The College of Labor & Employment Lawyers

Summer 2002 Newsletter
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WASHINGTON, DC HOSTS SEVENTH ANNUAL INDUCTION DINNER

While other visitors to the District of Columbia sweltered in the midst of a summer heat wave, three hundred seventy-five College Fellows and their guests found relief with refrigerated air and ice-laden drinks in the cavernous surroundings of the Ronald Reagan Building and International Trade Center (Washington's largest government building). As always, the induction dinner was one of the highlight events held during the American Bar Association's summer session. For the seventh consecutive year, the College convened in formal attire to honor its leadership and to induct newly elected Fellows.

Showing that the College is not stuck in the old ways of the twentieth century, a new innovative element was added to the event. A pre-reception gathering was held for the Fellows-elect and their mentors. This get-together provided an opportunity for a personalized welcome and some supportive assurance that a "no-hazing-of-new-members rule" was generally honored.

During the reception, attendees had the opportunity to greet and congratulate the new Chair and Chair-Elect of the ABA's Labor and Employment Law Section – Jana Howard Carey and Steve Gordon. After an extended period of fellowship and good cheer (it shall be noted that unlike the general reaction to lengthy speeches, no one complained that "the reception lasted too long"), those in attendance were treated to a delicious four course gourmet dinner which included surprisingly good wine selections and a "killer" chocolate dessert.

Don Slesnick

The program started with a well-received report by President Stephen Pepe. The highlight of the evening was the induction ceremony, conducted by past President Harold Datz, wherein fifty-six new Fellows were welcomed into the membership. The Class of 2002 includes practitioners representing a wide geographic diversity: twenty-five states, one territory and a federal district.

The event was brought to a close with rousing remarks by Vice President Bob Dohrmann which included a commitment for new, exciting programming and a "charge" to members for a renewed commitment to their profession and to their College.

As always, small groups of Fellows continued the celebration into the night at various entertainment establishments throughout the city. This correspondent is pleased to report that the next day, the sun rose on the Nation's capitol which, despite the brief invasion of our Fellows, was safe, secure and undisturbed.

Don Slesnick, Roving Reporter

Elliott Bredhoff

Jerome "Buddy" Cooper

Judith Vladeck

Fellow and Board of Governor's Member Elliot Bredhoff, Fellow Emeritus Jerome "Buddy" Cooper and Fellow Judith Vladeck speaking at a special session of the AFL-CIO Union Lawyers Conference held April 28th in Chicago, Illinois.

THE EEOC'S INVESTIGATIVE AUTHORITY: THE POWER TO INVESTIGATE – OR THE POWER TO DESTROY?

By Joseph H. Yastrow

A management lawyer, Mr. Yastrow is a partner in the law firm of Laner Muchin Dombrow Becker Levin and Tominberg, Ltd. in Chicago, Illinois. He was inducted as a Fellow of the College in 2000.

The Commission is authorized to interview witnesses prior to serving or even notifying an employer of a charge.

The EEOC's investigative authority is codified in Section 709(a) of Title VII, 42 U.S.C. §2003-8(a), Section 107(a) of the ADA, 42 U.S.C. §2000e-9, Section 9 of the Fair Labor Standards Act (for the Equal Pay Act), 29 U.S.C. §206(d) and Section 7(a) of the ADEA, 29 U.S.C. §626(a). Recently, the EEOC has shown an increased willingness to use the powers conferred under these provisions more fully and aggressively. The following questions and answers are designed to highlight the EEOC's authority to conduct on-site investigations, interview witnesses at the pre-charge stage and to issue subpoenas.

1. When is the EEOC empowered to conduct an on-site investigation?

The EEOC Compliance Manual states that an on-site investigation may be appropriate where: (1) clarification or verification of information received in response to a request for information is needed; (2) there are inconsistencies in evidence obtained from the parties and other witnesses which need to be resolved; (3) the information needed does not lend itself to retrieval other than through on-site examination and copying; (4) the issues are complex and/or a large volume of documentary evidence is sought; or (5) the issues "can be more readily investigated by observing the facilities or jobs at issue." 1 *EEOC Compl. Man.* (BNA) § 25.3(a)-(e).

