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Professor Befort Reviews Supreme Court's Labor and Employment Decisions

By Mark Risk

Was 2004 a year of ERISA cases and/or a year in which "not all that much happened" on the Supreme Court's labor and employment docket? Outgoing Section Secretary Stephen Befort, a law professor at the University of Minnesota, posed this question to frame the annual lecture reviewing the High Court's year during the Section's Plenary Session at the ABA Annual Meeting August 9 in Atlanta.

Befort noted that the seven labor and employment decisions issued by the Court was the second lowest number in the last 20 years. He also noted that three of the seven decisions were in Employee Retirement Income Security Act (ERISA) cases.

Befort focused on two decisions that *could* have been major decisions had the Court decided differently.

In *General Dynamics Land Systems v. Cline*, the Court held that the Age Discrimination in Employment Act (ADEA) does not prevent employers from implementing policies that treat older workers more favorably than it does younger workers over 40, reversing a decision of the Sixth Circuit. In *Cline*, a group of General Dynamics employees challenged a collective bargaining agreement provision negotiated with the United Auto Workers that limited retiree health benefits to future retirees age 50 or older at the date of the agreement.

Writing for a 6-3 majority, Justice David Souter stated that the legislative history of the ADEA evidenced no intent to protect workers from discrimination that favored older workers. Notably, the Court declined to defer to the Equal Employment Opportunity Commission's interpretation of the ADEA as expressed in its regulation, stating that the legislative history left no doubt. A dissenting opinion by Justice Clarence Thomas stated that the plain language of the statute prohibits discrimination on the basis of "age," whether an individual is perceived as either "too old or too young."

Had the Court affirmed the Sixth Circuit, *Cline* "would have been a blockbuster," Befort said, as it would have invalidated many early retirement programs that do not offer the same benefits to all workers over age 40.

In *Aetna Health, Inc. v. Davila*, the Court held that state law claims challenging HMO medical coverage decisions were preempted by ERISA and therefore removable to federal court. Two participants in health insurance plans brought separate state court cases under a Texas statute, alleging that the HMOs "failed to use ordinary care" by, in one case, refusing to authorize payment for medications prescribed for arthritis and, in the other, by refusing to authorize an extended hospital stay recommended by the treating physician.

The HMOs removed both cases to federal court, and the district court dismissed them when plaintiffs declined to amend their complaints to assert claims under ERISA. The Fifth Circuit reversed, ruling that ERISA § 502(a) only preempts state causes of action when they precisely duplicate causes of

continued on page 14

Former EEOC Chairs Ida Castro and William Brown discuss Title VII on its 40th anniversary at the ABA Annual Meeting. Coverage of the Section's Annual Meeting programs continues on page 4. PHOTO BY JOEL A. D'ALBA

Comments from the Chair

Howard Shapiro

Having assumed the responsibilities as Chair of the Section, I want our members to know the Section is strong, vibrant, and healthy. At just under 22,000 members, the Section remains one of the leading forces within the ABA. At the heart of the Section are its approximately 21 standing committees that, along with various administrative committees, perform the everyday work of our Section. Many Section members, however, are not actively involved and do not attend the midwinter meetings of the standing committees. I ask you to consider the opportunities you are missing. WE WANT YOU (to attend one of our midwinter meetings)!

You are probably thinking, why take time from my busy routine to attend a midwinter meeting? After all, they are held in exotic locations and require being away from the office for a few days. Here's the answer: the midwinter meetings combine unparalleled CLE with an opportunity to exchange views and thoughts with other labor and employment lawyers in a friendly and collegial manner. Do you seek access to government officials in your practice area? At many of the midwinter meetings, you will meet the policy makers your clients interface with. Everyone at the midwinter meetings is in a casual, roll-up-your-sleeves mode, as they discuss the major issues we all confront every day in our practices.

A special commitment to welcoming new members

The midwinter meetings offer the opportunity to network with colleagues across the country and develop a national set of friends who will become important to your practice. I grew up in the Employee Benefits Committee. In addition to the warm relationships I have with lawyers who do what I do, many of my closest friends are Union and Plaintiffs' lawyers, whom I would not have gotten to know but for my involvement in the Committee. My life has been enriched by my annual interaction with the lawyers on the Committee. They teach me about the art of being a practitioner, and they have become the lawyers I turn to when I need assistance, personally and professionally.

The midwinter meetings are listed on our Section's website at *www.abanet.org/labor/calendar.html*. No matter what your area of practice or interest, the Section has a functioning standing committee. Are you interested in Ethics and Professional Responsibilities? Our Section has a standing committee meeting that considers these issues (and provides all the ethics hours your state bar may require)! Our Section has committees dealing with both State and Local Government Bargaining and State and Local Employment Laws. Does the moniker ERISA frighten you? Attend the midwinter meeting of the Employee Benefits Committee; I promise, we won't bite!

Before anyone thought up the term ADR, labor lawyers actively practiced in grievance and arbitration procedures under collective bargaining agreements. The Section has an ADR Committee that hosts a midwinter meeting.

Do you practice traditional labor law? The Section has two committees, the Development of the Law under the NLRA and Practice & Procedure Before the NLRB. This year these committees are meeting jointly and provide the opportunity to learn the substance of the law and how to get it done in front of the Board.

How about OSHA, Workers' Compensation, RICO, the Railway and Airline Labor Act? Don't know a lot about these topics, but you are running into them more frequently? Our Section has thriving committees, that hold excellent midwinter meetings in these areas of law.

What about technology and its reach into the way we practice and the way our clients' employees perform work? We established a Technology Committee approximately three years ago, and it is becoming a vibrant part of our Section's landscape.

Consider two other major committees in juicy subject areas: Sports & Entertainment Law and International Labor Law. Both are growing fields within our practice. In both committees you will meet the practice leaders who shape the law.

In our two largest committees you will meet some of the leading litigators in employment law. The Equal Opportunity Committee is renowned for bringing together government representatives and counsel representing all points of view. The Employment Rights and Responsibilities Committee has become the centerpiece for demonstrative litigation techniques within our Section. Both of these committees focus on the how and why of getting it done in employment litigation.

Are you worried that the attendees at these midwinter meetings already know each other and that you will encounter impenetrable cliques of unfriendly folks whom you don't know? Wrong. Each committee has undertaken a strong commitment to welcoming new members by holding new member receptions, assigning incumbent committee members as mentors, and generally reaching out to make new attendees feel welcome and at home. Diversity at our midwinter meetings is celebrated and structures exist within each committee to make the newest attendee feel like a part of something very special.

The Section offers many unbelievable opportunities for all its members. We ask but one thing, that you become involved by attending one of our midwinter meetings. If you do, I promise you will be glad you attended. I look forward to seeing you at one or more midwinter meetings. ■

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New Overtime Regulations Go Into Effect

By Ellen C. Kearns

On August 23, 2004, the Department of Labor (DOL) regulations redefining who is and who is not an exempt executive, administrative, or professional employee under the Fair Labor Standards Act (FLSA) went into effect. These rules, codified in Title 29 of the Code of Federal Regulations, Part 541, revise the "duties," the salary levels, and the "salary basis" tests used to exempt employees from the FLSA requirements for minimum wage and overtime compensation.

The new regulations are the first major regulatory overhaul of the "duties" tests since 1949. Also, for the first time since 1975, the regulations increase the minimum salary that an employee must receive to be exempted from FLSA from $8,060 to $23,660.

