

The WorkSheet

Beins, Axelrod, P.C.

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Firm News

March 2008

Beins, Axelrod, P.C. Welcomes Regina Markey to Firm

Beins, Axelrod, PC welcomes attorney and long-time labor advocate Regina M. Markey to the Firm. Regina will serve as "Of Counsel" to the Firm, practicing in the areas of civil rights, whistleblower protection, employee benefits and labor law. She currently represents a whistleblower in litigation against the EPA. Regina played a key role in the recent federal court victory of former Washington Redskins and Chicago Bears linebacker Wilber Marshall against the powerful NFL pension fund. (See inside for more on this case.) She also originated a complaint in an ongoing class action on behalf of New York City residents, workers and students against former EPA Administrator Whitman for her intentional misstatements following the 9/11 terrorist attacks. [Update: the 2nd Circuit Court of Appeals issued a disturbing decision on April 22nd in the matter, finding that Ms. Whitman could not have violated the U.S. Constitution as charged because she was following the Bush Administration's urgings (called "White House guidance") to lie to the public about the serious health risks. The District Court had previously found that Whitman's statements "shock the conscience" and had violated plaintiffs' 5th amendment rights. Lead counsel at Berger & Montague, PC is considering further action.]

Regina also brings to the Firm a specialty in labor capital market strategies. She has advised the AFL-CIO, International Labor Unions and many organizations on a broad range of public employee and private sector pension fund issues over her career. This expands the services Beins, Axelrod can provide to its union and fund clients. With workers' pension funds figuring prominently in the capital markets, unions are increasingly adding investment and shareholder approaches to their arsenal of tools for protecting and expanding employee rights. In the past, Regina has served as special assistant to the CEO of the AFL-CIO Investment Program, served as the Federation's representative to the Council of Institutional Investors, co-coordinated the United Steelworkers of America's path-breaking Industrial Heartland Labor Investment Forum, served as a union representative to the National Conference of Commissioners on Uniform State Law Drafting Committee on Public Employee Retirement Fund Act, and advised the United Mine Workers of America during the Pittston strike

Please feel free to call Regina about these approaches or other ideas for getting labor's agenda heard in the corporate board room. She can be reached at (202) 328-7222 or rmarkey@beinsaxelrod.com.

Firm & Client Successes

Our Firm's successes are really our clients' successes. Our clients have had several recently, and our Firm's attorneys have had the privilege of playing a role in them:

- Former NFL Linebacker Wilber Marshall Wins Just Compensation for Football Injuries
- Federal Government Employees Receive Favorable Settlements for Job Discrimination

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This newsletter discusses cases and legal issues that may be of general interest to the Firm's clients and friends and is for general informational purposes only. The newsletter does NOT necessarily represent the views of any of the Firm's clients. Any editorial comments are for entertainment (and perhaps therapeutic purposes) only. The newsletter should not be seen as a substitute for specific legal advice. If you have any questions, please call us.



Justice Prevails!!

Federal Court Awards NFL Great Wilber Marshall Deserved Benefits

Former football giant Wilber Marshall won a major victory in the US Court of Appeals for the 4th Circuit in securing eight months of benefits wrongfully denied by the NFL Players Association pension and disabilities plans. *In Re: Wilber Marshall*, 2008 U.S. App. LEXIS 722 (January 14, 2008) (unpublished). The Plans claimed Mr. Marshall had somehow miraculously recovered from his substantial football-related injuries when it eliminated his benefits for eight months in 2001. Overturning the decision of the U.S. District Court, the 4th Circuit panel ruled in January that the Plans did not follow a “deliberate, principled reasoning process” in establishing Mr. Marshall’s disability date. This conduct violated ERISA. The court remanded the case to have the benefits restored.

“Not only did I win, but this is a victory for all players against a system rigged to deny us benefits we rightfully earned,” Mr. Marshall told us. The Plan had mechanically chosen Mr. Marshall’s disability date as December 7, 2001, based on the date of a doctor’s examination, even though that doctor concluded at the time that Mr. Marshall had been disabled since at least 1997. In 2000, a faulty examination of Mr. Marshall by a different physician mistakenly found that he had recovered, leading to a disruptive series of denial, repossession and partial re-award of his benefits. The final result was the eight month benefit gap. **Beins, Axelrod, P.C.** attorney **Regina Markey** represented Mr. Marshall early in his challenge.