The Compliance Manual also states that an on-site "visit" can be useful as the initial step in the investigation of a Title VII and ADA charge when: (1) there is some promise of a substantial settlement; (2) there is a possibility that all of the evidence can be obtained in one visit; and (3) it is a discriminatory hiring case where there is a need for quick preservation of evidence (*e.g.*, employment applications). *Id.* at §25.2(b)(1).

Additionally, under any of the statutes the Commission enforces, the Compliance Manual states that where lack of cooperation [is] anticipated "[o]n-site investigations … may be initiated without advance notice to the respondent when necessary to preserve evidence." *Id.* An unscheduled on-site visit is also more likely to occur: (1) "[i]f the respondent has been unresponsive to RFIs [Requests for Information] in the past," *id.* at § 25.3(c); (2) if the Commission believes it "may be necessary to preserve evidence the respondent may otherwise fail to retain," *id.* at § 25.3(d); (3) if the statute of limitations is near expiration, *id.* at § 25.3(a); and/or (4) if the EEOC is considering legal action to obtain interim relief and feels there is a need to obtain evidence quickly. *Id.* at § 25.3(a).

Joseph H. Yastrow

2. At what point may the EEOC interview witnesses?

The Commission is authorized to interview witnesses prior to serving or even notifying an employer of a charge. *Id.* at §14.2(d). The Compliance Manual provides that such interviews may be conducted: (1) to preserve the testimony of witnesses who may not be readily available at a later time, *id.*; (2) to preserve the testimony of witnesses "who may be intimidated or coached after the respondent becomes aware of the charge," *id.* at § 14.2(d)(1); (3) to preserve the testimony of witnesses "who may have key information or may be able to verify key information," *id.* at § 14.2(d)(1); (4) to preserve the testimony of witnesses "who are custodians of records or who may be able to provide essential information on actual policies, recordkeeping practices, location of records, etc.", *id.* at § 14.2(d)(1); and (5) to plan the investigation and/or determine whether an on-site investigation should be executed. *Id.* at § 14.2(d)(1).

3. Under what circumstances may EEOC subpoenas be issued?

The EEOC's subpoena power is extremely broad. It "may obtain any evidence that is relevant and necessary to the resolution of any issue in an investigation, unless it would be unduly burdensome to provide the evidence." *Id.* at § 24.4.

Subpoenas issued under Title VII and the ADA are not self-enforcing. Thus, if the respondent refuses to comply, the EEOC must petition the district court for enforcement. 29 U.S.C. § 161. Some courts have held that a respondent who fails to exhaust available administrative remedies may not then challenge judicial enforcement of the subpoena. *EEOC v. Cuzzens of Ga., Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979);

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The appellate courts have generally applied the Shell Oil "valid charge" test liberally, and in favor of the EEOC.

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EEOC v. Roadway Express, Inc., 569 F. Supp. 1526, 1528-1529 (N.D. Ind. 1983) (holding that an employer may not challenge judicial enforcement of an EEOC subpoena if the employer has failed to exhaust available administrative remedies). Accordingly, an employer who wishes to challenge or does not intend to comply with an EEOC subpoena issued under Title VII or the ADA should file a petition to revoke or modify the subpoena with the Commission.

The EEOC's ability to enforce subpoenas under Title VII and the ADA differs dramatically from its ability to enforce subpoenas issued under the ADEA and the EPA. This is because 15 U.S.C. §§ 49, 50, which govern the EEOC's authority to enforce ADEA and EPA subpoenas, provides that: (1) there is no right to appeal an ADEA or EPA subpoena, 29 C.F.R. § 1620.31(b) (EPA subpoena), *id*. at § 1626.16(c) (ADEA subpoena); and (2) refusal to obey an ADEA or EPA subpoena may result in a fine of $1,000 to $5,000 and imprisonment. 15 U.S.C. §§ 49 & 50. Accordingly, an employer should be particularly careful to consider the possible consequences of noncompliance with a subpoena if it has been issued under the ADEA or EPA.