Many groups, disenchanted with the new regulations, have threatened to stop them from becoming effective, but at least one avenue for challenging them has reached a roadblock. That is, a lawsuit challenging the regulations as a whole had to be filed within 90 days of promulgation of the final regulations last April.

Other challenges could be made to specific parts of the regulations under the Administrative Procedure Act. Generally speaking, such challenges would have to show that the changes to the regulations are beyond the scope of the DOL's power to regulate such matters.

The new regulations made these major changes to the existing regulations:

- Increase of the minimum salary needed to be an exempt employee;
- Elimination of the "long test" and the requirement that employees could only perform nonexempt work 20% of the time;
- Creation of a new test for "highly compensated" employees (employees earning $100,000/year) in which employers need prove only that an employee "customarily and regularly" meets one of the tests for an exemption;
- Creation of a new "concurrent duties" test for retail workers under the executive exemption, in which employees who are in charge of a department, supervising two or more employees, can be considered exempt even if they are performing the same work as other employees for more than 50% of the time;
- Provision for employers of a new protective shield under the salary basis test, along with other changes to that test that will make it easier for an employer to establish salaried status for employees; and
- Addition of a new duty to the executive duties test, making it more difficult for an employee to be considered an executive white-collar employee.

Under the new regulations, the minimum salary needed to be considered an exempt employee is $455 a week. This change is unlikely to affect most urban exempt employees, who already earn more than $23,660 a year, but it has caused some employers in economically depressed areas and in lower-paid supervisory jobs in retail and service industries to raise employees' salaries above the $23,660 to avoid paying for overtime.

As noted above, one of the most dramatic changes in the new regulations is a "safe harbor" provision found in subsections 541.603(b) and (d). That provision states that an employer that has an "actual practice of making improper deductions" will lose the exemption *only* for "the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions." And, if the employer has a "clearly communicated policy" that prohibits improper pay deductions, and has a complaint mechanism, reimburses employees for improper deductions, and makes a good-faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

The new test for the executive exemption provides the most significant change to the duties test of any of the exempt categories. Under the former regulations, the so-called "short" duties test for the executive exemption did not expressly state that an exempt manager must have the power to hire and fire workers. Rather, it was sufficient that the manager supervise two or more employees and have other indicia of managerial control (with the power to hire and fire being one of many such indicia). In contrast, under the new "standard test" contained in the regulations, an exempt executive will be required to have the power to hire and fire or, at least, to have their recommendations regarding these subjects be given "particular weight." The final regulations specifically define the term "particular weight."

The Labor Department acts, and congressional opponents respond.

Congressional Democrats and organized labor have vowed to continue to fight the new regulations. In a statement released on the effective date of the new regulations, Senator John Kerry (D – Mass.) called the regulations "the latest insult to America's middle class," and promised to rescind them if elected to the White House.

In the short legislative session this fall, the House of Representatives and the Senate Appropriations Committee have moved to block the regulations, in the form of amendments to the fiscal year 2005 spending bills for the Department of Labor.

On September 9, the House of Representatives included in the spending bill language purporting to deny funding for the Labor Department to implement or administer the new regulations, with the exception of the provisions raising the new minimum salary threshold. The amendment was proposed by Rep. David Obey (D – Wisc.) and George Miller (D – Calif.).

On September 15, the Senate Appropriations Committee approved a similar amendment proposed by Senator Tom Harkin (D – Iowa). Prior to the vote on the Obey amendment, Solicitor of Labor Howard Radzely told Congress that if the Obey amendment survived a presidential veto, it would not rescind the new regulations; rather it meant that plaintiff lawyers, not the DOL, would be responsible for acting under the new regulations. In response to Radzely's statements to Congress, Harkin's amendment added language that would explicitly reinstate the old regulations. A House – Senate Conference Committee will decide which bill to send to the president. President Bush has said that he will veto the spending bill if it includes either version of the amendment. ■

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Panelists Consider Title VII on 40th Anniversary

By Lori D. Ecker

Many legal historians believe that a law so sweeping, dramatic, and controversial as the Civil Rights Act of 1964 would never have been enacted but for a strange and powerful confluence of social forces, activated by President John F. Kennedy's assassination and the power wielded by a strong, popular political tactician in President Lyndon Johnson.

At this year's ABA Annual Meeting, two panels highlighted the 40-year history of Title VII of the Civil Rights Act of 1964, reviewing the progress since its enactment, the problems that still exist, and the challenges that lie ahead. A group of practitioners—Bill Lann Lee, Mark S. Dichter, Connye Y. Harper, Thomas A. Saenz, and Eva Jefferson Paterson—offered their "Reflections on Forty Years Under Title VII," and a panel of former and current leaders of the U.S. Equal Employment Opportunity Commission (EEOC) addressed the Section's annual luncheon on "A Title VII Birthday Celebration: The 40-Year Fight for Equal Employment Opportunity."

Noting that Title VII had a "clear and drastic impact on the labor movement," Harper, associate general counsel of the United Auto Workers, explained that, in 1935, when Congress passed the National Labor Relations Act and the Fair Labor Standards Act, those laws expressly did not cover employees in agriculture, service industries, public employees, and anyone not employed by a company engaging in interstate commerce. People of color disproportionately employed in such industries gained little from these laws establishing basic worker rights.

President Kennedy's original Civil Rights Bill did not include a section prohibiting discrimination in employment. Lee, a partner in the San Francisco office of Lieff Cabraser Heimann & Bernstein, who served as Assistant Attorney General for Civil Rights during the Clinton administration, explained that the feeling was that the bill was ambitious enough without such provisions. President Kennedy sent the bill to Congress in June 1963, and it underwent significant revisions during the following months.

Dichter, of Morgan, Lewis & Bockius in Philadelphia, noted that discrimination based on sex was added to Title VII in an attempt to "torpedo" its passage.

Paterson, a 26-year veteran of the Lawyers' Committee for Civil Rights in San Francisco and now executive director of the Equal Justice Society, contended that Title VII was the result of "people agitating in the streets." For example, she noted that, in August 1963, 250,000 demonstrators gathered in Washington, D.C. A few days after President Kennedy was assassinated that November, President Johnson called on Congress to pass the Civil Rights Bill. After continued debate, the Act passed in June 1964 by a strong bipartisan majority in both the Senate and the House of Representatives.

Commissioners and practitioners reflect on equal employment opportunity then and now.

Since the enactment of Title VII, "the heart of enforcement has been in court actions and private enforcement," Dichter said. Lee agreed and noted that the United States is unique in that enforcement of civil rights is conducted primarily by private litigation.

The panelists further agreed that Title VII has had an impact on providing employment opportunities and protections against harassment and discrimination for women and minorities. "Because of Title VII, collective bargaining agreements now include express nondiscrimination clauses as standard language," Harper observed. Dichter recalled that, in 1960, women wore "59 cents" buttons to protest and publicize the wage disparity between men and women. Although it has narrowed, a wage gap still exists: in 1971, women were making 70 cents for each dollar earned by men, and in 2000, they were making 76 cents to each dollar made by men.

In fact, there remain significant income differences related to both gender and race. Paterson said that the average wage of white male workers in 2004 is $42,000, while that of male African-American employees is $27,000. But, more troubling, Paterson explained, is the disparity in average wealth, which is $482,000 for whites, $115,000 for nonwhites, and $75,000 for African Americans.

