and good humor. Rounding out our talented staff are ever-helpful and cheerful Judy Stofko, Section Assistant, ever-supportive Donavan Vicha, Technology Manager, and relative newcomers Ej Sherman, Committees Manager, Shannon Gilmore, Meetings Assistant, and Ryan Baffield, Membership & Marketing Assistant. While Section leaders come and go, these folks not only provide continuity and perspective but also exhibit exceptional dedication and talent in doing their jobs. When you see them, please thank them for their service. ■

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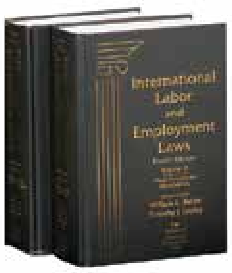

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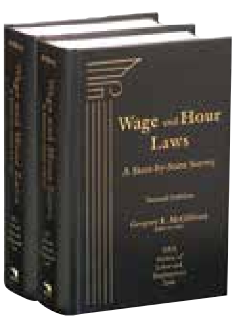

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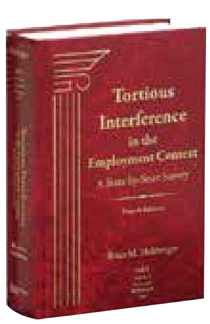

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By **Brian M. Malsberger**

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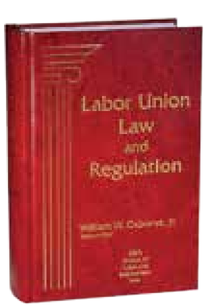

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Committee on Union Administration and Procedure

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Supreme Court

continued from page 1

counsel for petitioner noted the anomaly of requiring a state employee to pay money to an outside organization, as opposed to the state's own interest in managing the labor of its own workers. In an exchange with Solicitor General Verrilli, Justice Alito drew a contrast between disciplining an employee for speaking on matters of public concern, on the one hand, and compelling the employee to make a statement on a matter of public concern on the other.

In contrast, the supporters of mandatory agency fees focused on the union's role in supporting the state's management of its workforce. The attorneys for California, the teachers' union, and the United States as *amicus curiae* referenced the importance of exclusive representation in avoiding the cacophony and contentiousness of a non-exclusive system. In hammering on the role of the state acting as an employer, rather than sovereign, they argued that mandatory fees were a reasonable way for the state to construct its human resources policies so as to obtain a solitary but democratic voice on bargaining issues. In fact, counsel for the union pointed to Wisconsin and Michigan, which recently eliminated collective bargaining for most employees, as examples of state control over the process.

There was also significant concern over the potential for overturning forty-year-old precedent. The participants debated the level of deference to be afforded, with Justices Kagan and Sotomayor arguing that petitioners had a "heavy burden," while petitioner's counsel argued that the Court was obligated to overrule erroneous precedent where fundamental rights were at stake. Justice Breyer and Kagan also feared the impact that a ruling for petitioners would have on the settled expectations of states and state employee unions.

Ultimately, the most intriguing exchanges centered around the ramifications of a ruling in favor of petitioners. Several of the Justices seemed dubious of the prospect that the absence of agency fees would mean an end to public employee unions. In response, counsel for the state and the union pointed to the lack of a factual record, as well as the relatively pallid state of federal-sector unionism. Counsel for the petitioning teachers had no constitutional problem with the exclusive representation mandate for public employee unions. He also averred that such fees in the private context lacked the state action that made public-sector agency fees objectionable. Justice Sotomayor explored the possibility that a state could directly fund or subsidize the union itself; petitioner's counsel ruminated that it was a "very tricky question." Although Justice Alito noted that unions, throughout their history, have opposed employer funding, the potential for direct payment seemed like a potential response to overruling *Abood*. States that supported agency fees in the first place might look to other methods, such as direct funding or HR "consulting" contracts, to involve and support employee-selected bargaining representatives.

After the unexpected passing of Justice Scalia, on March 29th the Court issued a one line decision holding PER CURIAM that the judgment was affirmed by an equally divided Court. Hence the Ninth Circuit Court of Appeals Decision affirming the Supreme Court's 1977 holding in *Abood* which permits unions to collect "fair share" fees from non-members stands. ■

Matthew Bodie (*mbodie@slu.edu*) is the Callis Family Professor at Saint Louis University School of Law, as well as a co-reporter on the ALI's Restatement of Employment Law. He was a coauthor of an amicus brief from labor law and labor relations professors in support of the respondents in *Friedrichs*.