4. What is the standard for judicial enforcement of an EEOC subpoena?

In *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 n.15 (1984), the Supreme Court made clear that the existence of a valid charge meeting the requirements of § 706(b) of Title VII is a jurisdictional prerequisite to enforcement of a subpoena issued by the EEOC. A "valid charge" was defined as follows:

> [The charge] must identify the groups of persons that [the commissioner] has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been affected, and the periods of time in which [the commissioner] suspects the discrimination to have been practiced.

Shell Oil, 466 U.S. at 73.

There is no comparable "valid charge" requirement for ADEA or EPA investigations or subpoena enforcement actions thereunder. *EEOC v. Am. & Efird Mills, Inc.*, 264 F.2d 300, 301 (4th Cir. 1992).

The appellate courts have generally applied the *Shell Oil* "valid charge" test liberally, and in favor of the EEOC. See e.g., *EEOC v. Quad/ Graphics, Inc.*, 63 F.3d 642, 647 (7th Cir. 1995); EEOC v. Superior Temp. Serv., Inc., 56 F.3d 441, 447 (2nd Cir. 1995). They also have held that a district court's role in reviewing EEOC subpoenas is deferential and limited to an inquiry of whether: (1) the investigation is within the EEOC's authority; (2) the EEOC's demand is too indefinite; and (3) the information sought is reasonably relevant. *Quad/ Graphics*, 63 F.3d at 645; *U.S. v. Fl. Azalea Specialists*, 19 F.3d 620, 623 (11th Cir. 1994).

5. Under what circumstances have federal courts refused enforcement of EEOC subpoenas?

Most courts have refused to allow access to evidence pertaining to bases of discrimination clearly not raised in the charge. *See, e.g., Gen. Ins. Co. v. EEOC*, 491 F.2d 133, 136 (9th Cir. 1974) (EEOC not entitled to "evidence going to forms of discrimination not even charged or alleged"); *EEOC v. Quick Shop Mkts.*, 396 F. Supp. 133, 135-36 (E.D. Mo.) (denying access to information on race discrimination since only sex discrimination was alleged in charge), aff'd., 526 F.2d 802 (8th Cir. 1975).

The EEOC's subpoena power also does not extend to respondents not named in a charge. *EEOC v. Bellemar Parts Indus., Inc.*, 868 F.2d 199, 200 (6th Cir. 1989) (upholding an award of attorney's fees against the EEOC in subpoena enforcement action where respondent had not been named and had presented evidence that the charge was against another respondent and did not apply to it).

In addition, a number of courts have modified EEOC subpoenas judged to be overbroad or directed at irrelevant material. *E.g., EEOC v. Packard Elec. Div.*, 569 F.2d 315, 317-19 (5th Cir. 1978) (refusing to enforce subpoena seeking plant-wide information should be not be enforced where charge concerned narrow factual situation); *EEOC v. S. Farm Bureau Cas. Ins. Co.*, 2000 U.S. Dist. LEXIS 15946 (E.D. La. 2000) (refusing to enforce an EEOC subpoena seeking irrelevant information merely by asserting an expanded investigation), aff'd., 271 F.3d 209 (5th Cir. 2001); EEOC v. U.S. Fid. & Guar. Co., 414 F. Supp. 227, 250 (D. Md.) (holding that EEOC may not request that information be identified by race and sex where the charge alleges only sex discrimination and the charging party is caucasian), aff'd., 538 F.2d 324 (4th Cir.), cert. denied, 429 U.S. 1023 (1976). For this reason, the EEOC's former practice of utilizing a vague, catchall description in seeking evidence was disapproved. *Manpower, Inc. v. EEOC*, 346 F. Supp. 126, 128-29 (E.D. Wis. 1972) (refusing to enforce EEOC's broad catchall demand for "any like or related records"); H. Kessler & Co. v. EEOC, 53 F.R.D. 330, 333, 336 (N.D. Ga. 1971) (refusing to enforce "catchall" request of "any and all like or related records"), aff'd., 468 F.2d 25 (5th Cir.

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THE "NO CONTACT" RULE: EX PARTE COMMUNICATIONS IN EMPLOYMENT LITIGATION

By Richard L. Alfred

Mr. Alfred is a management lawyer practicing in the Boston office of Seyfarth Shaw. He was inducted as a Fellow of the College in 2000. The author wishes to acknowledge the assistance of Krista Green Pratt, an associate practicing labor and employment law at Seyfarth Shaw, in preparing this article.