Saenz, vice president of litigation at the Mexican American Legal Defense Fund, expressed concern that the small percentage of national origin discrimination charges filed with the EEOC does not accurately reflect the magnitude of discrimination in the workplace. He advocated increasing the number of Spanish-speaking investigators and attorneys in the EEOC. Concern that their legal status may become an issue in an employment discrimination claim serves as a deterrent to immigrants whose employment rights have been violated.

At the Section's annual luncheon program, EEOC leaders past and present discussed challenges faced and accomplishments made at the EEOC during the four decades since the enactment of Title VII. Moderated by Donald R. Livingston, former EEOC General Counsel and currently a partner at Akin, Gump, Strauss, Hauer & Feld in Washington, D.C., the panel also included two former EEOC chairs, William H. Brown III (1969–1973), now at Schnader, Harrison, Segal & Lewis in Philadelphia, and Ida Castro (1998–2001), currently commissioner of the New Jersey Department of Personnel. Current EEOC Vice Chair Naomi Churchill Earp was also on the panel.

Brown identified three significant events during his tenure as chair: the commencement and settlement of class action litigation against AT&T, the 1972 amendment giving EEOC enforcement powers, and the establishment of a litigation office. Under Brown's leadership, the EEOC set up five litigation centers throughout the country, got 250 lawyers on board quickly, and assembled a program to allocate their resources. Then, braced by its success against AT&T, then the largest single private employer in the country, the agency pursued General Electric, General Motors, the International Brotherhood of Electrical Workers, and Sears Roebuck.

Fast-forwarding 25 years, Castro observed that when she was sworn in as chair, the public, unions, and management were so "ticked off" at the EEOC that the agency's survival was threatened. Castro faced a large backlog of charges, an enforcement staff that needed to be reenergized, and a strong litigation staff that was frustrated because it had been prevented from pursuing pattern and practice cases, class actions, and charges in novel areas.

During her tenure, Castro slashed the backlog of charges by implementing a priority charge pro-

cessing system, hired and trained investigators, developed a comprehensive enforcement strategy to ensure a fair and efficient process and improve service, created the National Mediation Program, and set about once again to litigate cases that would have a significant impact in the workplace.

Earp discussed three recent Supreme Court decisions that are relevant in shaping the agency's current litigation policies: *EEOC v. Waffle House Inc.*, *Hoffman Plastic Compounds, Inc. v. NLRB* and *Desert Palace Inc. v. Costa*. In *Waffle House*, the Court ruled that an arbitration agreement between the charging party and the employer does not ban the EEOC from pursuing victim-specific relief.

Hoffman Plastic holds that the NLRB is foreclosed from awarding back pay to an undocumented alien. Based on this case, the EEOC rescinded its 1992 Enforcement Guidance and no longer seeks damages awards for undocumented workers.

Desert Palace is the latest of more than 50 cases before the Supreme Court addressing burden of proof under Title VII. In a unanimous decision, the Court held that direct evidence is not required for an employee to get a mixed-motive jury instruction. ■

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NLRB's Rosenfeld Discusses Neutrality Agreements

By N. Elizabeth Reynolds

Neutrality agreements, under which employers agree to recognize a union based on a "card check" showing of majority support and not to communicate opposition to union organizing campaigns, were the subject of the remarks by National Labor Relations Board (NLRB) General Counsel Arthur Rosenfeld at the ABA Annual Meeting in Atlanta.

While the particular commitments in specific neutrality agreements can include providing employee lists to the union, allowing union access to facilities, agreeing not to support anti-union individuals or groups, not making anti-union statements, and accepting a card check as proof of the union's majority status in lieu of an NLRB election, the General Counsel commented that all involve an employer's promise to forgo conduct to which it would otherwise have a right under the National Labor Relations Act.

Rosenfeld announced that neutrality agreements will be the subject of a soon-to-be-issued special report by his office. He reported that Congress has shown interest in neutrality agreements this year, including a request for information from the NLRB, requests from legislators to meet with the general counsel, House and Senate committee hearings, and pending bills on both sides of the card check issue.

Rosenfeld voiced his belief that card checks are "a pale substitute for the gold standard of a Board election" and pose a tension between freedom of contract and employee choice. He also noted that an employer's conduct under a neutrality agreement may be tantamount to recognizing a minority union and may warrant injunctive relief under Section 10(j) of the National Labor Relations Act.

Rosenfeld reviewed several issues related to neutrality agreements that the NLRB is or might soon be considering.

The Board is considering whether voluntary recognition in the context of a neutrality agreement bars an election. The general counsel discussed his amicus brief in the pending *Dana/Metaldyne* cases, which urges the Board to retain the voluntary recognition bar but to create the following exception:

> Where a document expressing opposition to union representation is signed by at least 50% of unit employees at the time of formal written notice to employees of voluntary recognition or no later than 21 days thereafter, and where a decertification petition is filed no later than 30 days after that formal written notice of voluntary recognition, the recognition shall not operate as a bar to an election.

(Amicus brief of General Counsel, p. 12, available at *www.nlrb.gov*.) He also indicated that the Board may revisit *Verizon Information Systems*, 335 NLRB 558 (2001), which dismissed an election petition by a party to a neutrality agreement on estoppel grounds.

The general counsel discussed after-acquired shop clauses and similar provisions as a type of neutrality agreement. He stated that the lawfulness of such clauses is a "hot-button issue," and his office will be deciding shortly whether to issue a complaint in such a case. He referred to tensions between *Northeast Ohio District Council of Carpenters (Alessio Construction)*, 310 NLRB 1023 (1993), and *Painters District Council No. 51 (Manganaro Corp.)*, 321 NLRB 158 (1996), which involved unions' efforts to obtain anti-double-breasting clauses. Rosenfeld also indicated that the Board may reconsider issues from *Pall Biomedical Products*, 331 NLRB 1674 (2000), *enf. den.*, 275 F.3d 116 (D.C. Cir. 2002), concerning whether certain after-acquired shop agreements are mandatory, permissive, or illegal subjects of bargaining.

The general counsel also identified the following upcoming issues: whether agreeing that the parties will adhere to certain broad principles in contract negotiations upon a showing of majority support constitutes negotiating with a minority union under the "penumbra" of *Majestic Weaving*, 147 NLRB 859 (1964); whether an employer violates Section 8(a)(2) by endorsing a union where there is no rival union, by encouraging employees in a right-to-work state to join a union, or by informing employees during an organizing campaign that a wage increase was granted with the union's consent; and whether a union violates the Act by accepting voluntary recognition when it has a card majority but knows that over 50 percent of employees have signed an anti-union petition.

Brent Garren, of UNITE HERE! in New York, faulted the NLRB for taking actions in the name of employee free choice that make it more difficult for employees to organize. Emphasizing that Section 9(a) of the Act expressly approves voluntary recognition, he contended that unfair labor practice charges are the appropriate defense against coercion in connection with neutrality agreements.

Management Lawyer I. Harold Koretzky of Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux in New Orleans argued that card check recognition is inherently unreliable and does not preclude a question concerning representation. He warned that Board elections are on the verge of obsolescence, and questioned whether the general counsel's proposed exception to the recognition bar in *Dana/Metaldyne* is sufficient.

The NLRB's Deputy General Counsel John Higgins moderated the program. ■

N. Elizabeth Reynolds is an associate at Allison, Slutsky & Kennedy, P.C. in Chicago, Illinois.

A Dialogue with the National Labor Relations Board

By Peter A. Janus and Kenneth L. Wagner

At the ABA Annual Meeting in August in Atlanta, the National Labor Relations Board participated in another of its "dialogues" with members of the Section of Labor and Employment Law. Chairman Robert Battista and Members Dennis Walsh, Peter Schaumber, and Ronald Meisberg responded to questions (Member Wilma Liebman was unable to participate in the program this year because of a scheduling conflict).