Regina believed the Plans had violated ERISA and the plan documents in erroneously finding he had recovered. She succeeded in prompting the plans to provide two months of benefits it had denied, but not as to the remaining eight months. This led to the litigation. “Regina saw through their games and took the League on,” Mr. Marshall says.

Mr. Marshall suffered financial hardship from the improper action. The Groom Law Group, representing the plans throughout the proceeding, told the Wall Street Journal in 2005 it rarely loses such challenges. In the prior decade, Groom recounted, 18 of 20 suits filed by retired players seeking benefits had failed. Mr. Marshall’s interests were ably represented before the Fourth Circuit by Tighe, Patton, Armstrong & Teasdale, P.L.L.C., Washington, D.C. and the Meiburger Law Firm of McLean, VA.

Mr. Marshall enjoyed a stellar 12-year professional football career between 1984-1995, playing linebacker and winning Super Bowl rings with the Chicago Bears and Washington Redskins, and playing for several other teams.

Sometimes Settlement is the Best Way to Vindicate Employee Rights

Management attorneys are (usually) smart enough to settle the most outrageous cases of mistreatment against employees before the case goes to trial. Although they may be called “settlement”, they are often a real victory for the employee.

David Kelly has recently negotiated very favorable settlements in two cases on behalf of terminated federal employees. In the first case, the Government refused to settle prior to the hearing, despite David’s warnings that the evidence would be very unfavorable to the Government. After hearing from the first few witnesses, the Government agreed to rescind its termination of the employee and award a large backpay amount. In the second case, the Government wisely agreed to settle the matter before the trial. The employee had alleged serious sexual harassment. The settlement gave the employee almost all of the remedies she had sought in her complaint.

Applicable law requires that prevailing employees in these cases get their attorneys’ fees paid by the Government. Settlements thus often involve attorneys’ fees payments because the fees would be even higher if the case actually proceeded through and post-trial procedures. The “fee shifting” laws are the fair way for employees to get competent legal representation.

Some people claim that employees and their attorneys are unfairly “milking” the Government for large settlements and judgments and attorneys’ fees awards. But why shouldn’t the Government as an employer be held to the same standards of fairness as a private sector employer? The Government is an extension of ourselves, of our own community. Shouldn’t we hold ourselves to the highest of standards? Damages awarded, or negotiated in settlements, in these cases are simply “make-whole” damages plus attorneys’ fees; the aggrieved employee is simply made whole for the losses caused by management’s wrongdoing.

NFL Players are not often thought of as oppressed employees, but many former players are not wealthy and are severely disabled by injuries

If taxpayers are unhappy with the Government having to pay for too many employee lawsuits, they should question the way the Government manages its workforce. Whatever problems may exist, the employees should not be the ones to suffer the consequences.

Supreme Court Update



Court Issues Several Cases Relevant to Employees

AGREEMENT TO ARBITRATE IS BINDING

Although not a traditional labor case, in *Preston v. Ferrer*, 552 U.S. — (2008), the Court again emphasized that parties who agree to arbitrate their disputes cannot easily escape from arbitration. An actor and his attorney/agent agreed to arbitrate any dispute concerning the terms of their contract, including disputes over the validity of the contract. When the attorney sought arbitration, claiming he was due additional fees, the actor asked a state agency to hold the contract unlawful because the attorney was not a licensed agent. The Supreme Court held that by agreeing to arbitrate questions including the validity of the contract, the actor had agreed that an arbitrator, not the state agency, would resolve the issue. Arbitration under the Federal Arbitration Act did not preempt state law, but it did control the forum which would make the decision.

401(K) PARTICIPANT CAN SUE FIDUCIARY TO PROTECT HIS OWN ACCOUNT

In *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. — (2008), the Court unanimously held that participants in a defined contribution pension plan (an IRA or a 401(k) plan) could sue the plan's fiduciary for fiduciary breaches that impair the value of plan assets in a participant's individual account. In a plan which permits participants to direct the investment of the assets in his individual account, the plaintiff alleged that the trustee had failed to implement his directions and that he lost \$150,000.00 because of the trustee's breach. Because ERISA provides that a fiduciary who breaches his obligations must make "the plan" whole, the trustees argued that ERISA did not permit monetary relief for an individual participant. Acknowledging the dominant role of defined contribution plans and the trend toward such plans and away from defined benefit plans, the Court explained that misconduct by the administrator of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. But in a defined contribution plan, an administrator's misconduct can damage a particular individual account without threatening the solvency of the entire plan.