Courts around the country have sought to apply the "no contact" rule in a manner that balances the rights of plaintiffs to gather information before commencing litigation with the defendant organization's right to counsel.

One of the hottest debates in employment law today involves the issue of when plaintiffs' counsel may contact and interview employees of a represented corporate defendant.[1] Despite receiving guidance from a number of sources (including state and federal court opinions, administrative agency decisions, bar association opinions, the text and comments to state ethical rules, etc.), employment lawyers have struggled to distinguish appropriate fact-gathering activity from unlawful ex parte communications with represented parties. The American Bar Association Model Rule of Professional Conduct 4.2, adopted in most jurisdictions, prohibits a lawyer from communicating with a person he or she knows to be represented by another lawyer about the subject of the representation. Applying this rule to an organization, the Comment to Rule 4.2 explains that an attorney may not speak ex parte to employees: (1) "having managerial responsibility on behalf of the organization"; (2) "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability"; or (3) "whose statement may constitute an admission on the part of the organization." Although the ABA's Ethics 2000 Commission advocated deletion of the third category of the Comment, this approach has not yet been adopted by the ABA.

In 2002, the highest state court in Massachusetts waded into the debate in *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347 (2002) ("*MR&W*") offering the most recent interpretation of the elusive Massachusetts Rule of Professional Conduct 4.2 (identical to ABA Model Rule 4.2). The Supreme Judicial Court (SJC), in *MR&W*, overturned the lower court's imposition of almost $95,000 in sanctions against the plaintiff's attorneys in the underlying action for interviewing five of the defendant's employees. In doing so, the SJC adopted an approach similar to that taken by the New York Court of Appeals and rejected the prohibition in Comment 4.2[4] on contact with any employee "whose statement may constitute an admission." Thus, the SJC prohibited contact "only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation." Criticized as creating a distinct disadvantage to organizational parties over individuals and permitting interference with the attorney-client relationship,[2] the decision has left corporate defendants in the difficult position of being held responsible for statements of employees—often drafted or coached by adverse counsel—without the ability to be represented by counsel in the interviews that result in such statements. Although ostensibly eschewing an approach that would "result in extensive litigation before the case even begins," the Court's decision left no doubt that additional litigation would be inevitable as attorneys for both plaintiffs and defendants struggled with its application.

Richard L. Alfred

The approach taken by the SJC is one of many. Courts around the country have sought to apply the "no contact" rule in a manner that balances the rights of plaintiffs to gather information before commencing litigation with the defendant organization's right to counsel. Essentially, the approaches adopted by various courts fall into three categories:

"Admissions" Approach: The ABA's current approach as articulated in its Model Rule 4.2, Comment [4], takes into account the standard for "admissions" as defined in the Federal Rules of Evidence. Under this standard, ex parte communications with employees "whose statement may constitute an admission on the part of the organization" are forbidden. Reading the term "admission" as referring to Fed. R. Evid. 801(d)(2)(D), courts following this approach, including the Superior Court that originally imposed the sanction that led to the *MR&W* decision, have prohibited ex parte contact with employees whose statements could constitute a legal admission, i.e., "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."[3]

"Control group" Approach: Courts adhering to this approach permit plaintiffs the greatest lati-

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tude in contacting employees of a defendant. Contact is restricted only as to the organization's "control group," i.e., those high level management employees who make or have substantial input into "final decisions" of the company.[4]

***Niesig* Approach:** Ostensibly the approach taken by the SJC in *MR&W*, this standard was first adopted by the New York Court of Appeals in *Niesig v. Team I*, 76 N.Y.2d 363 (N.Y. 1990), when it rejected the blanket "no contact rule" espoused by the trial court as overbroad and the "control group" test advocated by the plaintiffs as too narrow. Striving to balance the interests of plaintiffs and represented organizations, the *Niesig* court stated that contact was prohibited only with those "whose acts or omissions . . . are binding on the corporation . . . or imputed to the corporation for purposes of liability, or employees implementing the advice of counsel." The *Niesig* approach is also consistent with that taken in the Restatement (Third) of the Law Governing Lawyers § 100, Reporter's Note comment e, at 98 (1998).