In a wide-ranging conversation, the NLRB members discussed the anticipated Board vacancies by the end of 2004 and how the agency will maintain its productivity; the role of *stare decisis* in NLRB decisions; the spate of separate opinions and dissents that have appeared in cases during the past year; the possibility of increased rulemaking; and tips for practitioners on effective arguments before the agency.

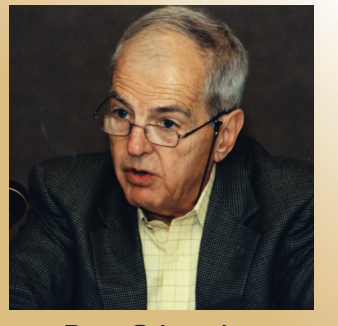
Battista and Schaumber responded to the question of what difficulties the NLRB might soon face with the impending expiration of both Meisberg's recess appointment this fall and Walsh's term of office in December 2004. Because of the upcoming presidential election, there is a substantial likelihood that the Board will be down to only three members and will have to function in that capacity during early 2005 and possibly longer.

Battista commented that term expirations and Board turnover are regular events, so the agency maintains procedures such as reassigning staff to other members' offices and reconfiguring Board panels. Battista also acknowledged the possibility of deadlock on major issues in pending controversial cases. Schaumber suggested that the National Labor Relations Act should be amended so that a Board member would remain in office until his/her replacement is confirmed.

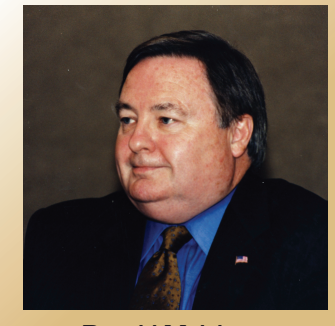
Given several recent decisions overturning Board precedent (e.g., the *IBM Corp.*, *San Manuel Indian Casino*, and *Brown University* cases), Battista was asked for his view on the role of *stare decisis* in the Board's decision-making process. Battista acknowledged that case adjudication in such situations is often difficult. Stating that he does not lightly vote to change precedent, Battista said that if the issue is before him, he attempts to resolve any conflicts between competing values. He finds it is easier to reverse "recently" established precedent or precedent that in his assessment is "unfair."

Robert Battista

Dennis Walsh



Peter Schaumber



Ronald Meisberg

PHOTOS BY JOEL A. D'ALBA

Walsh was asked what he and his colleagues are doing to resolve certain philosophical differences so that there might be more consensus. During the past year, numerous separate opinions were filed by Board members, even in cases presenting no major legal issues. Walsh acknowledged that a divided Board leads to delay, often generating a "memo war" that occupies a lot of staff and Board member time. He added that this was still necessary on major issues if differences existed.

However, Walsh stated that greater effort should be applied to reach consensus, or single opinions, in cases where differences of opinion do not affect the outcome and need not be set forth in the opinion. In that instance, Walsh admonished, the member should simply let the issue pass for the moment. Schaumber commented, however, that dissents often are helpful and make for better decisions on both sides.

Meisberg, the most recent appointee to the Board, discussed his evolving view on whether the Board should use its rulemaking authority more frequently. Acknowledging that he had moved away from an initial assumption that the Board *should* engage in more rulemaking, after several months on the job, he now thinks that substantive issues are better addressed by the Board's adjudicative process.

Meisberg explained his view that rulemaking flips the traditional process—rather than quasi-judicial decision makers applying broad rules by sifting through fact-specific arguments to address a precise question presented, rulemaking has those same decision makers proposing a broad, comprehensive rule, receiving comments, and issuing a revised rule. Walsh observed that rulemaking consumes a lot of the Board's limited resources.

In response to questions on the effective presentation of argument to the Board, both Schaumber and Meisberg urged counsel to avoid overstatement or exaggeration of facts. Schaumber suggested that attacks on an administrative law judge's credibility determinations are seldom successful and, in his view, generally best not raised. Walsh bemoaned the tactic of lawyers who "throw in everything" because this often obscures their most salient arguments, a point with which Meisberg agreed.

Schaumber noted that he finds helpful arguments addressing or framed in terms of the parties' respective burdens of proof. A final word to the wise: Meisberg maintains a general bias against the use of exclamation points to emphasize, even though the writer may find the argument particularly compelling! ■

Peter A. Janus of Siegel, O'Connor, Zangari, O'Donnell & Beck in Hartford, Connecticut, and **Kenneth L. Wagner** of Blitman & King in Syracuse, New York, are co-chairs of the Committee on the Development of the Law Under the NLRA, moderated the discussion.

Case Notes

By Samuel Estreicher

Significant Nonlabor "Labor" Decisions of the Supreme Court's 2003–04 Term

There are interesting Supreme Court decisions that are not technically labor and employment cases. They are nonlabor "labor" cases—cases important to the labor and employment system, although they appear under a nonlabor heading and have nothing to do with substantive labor and employment issues. Perhaps one way to understand this point is to consider that, like the jurisdiction of the Teamsters Union, labor and employment covers "anything that moves."

Political Speech

We start with a pair of political speech cases, *McConnell v. Federal Election Commission* and *Vieth v. Jubelirer*, that may significantly reduce the political influence of labor unions.

McConnell, on fast-track review from the district court in Washington, D.C., sustained a facial challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA), colloquially known as the McCain-Feingold Act, bringing together those close allies—the ACLU, AFL-CIO, Chamber of Commerce of the United States, and the Republican National Committee, among others. The joint opinion by Justices John Paul Stevens and Sandra Day O'Connor for the Court held that Congress could restrict "soft money" disbursements by corporations and unions from their treasuries to finance "electioneering communications," defined to include issue ads "refer[ring] to a clearly identified candidate for federal office" and made within 60 days of the election for the office sought by the candidate. The upshot is that both corporations and unions will be restricted to using the political action committee (PAC) device or attempting to tailor issue ads in such a way that even implied references to the federal candidate are omitted.

Why, you might ask, are the Court's liberals willing to endorse such a clear restriction on political speech? The answer lies in the justices' appreciation of Congress's interest in shoring up the campaign contribution limitations of its prior federal election campaign "reform" law and the old standby—avoiding the "appearance" of corruption through "soft money" disbursements.

Of course, as a formal matter, both corporations and unions are subject to the same regime. One may question whether unions will have the same practical ability as corporations to establish PACs drawn from ostensibly voluntary contributions by their well-heeled members. Even the occasional left-wing billionaire like George Soros will find his ability to fund issue ads targeting his political nemesis in the White House encumbered under McCain-Feingold.

Labor and employment touches anything that moves, and vice versa.

Vieth involves the issue of "political" gerrymandering—the efforts of state legislatures to redraw congressional districts to make them safe havens for majority-party incumbents. Recall the attempt by Texas Democrats to leave the state to prevent a quorum in a desperate bid to thwart a vote on a partisan redistricting scheme. In this case, the ostensible conservatives Chief Justice William Rehnquist, Justice Antonin Scalia, and Justice Clarence Thomas joined forces with Justice O'Connor to find political gerrymandering claims generally nonjusticiable because of the absence of judicially discernible and manageable standards. Justice Anthony Kennedy, concurring in the judgment, supplied the critical fifth vote, arguing that truly "excessive" gerrymandering disfavoring one party might be subject to judicial review. What would be truly "excessive" partisan line drawing, we are told, must await future litigation.