A Persevering Physician Changes Tennis History

By Mark Risk

Renee Richards' plan to begin a new life in California in 1975 after sex reassignment surgery took an unexpected turn at a tennis tournament.

Born as a male in New York, she had been the men's tennis captain at Yale University, the all U.S. Navy men's champion, and was a medical school graduate with a distinguished and promising career as an eye surgeon.

All this while engaged in prolonged anguish over her gender identity, beginning in early childhood—feeling that she was a woman, struggling to understand what to do about those feelings.

Richards' myriad attempts to deal with her situation included years of unhelpful psychotherapy. At times, she lived an agonizing double life, working as a male doctor by day, presenting as a woman after hours and on weekends.

She was rejected multiple times for gender reassignment surgery, perhaps because she was a physician. "Only a handful of transsexual operations had been done in this country," she wrote in her 1983 memoir *Second Serve*. "As long as they were obscure entertainers or quiet people from ordinary walks of life, the risks were few."

On the other hand, performing the surgery on a doctor might attract the wrong kind of public attention. And, there was concern that the American Medical Association and state licensing boards would not permit a transsexual doctor to practice.

Richards went to Morocco, where the surgery was being performed—under medically questionable conditions, to be paid for in cash. She twice walked to the front door of the clinic, and each time she could not bring herself to go in.

Finally, in 1975 at the age of 40, an American physician agreed to perform the surgery in New York City. She accepted a position in a medical practice in Orange County California, and planned to begin a quiet new life as a woman.

She joined a local tennis club, intending to play only socially. But, she agreed to represent the club in an amateur tournament in San Diego, not realizing the large amount of public and press attention that the tournament received. As she progressed through the tournament, rumors began to spread about the striking 6'1", 147 pound opthalmologist with the unusual left hand serve. After the tournament, which Richards won, a San Diego sportswriter reported that the event had been won by a male tennis player masquerading as a woman.

Richards was forced to call a press conference in which she explained her story.

Then mail began arriving, about 40,000 letters, most of which were delivered to the tennis club. Ninety percent were supportive, most of it coming from "blacks, convicts, Chicanos, hippies, homosexuals, people with physical handicaps, and, of course, transsexuals", she wrote.

"Other individuals who were themselves oppressed saw me as even lonelier and so, more put upon."

As tennis administrators suggested that they would not sanction any event in which she played, she received an invitation for a tournament in New Jersey—one in which she had competed three years earlier as a man. Under enormous pressure and national media attention, she made it to the semi finals.

Tennis player Dr. Renee Richards, shown in action at stadium in Forest Hills, New York during U.S. Open tennis match on Sept. 1, 1977.

AP PHOTO/DAVE PICKOFF

She decided to leave her lucrative medical career to play professional tennis. But you cannot make a living playing tennis when you are not invited to play. The U.S. Tennis Association was requiring her to take a chromosome test to prove she was a woman, a test which she likely would not pass and which she believed was rank discrimination.

"Of all the potential competitors, my sex was the least in doubt. It was a matter of public record based on legal documentation."

A New York state court judge agreed, enjoining the U.S.T.A. from requiring that Richards pass a chromosome test in order to play in the 1977 U.S. Open. Richards played and reached the womens' doubles finals.

She continued to play professionally until 1981, winning the U.S. Open womens 35 and over singles title in 1979 and twice reaching the mixed doubles semi-finals with partner Ilie Nastase.

Her tennis career was extended, however, by some chance work teaching strategy to Martina Navritilova, which led to Richards serving as Navratilova's personal coach through two Wimbledon titles and an Australian Open championship.

Having reach the pinnacle of professional tennis as a coach, Richards left Navratilova to return to medicine. After a refresher course at Harvard, she returned to New York and had a long career in the practice of opthalmology.

When last interviewed in 2015, she was 81 and continuing to see patients one day per week.

In 2014, a collection of LGBT-relevant papers, photographs, and other items of historical significance was donated to the National Museum of American History, at the Smithsonian. A wood racket used by Richards was among them. ■

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March 23–25
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