The purpose of Rule 4.2 is to require that communications by an attorney with an adverse party represented by counsel occur only with the adverse party's lawyer present.

The purpose of Rule 4.2 is to require that communications by an attorney with an adverse party represented by counsel occur only with the adverse party's lawyer present. In the context of organizations that can act only through their employees, the "admissions approach" balances the interests of the parties on both sides in order "[t]o ensure the effective assistance of counsel by preserving counsels' mediating role on behalf of their clients, protecting clients from overreaching by counsel for adverse interests, and protecting the attorney-client relationship by preventing clients from making ill-advised statements without the advice of their attorney."[5] Contrary to the approach taken in *Niesig*, the admissions approach, derivative of the Fed. R. Evid. 801 definition of the term, represents the most rational balancing of interests and ensures effective assistance of counsel for organizations. Prohibiting such contact is particularly important in those jurisdictions where employees' statements are generally admissible as long as they concern matters within the scope of their employment. Plaintiffs' counsel frequently argue that a restrictive approach creates an unfair advantage for organizational litigants because interviewing witnesses in other contexts is not subject to the same scrutiny as interviewing employees of a represented organization. As the dissent in *MR&W* points out, however, the stakes for employers are much higher, since "[i]n the non-organizational context, a witness's hearsay statement could not be a vicarious admission of the defendant, yet in the organizational context it could."

The *Niesig* and "control group" tests, both permitting plaintiffs broad latitude in contacting employees of an organization, present serious concerns for represented organizations. First, employers face the prospect of extra-judicial "discovery" beyond the regulation of the jurisdiction's discovery rules. There are no formal limits, for example, placed on the number, length or content of any ex parte discussions with employees as there are under the federal and most states' rules of civil procedure. Second, employers may be unfairly surprised by statements drafted by plaintiff's counsel pre-complaint or post-discovery and seen by defendant's counsel for the first time during discovery or even as late as the plaintiff's opposition to defendant's summary judgment motion. Third, given the confusion acknowledged by the SJC about this subject and, in particular, the application of the attorney-client privilege, the employer and its counsel must be cautious in communicating with the company's own employees about an internal complaint that could give rise to formal legal action.

Under these circumstances, in jurisdictions that permit such latitude to plaintiffs' counsel in conducting ex parte communications with employees of a represented company, it is important that employers have a carefully drafted policy, consistent with ABA Model Rule 3.4, that informs employees (1) that they have no obligation to speak with any attorney representing an employee or former employee adverse to the company; (2) depending on the specific circumstances, that they are encouraged not to speak with any such attorney without the company's lawyer also present; (3) that they should not, in any event, sign a statement prepared by such an attorney that pertains to their work for the company; and (4) that the company hopes that they will inform human resources immediately if they are contacted by an adverse attorney.[6] In this way, employers may attempt to limit the potential harm caused by unfair ex parte statements taken by plaintiffs' counsel and used as admissions in administrative and court proceedings.

1/ A related issue – when counsel may contact former employees of the corporate defendant – is outside the scope of this article. For more information on this topic, see Benjamin J. Vernia, Right of Attorney to Conduct Ex Parte Interviews with Former Corporate Employees, 57 A.L.R. 5th 633.

2/ See MR&W, 436 Mass. at 365 (Cordy, J., dissenting).

3/ See, e.g., Weibrecht v. Southern Ill. Transfer, Inc., 241 F.3d 875, 883 (7th Cir. 2001) (quoting Fed. R. Evid. 801).

4/ See Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc., 128 Ill. App. 3d 763 (2d. Dist. 1984) (prohibiting contact with "top management persons who had the responsibility of making final decisions").

5/ MR&W, 436 Mass. at 363 (Cordy, J., dissenting).

6/ For additional guidance as to what attorneys for employers may request of employees, see Comment to ABA Model Rule 3.4, and Restatement (Third) of the Law Governing Lawyers §§ 99 & 100 (1998).