Although the plurality may be right that it is best to avoid yet another intractable political thicket, we may be entering an era where a disputed House seat will be as rare as the proverbial blue moon. And existing majorities in state legislatures will be able to entrench themselves even more. Why vote in elections when the outcome is, for practical purposes, predetermined? Don't we have better things to do with our leisure time?

Privatization

Opponents of school voucher programs (which often include teachers' unions) received a boost with the Court's decision in *Locke v. Davey*. The Court had previously ruled in *Zelman v. Simmons-Harris*, the Cleveland school voucher case, that, consistent with the federal Establishment Clause, states could issue vouchers to parents of school children making a private choice to use those vouchers to fund private school alternatives, including religious private schools. *Zelman* did not, however, provide clear sailing for the voucher movement because many state constitutions bar any use of government funds to aid religious schools.

In *Locke*, the Court upheld Washington state's refusal to provide a scholarship for college students seeking a divinity degree, even though scholarships were available for virtually any other course of instruction at an accredited institution of higher learning. The justices agreed that the Washington state constitution could take a more restrictive view of establishment concerns than the federal Constitution does, and hence Washington was within its rights in drawing a line between secular and sectarian courses of study in terms of what it was willing to fund with scholarship aid.

Locke did not directly involve school voucher initiatives, but its reasoning would seem to allow states to read their constitutions to bar such programs from funding religious schools. Whether other states will follow suit remains an open question, as raised in recent Florida litigation pending before its high court.

Environmental Law

For understandable reasons, labor unions have not always been partial to vigorous enforcement of the environmental laws. Jobs or snail darters? That is too often the question. However, they helped raise the environmental banner in *Department of Transportation v. Public Citizen* in an attempt to enjoin regulations of the Federal Motor Carrier Safety Administration (FMCSA) that would have cleared the way for Mexican motor carriers to engage in cross-border operations, pursuant to the North American Free Trade Agreement. Justice Thomas, writing for the Court, held that the FMCSA lacked authority to prevent such operations and hence was not required to consider the environmental effects of such operations.

continued on page 14

Guest Commentary

Job Anxiety on a Global Scale

By Sandra Polaski

Three years after the last recession ended, there are one million fewer jobs in the United States than before it began. Why is the labor market behaving differently than in previous business cycles? The answer is that strong employment growth during the 1990s masked two long-term, structural changes: a global oversupply of workers and technological change that puts more of these workers in competition with each other. These changes will roil the U.S. labor market for the foreseeable future and suggest a need for changes in public policy.

The global surplus of workers is primarily the result of the end of the Cold War and the collapse of the socialist bloc. Two global economic systems—with separate labor forces—merged into one. The workers of China, Russia, and Eastern Europe are slowly being absorbed into the global production system. Similarly affected are countries like India that were partly in the socialist sphere. The scale of the labor supply shock is unlike anything we have experienced before.

The second structural change is technological and explains the feasibility of offshore outsourcing of jobs. The main factors are well known: software advances that create shared work platforms; falling prices for computers, transport, and communications; and huge expansion in global data transmission infrastructure. Manufacturing jobs have been sent offshore at an increasing pace, and relocation of data or labor-intensive service jobs is now accelerating. We can expect these trends to expand in a wide range of service industries.

Technological changes have also had a major impact on worker productivity in both manufacturing and services. Any given level of demand for products or services can now be satisfied with fewer workers. The stunning productivity growth in the United States is well known, but productivity spurts have also occurred in China, Mexico, and elsewhere. In the long term, this creates the possibility of higher wages. But, in the short term, it contributes to disequilibrium in supply and demand in the global labor market, as more products and services are produced without a concomitant increase in workers, paychecks, and consumer demand.

Job creation will have to be much stronger—not just in the United States, but globally—to avoid unemployment and downward pressure on wages in this country.

The absorption of the global labor supply will not be a short or painless process, and it will get worse before it gets better. For example, Chinese unemployment is expected to grow for at least the next few years, as the rural underemployed and workers laid off from state-owned enterprises continue to flood the labor market there. We are at the beginning, not the end, of this adjustment process.

What are the appropriate policy responses to this unprecedented challenge? Some of the domestic policy prescriptions currently under debate are clearly appropriate. For example, job retraining and unemployment assistance should be available to service workers as well as to manufacturing workers displaced by global job shifts. Tax policy distortions that favor job creation abroad over job creation in the United States should be eliminated.

The problem, however, is much larger. The world economy must work off the oversupply of labor. The answer to oversupply, in the broadest terms, is to increase demand for labor at the global level. This cannot be accomplished within the U.S. domestic economy. Even if U.S. consumption were further stimulated through monetary or fiscal policy, it could not achieve the scale needed to solve the global problem.

Policy solutions of an appropriate scale lie in the areas of trade and international macroeconomic policy, where levers exist to increase the demand for labor in multiple countries at once. Here are three areas in which U.S. policy should be reexamined:

- In low-income countries, 68 percent of workers find employment in agriculture (compared with 1 percent in the United States). Trade pacts that increase agricultural employment in poor countries should be sought, and we should scale back agricultural subsidies that depress prices on world markets and reduce employment in those countries. The framework agreement reached in World Trade Organization negotiations in July was a small step in the right direction.
- Trade agreements should establish minimum international standards for treatment of workers. While wages vary widely based on productivity, cost of living, and other factors, certain labor standards should apply everywhere. These include the right to form unions and collectively bargain, equal treatment for women and minority workers, and avoidance of child labor. These rights have already been agreed by all countries through the International Labor Organization, but in practice they are widely violated. Labor provisions in trade pacts will strengthen economic demand at the global level because better-paid, more-secure workers buy more goods and services, including our own, creating a virtuous economic circle.
- The macroeconomic tools of demand management—monetary and fiscal policy—can be coordinated at the international level. Considerable room exists today to improve global macroeconomic coordination. The United States has had a stimulative macroeconomic policy for the last three years, while European Union policy has constrained economic growth there. In developing countries, debt repayment conditions of the International Monetary Fund (supported by the United States) often prevent even modestly stimulative policies to cope with high unemployment. In the global context, these policies cancel each other out and yield an unsatisfactory overall equilibrium of depressed demand, unemployment, and downward pressure on wages that harms all countries. International macroeconomic policy coordination is not easy, but it has been accomplished in the past, notably when there was strong political will from the United States. ■

Workers at the face cream laboratory of the Dr. Irena Eris cosmetics company in Piaseczno, near Warsaw, Poland. The Company is increasing exports to the United States, Russia, Germany, and other countries.

AP PHOTO/CZAREK SOKOLOWSKI

Sandra Polaski is a senior associate at the Carnegie Endowment for International Peace in Washington. She previously served as special representative for International Labor Affairs in the U.S. Department of State.

The Economic Impact of Title VII

By William J. Carrington and Claudia A. Gonzalez Martinez

Title VII of the 1964 Civil Rights Act is the centerpiece of the federal government's commitment to eliminating discrimination in the labor market. Together with the affirmative action programs implemented soon thereafter, Title VII caused enormous changes in employment law and practices. But, as we pass the 40th anniversary of Title VII, it is worth asking: Were the *economic* changes wrought by Title VII of fundamental importance, or were they mere hoopla?