NEW DECISIONS AID PLAINTIFFS IN DISCRIMINATION CASES

Two decisions marginally advanced the rights of plaintiffs in discrimination cases. In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. — (2008), a woman alleging age discrimination sought to support her claim with evidence of age discrimination by company supervisors who played no role in the discrimination against her. The district court had excluded the evidence as irrelevant. But it was unclear from the district court decision whether the court held that evidence involving unrelated supervisors could never be admissible or that this specific evidence was inadmissible. The Supreme Court held that a *per se* rule of inadmissibility would have been an abuse of discretion. However, because the district court's rationale had been unclear, the Court remanded so that the district court could explain its decision.

In *Federal Express Corp. v. Holowecki*, 552 U.S. — (2008), the Court held that an ambiguity in the EEOC's procedures did not deprive a plaintiff of the right to file a complaint in court. The ADEA permits suit in federal court 60 days after the filing of a charge with the EEOC, but the statute does not define "charge." The EEOC has a specific form for filing a charge. But EEOC regulations define a charge loosely, as any request that the EEOC take action based on allegations of discrimination. The plaintiff signed an EEOC intake form and a supporting affidavit. The Court agreed with the EEOC that the filing was properly deemed a charge because it could be construed as a request for EEOC action and appropriate relief.

Low Productivity at Supreme Court?

The number of cases heard by the Supreme Court has been in a steady decline for the past 20 years. In the mid-1980s, the Court was averaging about 140 cases per term. In the past ten years, they have heard less than 80 cases per term.

We're always hearing big business and Republican calls for more "worker productivity." Must not apply to the Supreme Court.

Justice Clarence Thomas has not asked a question during oral argument in the last 142 Supreme Court cases

Justice Samuel Alito recused himself from the recent Exxon Supreme Court case because he holds over \$100,000 in Exxon stock



NLRB Update: When Will the Madness End?

NLRB Stays in 20th Century; Worker Rights Have No Place in Tech Era

The technological revolution is no obstacle for the NLRB's continued assault on worker rights. In a recent ruling, the NLRB (still dominated by Bush appointees) determined that employers may prohibit employees from using the employer's e-mail system to communicate about union activities. *The Guard Publishing Company d/b/a The Register Guard and Eugene Newspaper Guild, CWA Local 37194*. The employer's rule specifically prohibited use of its computer systems for "non-job related solicitations."

The Board, in an attempt to appear defensive of Section 7 organizing rights, made clear that an employer's enforcement of the allegedly non-discriminatory rule would still be a unfair labor practice. The Board's discussion on this issue shows that it is extremely difficult, if not practically impossible, to separate a rule itself from its enforcement. The Board listed numerous types of rules that an employer could promulgate; all the examples lead to the conclusion that an employer can carve out rules to effectively allow communications it deems to be acceptable while excluding communications regarding union activity. An employer's reliable escape route is that it does not discriminate between pro-union communications and anti-union communications.

The Board went down the wrong path when it analogized use of e-mail as being closer to the use of an employer owned bulletin board than to simple face to face communication between employees. An employer has no right to restrict face to face communication on union activities on employer property, subject only to the employer's normal control over employees' productive use of paid for time; on the other hand, employers still have control over the content of posting on its bulletin boards. E-mail is much more similar to face to face communication.

The Board majority misses the simple fact that sending or receiving an e-mail imposes an immeasurably small burden on the employer's computer systems. In the event that an irresponsible (or maybe just technically inept) employee jams an e-mail system by trying to send a bulky union-related message, that employee would be subject to discipline on the same basis as an employee who jams the e-mail system by sending a bulky e-mail that has nothing to do with union activities. And although an employer may have a legitimate interest in preventing employees from engaging in extended e-mail exchanges during work periods, such electronic chatting is also a legitimate disciplinary issue. It is irrelevant whether the excessive communications are about union activities. Yet those assurances are not good enough for employers.

The NLRB shows no interest in recognizing that the law must adapt with the changing world. As usual, the bright spot to this case is that Board Members Liebman and Walsh dissented. Soon, with a new White House administration, Liebman and Walsh will be part of a majority.