THE LEGALITY OF SECONDARY ACTIVITY TO ENFORCE EITHER RECOGNITION OR BARGAINING

By Nelson D. Atkin II and Richard F. Liebman

Mr. Atkin and Mr. Liebman are partners in the law firm of Barran Liebman LLP in Portland, Oregon. Management lawyers, they were elected Fellows of the College in 2001 and 1998, respectively.

Nelson D. Atkin II

Richard F. Liebman

Through picketing and leafleting, the union asked potential contributors to "Please Stop Your Contributions" to the United Way, and asked the United Way, in turn, to "cease doing business" with VNHS.

In United Food and Commercial Workers, Local No. 1996 (Visiting Nurse Health System, Inc.) ("VNHS"), 336 NLRB No. 35, (2001), the National Labor Relations Board was presented with the question of whether a union violates Section 8(b)(4)(B) of the National Labor Relations Act, as amended, by engaging in secondary boycott activities where an object is to enforce the union's certification as the collective bargaining representative of the employees of the primary employer. A Board Majority (Chair Liebman, Walsh; Hurtgen dissenting) found that the union did not violate §8(b)(4)(B) by such activity.

Local 1996 won a certification election in December 1992 by a small margin (43 to 40). However, one vote was cast for an intervenor and two votes were challenged, leaving the employer hoping that the election would be ruled a tie and that a new election would be ordered. That did not happen; ultimately the employer challenged the Board's certification by refusing to bargain.

After four and one-half year with no bargaining, the union decided to take action. Rather than calling a strike (which in view of its slim majority would likely be only marginally successful at best), the UFCW decided to boycott the United Way of Atlanta, which contributed substantial funds to VNHS' operations. Through picketing and leafleting, the union asked potential contributors to "Please Stop Your Contributions" to the United Way, and asked the United Way, in turn, to "cease doing business" with VNHS.

A charge under §8(b)(4)(B) was then filed, a complaint was issued and the parties stipulated to the facts, including the clear secondary intent of the union. At the joint motion of the parties, the matter was submitted directly to the Board.

In finding no violation, the majority focused on the "plain meaning" of the statute after the Landrum-Griffin amendments in 1959.

> "In interpreting the Act, it is well-settled that basic principles of statutory construction apply: '[I]f a statute's meaning is plain, the Board and reviewing courts "must give effect to the unambiguously expressed intent of Congress."' Section 8(b)(4)(B) prohibits secondary activity having the following objects:
>
> "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [of the Act]….
>
> "By its express terms, Section 8(b)(4)(B) addresses two distinct forms of secondary activity: (1) forcing or requiring an employer or any other person to 'cease doing business with any other person' (a 'cease doing business' boycott); and (2) forcing or requiring any other employer 'to recognize or bargain with a labor organization as the representative of his employees…' (a 'recognition' boycott). With respect to recognition boycotts, Section 8(b)(4)(B) contains an exemption privileging such boycotts by a 'labor organization [which] has been certified as the representative of such employees under the provisions of section 9 [of the Act].' Accordingly, we find that the plain meaning of the text of Section 8(b)(4)(B) is that it was not intended to condemn secondary activity, by a certified union, for the purpose of inducing the primary employer to recognize or bargain with that union." (336 NLRB No. 35, at pp. 5-6; footnote omitted)

The majority rejected the construction urged by the General Counsel

> "that the statutory language authorizing secondary recognitional boycotts by certified union acts are an exemption only to the

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> prohibitions, in the second clause of Section 8(b)(4)(B), against recognition boycotts by uncertified unions"

because it would render the second clause of Section 8(b)(4)(B) superfluous and would make the exemption of the second clause meaningless since,

> "* * * It is difficult to conceive of a recognitional boycott that would not also have, as one of its objectives, forcing the secondary employer to 'cease doing business' with the primary employer. * * *" (336 NLRB No. 35, at p. 6)

The majority's opinion concluded with the statement that its decision will not open the floodgates to secondary activity since it only applies to certified unions and only applies where certification enforcement is an object of the secondary activity. In any event, the majority points out that, in its view, Congress has chosen not to protect neutral employers in those circumstances and that,

> "* * * In our decision today, we have given effect to the choice the Congress has made." (336 NLRB No. 35, at p. 12)

The VNHS case involved only the UFCW's attempt to enforce its certification; the dissent criticized the majority opinion as unfair:

> "* * * Employers will be pressured into foregoing their right to judicial review of a certification of representative. Employers who persist in seeking judicial review will be subject to the economic harm inflicted by a secondary boycott and will, so far as the majority is concerned, have no recourse for redress even if the certification of representative is ultimately found to be defective by a reviewing court. * * *" (336 NLRB No. 35, at p. 12)

VNHS and the United Way of Atlanta learned that the hard way.