The most direct approach to answering this question is to ask whether the years after 1964 brought a substantial improvement in the relative economic position of blacks. As it turns out, the salary differential between blacks and whites (among full-time, year-round workers) fell from about 35 percent to about 25 percent between 1960 and 1975. What's more, blacks were increasingly likely to hold managerial and professional positions during this same period. Substantial black–white differences remained as the economy entered the 1974–75 recession, but the progress observed between 1964 and 1975 was historically anomalous. These facts have led some analysts to conclude that Title VII was truly instrumental in the reduction of black–white economic differences during this period.

Yet, there are several reasons why this simple analysis could be misleading. First, Title VII and affirmative action did not simply materialize out of thin air. Rather, the institution of Title VII reflected a growing sense that racial differences in the labor market were unacceptable. The same slowly changing attitudes that led to the passage of Title VII might themselves have directly affected employment opportunities for blacks. In an extreme version of this view, a background reduction in discriminatory attitudes both helped blacks in the labor market and led to the passage of Title VII, but the extra impact of Title VII was negligible.

Second, Title VII and affirmative action were not the only federal policies designed to reduce racial economic differences that were beginning to take effect in the mid-1960s. Schools had long been segregated in the South and, less explicitly, in the North as well, and the schools attended by blacks typically had far fewer resources.

President Lyndon Johnson signs the civil rights bill on July 2, 1964, in the East Room of the White House.

AP PHOTO

These differences decreased with World War II, and convergence in school resources was hastened by the *Brown v. Board of Education* decision of 1954. Thus, the cohorts of blacks coming of age in the 1960s were more similar to whites in their past education than were the older cohorts already in the labor market. Even absent Title VII, adding these relatively well-educated younger black cohorts would have reduced the black–white gap in wages and employment.

A third factor complicating evaluation of Title VII is that only wages for those who actually work are measured. This is important because an increasing number of men did not work during this period. Studies indicate that men with low potential wages were primarily the ones who did not work, particularly among blacks. Thus, a competing explanation for the apparent rise in the relative earnings of black men *who worked* is that low-wage black men had disproportionately dropped out of the labor market.

Economists have used several approaches to separate the effect of Title VII from the contemporaneous effects of school policy changes, general changes in attitudes, and other confounding factors.

The first approach argues that Title VII was imposed on the South by the rest of the country and notes that post-1964 changes in black wages and employment were particularly striking in the South. This reasoning suggests that Title VII had a *causal* impact on the South, above and beyond any independent effect of changes in schooling and attitudes.

The second approach notes that the impact of Title VII and affirmative action was likely to be concentrated in particular segments of the economy. Studies have shown a dramatic shift of black employment toward large employers and federal contractors—precisely the employers pressured most by the enforcement mechanisms set up by Title VII and affirmative action. These findings also suggest that these policies had an impact beyond any effect of changes in schooling and attitudes.

Finally, other studies have noted the speed with which particular companies and industries were integrated since 1964. For example, one study found that the textile industry in South Carolina quickly integrated in the late-1960s after a long period in which virtually no blacks had been employed there. The speed of these changes seems inconsistent with the slow movements one would expect in response to changes in schooling and attitudes.

While it is not possible to completely separate the effects of Title VII from the changes in society that gave rise to its adoption, evidence indicates that Title VII has had a role in improving the economic situation of blacks since 1964. This fact is worth keeping in mind when considering the future of Title VII and its kin. ■

William J. Carrington, Ph.D., is a vice president and **Claudia A. Gonzalez Martinez,** Ph.D., is an economist with Welch Consulting in Silver Spring, Maryland. Carrington is a member of the Section of Labor and Employment Law. For a version of this article with citations, go to the Section website at *www.abanet.org/labor/carringtonmartinez.pdf.*

Section News

Michael Banks Earns Frances Perkins Public Service Award

Michael L. Banks, a partner at Morgan, Lewis & Bockius in Philadelphia, whose 15-year struggle obtained the freedom for a wrongfully convicted man on death row, was honored as the first recipient of the Section's Frances Perkins Public Service Award.

Since 1988, Banks has represented John Thompson, who was wrongly convicted in 1985 of both the murder of a New Orleans hotel executive and an unrelated armed carjacking, which was used by the prosecutors in the murder case. As a result of the convictions, Thompson was sentenced to death by electrocution in the murder case and to 50 years in prison without parole in the carjacking case.

During 15 years of post-conviction proceedings, Banks and the Morgan Lewis team uncovered concealed blood evidence in the carjacking case, which proved that Thompson was not the carjacker, as well as witnesses, documents, and critical information that had been hidden from the defense in the murder case. Ultimately, after the carjacking conviction was vacated based on the blood evidence, a Louisiana appellate court ordered a new trial in the murder case.

In May 2003, Banks, Morgan Lewis partner Gordon Cooney, and New Orleans lawyer Robert Glass retried the murder case. The jury deliberated just 35 minutes before finding Thompson not guilty of the murder. Thompson was released from custody after 18 years of imprisonment, and he has been completely exonerated of any involvement in those crimes.

Banks has practiced in the area of labor and employment law for 23 years. He received the Frances Perkins Public Service Award at the Section's business meeting in August. The award recognizes individuals and organizations that demonstrate a significant commitment to providing pro bono legal services to people of limited means or to nonprofit, governmental, civic, community, or religious organizations designed primarily to address the needs of individuals with limited means.

Banks, right, is congratulated by outgoing Section Chair Stephen Gordon.

PHOTO BY JOEL A. D'ALBA

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The American Bar Association's Section of Labor and Employment Law is proud to announce the launch of *www.laboremploymentlawjobs.com*, a feature-rich, industry-specific job board dedicated to helping match qualified professionals with their next career opportunity. Designed for use by Section member job seekers and employers alike, *www.laboremploymentlawjobs.com* affords Section members all the popular functionality of the cross-industry job sites, but with a concentration on the labor and employment law field.

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Please take a moment to explore *www.laboremploymentlawjobs.com* and discover the breadth of services it provides. Don't forget that this is a resource reserved for members of the ABA Section of Labor and Employment Law, is free of charge, and requires users to log in to the site to verify membership. If you have any questions or comments on the site, contact Keith Maziarek, the Section's Marketing and Communications Manager, at 312/988-5591 or *maziarek@staff.abanet.org*.

Equal Opportunity Committee Active at Annual Meeting

Leadership Luncheon

This year's luncheon attendance increased from last year's, reflecting both the interest of ABA Annual Meeting attendees in participating in the Section's Committees, as well as the desire of the Equal Opportunity in the Legal Profession (EOLP) Committee co-chairs to involve new attendees in their activities.

During the luncheon, Section Chair Stephen Gordon and Chair-Elect Howard Shapiro announced the winners of the first Equal Opportunity in the Legal Profession Committee Honor Roll. This year's honorees—the Equal Employment Opportunity Committee, the Employment Rights and Responsibilities Committee, and the Ethics and Professional Responsibility Committee—each received recognition for increasing the number of new and diverse attendees and speakers at their Midwinter Meetings. In addition, the EOLP gave honorable mention recognition to the Employee Benefits Committee and the Federal Labor Standards Legislation Committee for their innovative practices to increase the number of new and diverse members in their committees. In an effort to empower other committees to increase their diversity profile, the recipients shared their best practices and tips with the audience. Across the board, the committee representatives enjoyed the experiences and encouraged everyone to develop best practices that would work for their committees.