However, the reach of the decision is greater in light of the more inclusive language of §8(b)(4)(B). That section covers not only "recognition", which was most relevant to the VNHS case, but also covers "bargaining." There is no limitation to the aspects of "bargaining" which are covered by the section.

Consider this scenario. A union wins an election by a bare majority (as occurred in VNHS) and bargaining has been extended over ten months. The union is reluctant to call a strike since it is not confident that the strike will be effective, and it is concerned about the coming end to the certification year.

Under VNHS, the union has an effective alternative. It can present the employer an information request including items that may be either marginally or wholly irrelevant, thereby "assuring" that the employer will deny at least some of them. Upon that denial, the union then takes two actions:

> (1) It files an unfair labor practice charge alleging an unlawful refusal to bargain under §8(a)(5).
>
> (2) The union also begins a forceful secondary boycott campaign against the employer's customers, funding sources and suppliers, some of whom may be sensitive to unfavorable publicity (as would be the United Way of Atlanta) and some of whom may have union workforces whose contracts allow them to engage in sympathy strikes.

The processing of the charge may be slow or quick, but nothing prevents the union from filing a succession of charges relating to bargaining and extending the open charge period for months.

The processing of the charge may be slow or quick, but nothing prevents the union from filing a succession of charges relating to bargaining and extending the open charge period for months. The union keeps up its secondary boycott pressures until every one of the union's charges is either dismissed or withdrawn.

Under VNHS, whether the employer is right or wrong in its certification challenge is irrelevant to the right of the union to engage in a secondary boycott; the primary and secondary employers are without a remedy for the boycott. Similarly, in the above scenario it would be irrelevant as to whether the union won or lost its §8(a)(5) charges. The only relevant point is that the union claims to be enforcing what it believes (in good faith or in bad faith) to be the employer's bargaining obligation.

Under these circumstances it would be a rare employer that would be able to withstand months of intense secondary activity; and, if the employer attempts to withstand it, it may be committing industrial "hara-kiri." Thus, by the VNHS decision, the Board has greatly shifted the balance of economic power for a union which may have limited employee support but also has extensive assets and creativity with respect to Board law.

The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other notable information.

SPOTLIGHT ON FELLOWS

Fellow Robert Battista has been nominated to serve as a Member and Chairman of the National Labor Relations Board in Washington, DC. Mr. Battista, a management lawyer at Butzel Long in Detroit, Michigan, was inducted as a Fellow in the College's first class in 1996.

Fellow Jana Howard Carey, a Founding Governor of the College, has been elected Chair of the American Bar Association's Section of Labor & Employment Law. A partner in the Baltimore law firm of Venable, Baetjer and Howard, she represents public and private sector employers in the full range of labor and employment law matters, including litigation in employment discrimination and other employment related cases. She was named one of Maryland's Top 100 Women, recognized for outstanding leadership and achievement, by Maryland's business publication, *The Daily Record*, in 1997, 2000 and 2002, and as one of fewer than 50 women receiving this honor for three years, was elevated to the publication's Circle of Excellence. Prior to becoming Chair of the ABA's Section on Labor and Employment Law, she served for eight years on the Section's Governing Council. She also was co-Chair of the Section's Continuing Legal Education Committee and held several leadership positions in the Committee on Equal Employment Opportunity. In addition to her work in the Labor and Employment Law Section of the ABA, Ms. Carey served for three years on the ABA's Standing Committee on Continuing Legal Education, which is responsible for overseeing the organization's legal education activities, and is Deputy Chair of the Labor and Employment Law Committee of the ABA's Section on Public Utility, Communications and Transportation Law.