Accommodating Lawyers with Disabilities: Strategies for Success

The EOLP hosted a wonderful panel discussion on the legal developments under the Americans with Disabilities Act and their practical impact for lawyers with disabilities. After quickly reviewing the current legal standards and enforcement efforts, the panelists spent time exploring the practical issues attorneys and law students with physical, psychiatric, and other disabilities face; how barriers are eliminated; and the kinds of accommodations that employers have implemented in the workplace. The panel included Peggy Mastroianni, associate legal counsel for the Equal Employment Opportunity Commission; John Wodatch, chief of the Disability Rights Section of the Department of Justice's Civil Rights Division; Max Brittain, partner with Schiff Hardin, LLP; and Jeffery Gross, managing partner of the architecture firm of Gross and Associates and recognized expert in designing institutional facilities for persons with physical disabilities. The panelists' experiences and stories provided considerable insight into the struggles disabled attorneys face in their profession, and how, in many instances, increased civility within the profession can be the best accommodation.

■ ■ ■

The EOLP welcomes new Employer Co-chair Stacey Campbell of Shook Hardy and Bacon, LLP, and Employee Co-chair Cynthia Nance, a professor at the University of Arkansas, who are joining Union Co-chair Denise M. Clark and Public Co-chair Kay Baldwin for the 2004–05 term.

Thanks to departing Employer Co-chair Gail Golman Holtzman and Employee Co-chair Helen Norton for their dedication and work on behalf of this committee and the Section.

Law Students Earn Awards for Coordinating Labor and Employment Law Programs

The Section is pleased to announce that Wenlei Johnson and Shane Deaton have been selected to receive its 2003–04 Special Recognition Awards for their assistance in coordinating Labor and Employment Law Section presentations at their respective law schools, the University of San Francisco Law School and Indiana Law School. Each award recipient will receive a $250 travel voucher.

Johnson, a recent graduate of USF Law School, was president of the USF Labor and Employment Law Student Association. She was nominated for the award by Kathryn Burkett Dickson, of Dickson-Ross LLP, Oakland, California, with whom Johnson worked along with USF faculty in arranging a lively panel discussion about employment "retaliation claims." The presentation also included information about careers in labor and employment law.

Deaton, a recent graduate of Indiana Law School, was nominated by Nora Macey, of Macey Swanson and Allman, Indianapolis, Indiana, with whom he worked in the coordination of a program at IU Law School discussing various aspects of labor and employment law careers and the activities of the Section. Deaton also arranged post-program follow-up with ABA labor and employment attorneys so that students could ask questions about labor and employment law practice.

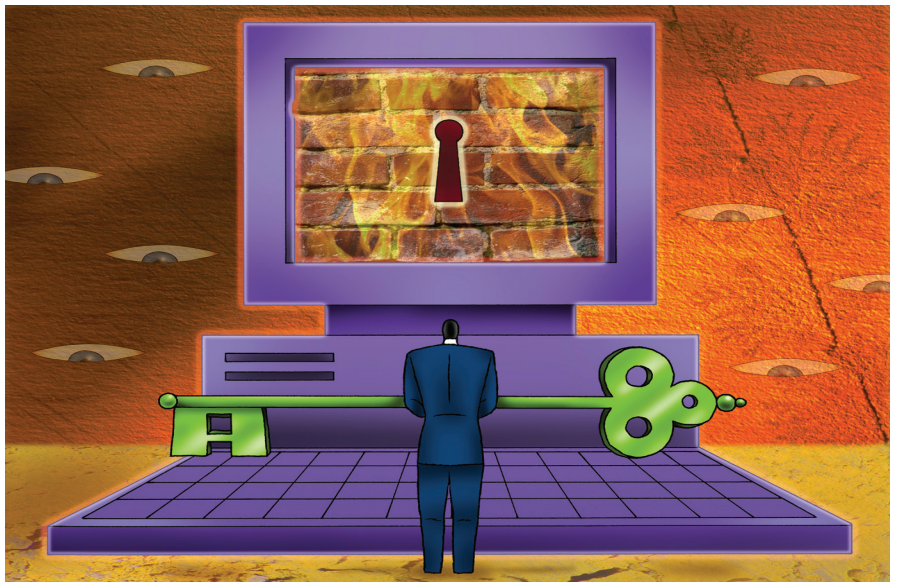
The Section's Law School Outreach Program is designed to bring experienced labor and employment law practitioners to various law schools on a periodic basis so that law students have an opportunity to meet with practitioners and discuss the benefits of being active Section members as well as obtain information about the practice of labor and employment law. Students interested in having such a program at their law school should contact Shannon Harrity at the Section Office at *Harrity@staff.abanet.org*.

Technology Committee Keys in on Substantive Electronic Workplace Issues

Continuing its pattern of producing high-quality CLE sessions on progressive labor and employment law topics, the Technology Committee held its 2004 Midyear Meeting April 21–23 at the National Hotel in South Miami Beach, Florida. Offering a dynamic and engaging program yet again, a few of the many excellent topics presented were: The Misuse of Employer Technology by Employees to Commit Criminal Acts; Ethical Hotspots; EU Data Privacy; Technology and the Americans with Disabilities Act; as well as several demonstrations of practical applications of technology in the practice of law.

These and other papers are available on the Section website at *www.abanet. org/labor/pubs.html*.

Next year's Midyear Meeting is scheduled for March 7–9, 2005, at the Sonesta Beach Resort in Key Biscayne, Florida. The meeting will immediately precede and overlap the Employment Rights and Responsibilities Committee Midwinter Meeting, enabling attendees of both meetings to sample from the other's programming. So plan to join us in Key Biscayne for another exciting program, and look for program and registration details on the Section calendar at *www.abanet.org/labor/calendar.html*.



College of Labor and Employment Lawyers Inducts Fellows

The College of Labor and Employment Lawyers inducted 68 fellows during the American Bar Association's Annual Meeting in Atlanta. Lawyers are elected fellows based upon their sustained outstanding performance in the profession, exemplifying integrity, dedication, and excellence.

To be elected as fellows, lawyers must have been in the field of labor and employment law for at least 20 years and have proven to their peers, the bar, bench, and public that they possess the highest professional qualifications and standards; the highest level of character, integrity, professional expertise and leadership; a commitment to fostering and furthering the objectives of the College; sustained, exceptionally high-quality professional services to clients, bar, bench, and public; and significant evidence of scholarship, teaching, lecturing, and/or published writings on labor and employment law.

The College, founded in 1995 through an initiative of the Council of the Section of Labor and Employment Law, is now represented by more than 715 members in 42 states, the District of Columbia, Puerto Rico, and Canada.

Class of 2004 Inductees

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Befort Reviews

continued from page 1

action authorized by ERISA.

Writing for a unanimous Court, Justice Thomas stated that ERISA was intended to provide "a uniform regulatory scheme over employee benefit plans" and that the preemption provisions are intended to make plan regulation "exclusively a federal concern." Where there is no "independent legal duty" implicated by a plaintiff's state law claim, then it is completely preempted by ERISA. The Court stated that the "duty of ordinary care" imposed by the Texas statute did not create such a duty.

Befort said that had the Court ruled for the plaintiffs, *Davila* would have been a major decision, as it would have "dramatically altered the current regime under which patients can sue doctors for medical malpractice, but can only sue health plans under ERISA to obtain treatment or reimbursement."