Jana Howard Carey

Fellow Rosemary M. Collyer has been nominated for a federal judgeship in the United States District Court for the District of Columbia. Ms. Collyer, a management lawyer at Crowell & Moring in Washington, DC, was also named one of the best labor and employment lawyers in the United States by *Corporate Counsel* magazine in March 2002. She was elected a Fellow in the class of 1997.

Fellow Stephen D. Gordon, also a Founding Governor of the College, has been elected Chair-Elect of the American Bar Association's Section of Labor & Employment Law and will succeed Jana Carey in 2003 as Chair of the Section. He is a partner in the firm of Williams & Iversen in Roseville, Minnesota.

Fellow Emeritus Warren Tomlinson passed away May 2, 2002, at his home in Vail, Colorado. A management lawyer in the Denver office of Holland and Hart, he served as managing partner, member of the management committee and chairman of the labor law department during his thirty-seven years with the firm. After retiring, he moved to Vail where he did mediation work in Eagle and Summit counties. He was inducted in the College's inaugural class of 1996.

BOARD OF GOVERNORS APPROVES BY-LAW AMENDMENT REGARDING FELLOWS' TESTIMONY

At a recent meeting of the Board of Governors, the following language was adopted as an amendment to the College bylaws, which sets forth policy and procedures for any Fellow who is asked for testimony in a judicial, administrative or confirmation process. Please feel free to contact either Steve Pepe, in his Newport Beach Office, or Susan Wan, in the College's office, if you have any questions regarding this new policy.

Judicial or Administrative Nomination And Confirmation Process.

The College shall not participate in any judicial or administrative nomination process. The only information the College may provide is whether an individual is a member. The College shall not disclose anything else, including whether a person had been nominated and not admitted. Any Governor who testifies or participates in a judicial or administrative nomination shall make it clear, if appropriate, that he/she is not speaking on behalf of the College.

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SEVENTH ANNUAL INDUCTION DINNER










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1972), modified on other grounds, 472 F.2d 1147 (5th Cir.), cert. denied, 412 U.S. 939 (1973); EEOC v. Ford Motor Credit Co., 26 F.3d 44, 47-48 (6th Cir. 1994) (noting that the EEOC is not automatically entitled "to any material it deems relevant in its discretion"); EEOC v. United Airlines, Inc., 287 F.3d 643 (7th Cir. 2002) (refusing to enforce the EEOC subpoena which was not relevant to the charge and would have been overly burdensome to the employer).

Some courts have imposed limitations on the time period for which records must be produced. E.g., Monsanto Co. v. EEOC, 2 F.E.P. 50, 50 (N.D. Fla. 1969) (eight-month period); Ga. Power Co. v. EEOC, 295 F. Supp. 950, 954 (N.D. Ga. 1968) (five years prior to the alleged violation), aff'd., 412 F.2d 462 (5th Cir. 1969); cf., EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 755 (9th Cir. 1991) (holding that three to four years worth of documents is not burdensome, and they are relevant where the biased acts could have occurred within that time period); EEOC v. Magnetics Div., 13 F.E.P. 191, 192 (W.D. Pa. 1976) (holding that discovery of information for the time period of three and one-half years before the alleged discriminatory act is not unduly impressive to the employer).

Still other courts have excluded information pertaining to unrelated facilities. Joslin Dry Goods Co. v. EEOC, 483 F.2d 178, 184 (10th Cir. 1973) (limiting EEOC discovery to single location where "[i]t was not shown that there were hiring or firing practices and procedures applicable to all of the stores"); cf., Ga. Power Co. v. EEOC, 295 F. Supp. at 954 (EEOC's discovery should be limited to city of Atlanta, where "all personnel records [for 18 locations] are maintained at one central office"). But see, Parliament House Motor Hotel v. EEOC, 444 F.2d 1335, 1340-41 (5th Cir. 1971) (affirming enforcement of subpoena for records relating to another restaurant because of common management).

CONCLUSION

In light of the foregoing, an employer faced with an EEOC investigation should carefully craft its strategy to avoid legal skirmishes which it cannot win and which could cause the EEOC to respond with an even more aggressive investigation.

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