Befort explained that if *Cline* were considered a benefits dispute, then four of the Court's seven decisions were benefits cases. Befort noted the "front-burner nature" of health care as a social issue, including the rapid increase in health care costs. ERISA's lack of substantive regulation provides a powerful incentive to states to step in, and the result is a "game of cat and mouse that has produced a steady stream of preemption cases," Befort said.

As for the reduction in labor and Title VII cases before the Court, Befort stated that the decline in union membership may diminish the perceived importance of labor issues in the eyes of the Court, and that both the NLRA and Title VII are "mature" statutes that require less judicial construction.

Befort identified three lines of cases through which the Court has mounted a "three-prong attack" to reduce the labor and employment caseload of the federal courts. The Court's policy encouraging arbitration of workplace disputes has resulted in fewer employment cases in federal courts. Second, the Eleventh Amendment cases prohibiting suits against state governments under the Fair Labor Standards Act, ADEA, and Title I of the Americans with Disabilities Act have steered 5 million state government workers away from federal court on such claims. Finally, the Court's narrow construction of the ADA's "disability" requirement has reduced the number of ADA claims.

Labor and employment lawyers will continue to be busy, Befort said, "albeit sometimes at a different location." Befort noted that labor arbitration provides obvious advantages of speed and reduced expense, and that a system of specialized labor courts as used throughout Europe and South America might be beneficial in simplifying dispute resolution in the American workplace. Any move in that direction, however, should be accomplished through legislation that establishes fair and predictable procedures and a uniform body of substantive law. "The Court's *ad hoc* redirection of some employment law claims does neither." ■

Stephen Befort's paper will be published in the Section's journal, *The Labor Lawyer*. His outline of the cases is posted on the Section website at *www.abanet.org/labor*.

Nonlabor "Labor"

continued from page 7

Environmental concerns also played a role in *Cheney v. United States District Court for the District of Columbia*, the "duck hunting" case in which Justice Scalia declined to recuse himself despite extracurricular travel with Vice President Dick Cheney during the pendency of this litigation. The case involved an attempt by good-government types to pry open the deliberations of President Bush's National Energy Policy Development Group (NEPDG) on the theory that the NEPDG was consorting with industry members, hence requiring disclosure under the Federal Advisory Committee Act (FACA). Justice Kennedy's opinion for the Court did not squarely address whether the NEPDG was shielded from disclosure by the FACA provision expressly exempting committees made up entirely of federal officials. But the Court made interesting mandamus and privilege law, in holding that the court of appeals could entertain the vice president's mandamus petition without requiring the assertion of executive privilege.

International Law

International law involves terrain relatively unfamiliar to labor and employment lawyers. In *Sosa v. Alvarez-Machain*, the Court gave renewed life to the Alien Tort Statute (ATS), a 1789 law giving federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations" or a treaty of the United States. In a puzzling decision, Justice David Souter agreed with the government that the ATS was a jurisdictional provision only and did not create a federal cause of action for violations of international law. However, while seemingly subscribing to the government's theory of ATS's scope and ruling against the plaintiff on the facts, the Court also ruled that the 1789 Congress did intend to provide relief for violations of clearly established international norms, such as piracy and injury to ambassadors. And because the statute cannot reasonably be read to freeze actionable international norms to those recognized in 1789, modern equivalents of those norms could be reached under the ATS. Thus, this is a statute that both (1) is jurisdictional only and does not create a cause of action and (2) indeed creates a cause of action.

You might ask, what does anything of this have to do with a labor and employment practice? More than you think. Ask Chevron, recently sued under the ATS for allegedly aiding and abetting human rights abuses in Nigeria committed against Nigerians by Nigerian military and police. A Chevron subsidiary had been engaged in a joint venture with the Nigerian state oil company at whose oil platforms some of the incidents occurred. Or ask Unocal, which may yet see the Ninth Circuit revive, in light of *Sosa*, an ATS suit alleging Unocal's aiding and abetting the Myanmar military's human rights abuses growing out of another joint venture.

Customary international law is quite an elastic doctrine, requiring that we master not only U.S. treaty law, but also the practices of foreign states and the works of learned "publicists," i.e., academic commentators. We are in store for a major replenishment of our bag of tricks as effective labor and employment lawyers if we do. ■

Samuel Estreicher is professor of law at New York University School of Law and of counsel with Jones Day, New York. He is secretary of the Section for 2004–05. For a version of this article with citations, go to the Section website at *www.abanet.org/labor/estreicher.pdf*.

INSIDE

FALL 2004

Labor AND Employment Law

Section of Labor and Employment Law
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

ABA Defending Liberty Pursuing Justice

Calendar of Events

2004

November 11
Employment Litigation Skills Training
Des Moines, Iowa

November 12–14
Fall Council Meeting
Windsor Court Hotel
New Orleans, Louisiana

December 2
Fair Labor Standards Act and Family and Medical Leave Act Basics
San Francisco, California

December 2
Immigration Law Basics
San Francisco, California

2005

January 14–16
Ethics and Professional Responsibility Committee Midwinter Meeting
The National Hotel
Miami Beach, Florida

January 27–29
State and Local Government Bargaining and Employment Law Committee Midwinter Meeting
Camino Real
Puerto Vallarta, Mexico

February 9–12
Employee Benefits Committee Midwinter Meeting
Fairmont Hotel
San Francisco, California

February 9–15
ABA Midyear Meeting
Salt Lake City, Utah

February 13–16
ADR in Labor and Employment Law Committee Midwinter Meeting
The Biltmore Hotel
Coral Gables, Florida

February 16–18
Federal Labor Standards Legislation Committee Midwinter Meeting
Fiesta Americana Grand Coral Beach
Cancun, Mexico

February 24–26
State Labor and Employment Law Developments
Committee Midwinter Meeting
Las Brisas
Ixtapa, Mexico

February 27–March 2
Development of the Law Under the NLRA Committee Midwinter Meeting
Hyatt Dorado Beach
Dorado, Puerto Rico

March 1–4
Practice and Procedure Under the NLRA Committee Midwinter Meeting
Hyatt Dorado Beach
Dorado, Puerto Rico

March 1–4
Occupational Safety and Health Law Committee Midwinter Meeting
Wyndham Casa Marina Resort
Key West, Florida

March 2–4
Workers' Compensation Committee Midwinter Meeting
Wyndham Casa Marina Resort
Key West, Florida

March 7–9
Technology Committee Midwinter Meeting
Sonesta Beach Resort
Key Biscayne, Florida

March 9–11
Railway and Airline Labor Law Committee Midwinter Meeting
The Inn on Fifth
Naples, Florida

March 9–12
Employment Rights and Responsibilities Committee Midwinter Meeting
Sonesta Beach Resort
Key Biscayne, Florida

April 1–3
Council Meeting
Fairmont Scottsdale Princess
Scottsdale, Arizona

April 6–9
Equal Employment Opportunity Committee Midwinter Meeting
The Registry Resort
Naples, Florida

April 14–16
Sports and Entertainment Labor Law Committee Midyear Meeting
W Hotel Westwood
Los Angeles, California

May 15–20
International Labor Law Committee Midyear Meeting
Hotel Lutetia
Paris, France

August 4–9
ABA Annual Meeting
Chicago, Illinois

2006

February 1–7
ABA Midyear Meeting
New Orleans, Louisiana

February 12–15
ADR in Labor and Employment Law Committee Midwinter Meeting
Westin Mission Hills Resort
Rancho Mirage, California

For more information on any of these events, please contact the Section office at 312/988-5813 or check the Calendar Web page at *www.abanet.org/labor/calendar.html.*