Unions and Workers Start Wish Lists for Future of NLRB

Although we would be presumptuous to assume that we will have a Democratic President as of next January, we have reason to be optimistic. The AFL-CIO's "Lawyers Coordinating Committee" has already begun to make a wish list for ways to get back to the NLRA's goal of fostering collective bargaining and the right to union representation. Some of these may seem like boring procedural issues, but they play an important role in protecting collective bargaining rights. Most of them do not require any change at all to NLRA as it has existed for decades. Among the wish list for 2009:

→ More use of "Section 10(j)" Injunctions: This provision of the NLRA empowers the NLRB's Regional Directors to go directly to a federal court to enjoin employer misconduct immediately when a ULP charge is filed. Without a 10(j) injunction, employer misconduct continues at least until the ALJ makes a decision. We all know how long that can take. The employers love the delay- "Justice Delayed is Justice Denied."

→ Fewer "Collyer" Deferrals: The NLRB Regions have with increasing frequency deferred ULP charges to the contractual grievance process. The NLRB complains to us that they have to allocate their all too scarce budget resources to Representation cases. Of all the ways our Government likes to spend our money, allocating a little more to protect employee rights seems reasonable. Under the current system, Unions are forced to spend their own money to protect rights that the NLRB itself should be protecting. The employers are of course very satisfied with this system.

One irony of this case is that the Respondent is a newspaper- supposedly the defender of the right to communicate freely. As other NLRB cases involving the media have shown us, some media companies don't like free expression when it comes to their own control over employees.

Although unions are seeking several "big" changes to labor law, there are a few "small" changes to the NLRB's procedures that could have a major impact.



Sometimes the Federal Courts Get it Right

DC Circuit Rejects Employer Attempt to Ignore Arbitration Award

As most of you know, arbitration is the method by which most contract disputes between companies and unions get resolved. Some employers don't take defeat well and refuse to comply with an arbitrator's award in favor of the union. In such a case, the employer can sue the union in federal court to vacate the award. Not only does this delay justice for the union, but it also runs up legal fees for the union. Employers think it is a solid strategy. We disagree. Sometime federal courts disagree as well.

Generally speaking, federal law gives great deference to an arbitrator's award. A court will only vacate an award if there is proof of some sort of misconduct by the arbitrator or if the award absolutely disregards the contract language. This happens very rarely. If an arbitrator was arguably construing or applying the contract, a court must defer to the arbitrator's judgment.

In *Howard University v. Metropolitan Campus Police Officer's Union*, (Decided January 18, 2008), the US Court of Appeals for the DC Circuit rejected the employer's attempt to ignore an arbitration award. The Union had prevailed in an arbitration alleging that the employer failed to abide by wage increase provisions in the collective bargaining agreement. The employer contended at the arbitration that the Appendix setting forth wage increased had never actually been agreed upon by the parties. The arbitrator agreed with the union that the wage appendix was indeed part of the agreement.

The employer argued in court that the arbitrator did not have jurisdiction to decide whether the parties had agreed upon the wage appendix. The employer never argued to the arbitrator this alleged lack of jurisdiction. Obviously, the employer figured that it would be better off simply arguing the substantive defense to the arbitrator and then if it lost the arbitration taking a second bite at the apple by arguing to the court that the arbitrator lacked jurisdiction. Such "sandbagging" is generally not favored in labor law. And for good reason: the collective bargaining process usually works best when parties resolve all their disagreements without going to court and by arbitrating in good faith.

The DC Circuit didn't just reject the employer's late stage attempt at disputing the arbitrator's jurisdiction, it pointed out that all the other federal appeals courts that have considered the issue have also rejected such "sandbagging." ("Sandbagging is our word- not the DC Circuit's.")

The employer also argued that the arbitrator had erred when it refused to allow the employer to enter testimony from the union's negotiations attorney. The arbitrator had sustained the union's objection at the hearing that such testimony was privileged by the attorney-client privilege. The DC Circuit actually suggested that the arbitrator's ruling on this point was probably an incorrect interpretation of federal law governing the attorney-client privilege. Yet, in a stark example of how deferential federal courts are to arbitrators, the DC Circuit still declined to vacate the award. The court stated, "The question is not whether the arbitrator correctly applied federal law; the question is whether her decision to exclude the evidence out of a concern for a client's asserted interest in confidentiality amount to 'misconduct.' Plainly it did not."

The employer also argued (its hard to believe they could fit all these arguments into the maximum size of the brief to the court) that the arbitrator's award should have been vacated because the arbitrator partly based her decision on the failure of the employer's president- who signed the CBA- to testify at the arbitration to explain the employer's intentions. The court stated that it could not fault the arbitrator for drawing a negative inference from the president's failure to testify. We particularly liked this statement by the court, although we were disappointed that the court did not give the rule the label we have given it: The "Hugh Beins Adverse Inference Rule." We call it that because Hugh has successfully invoked the rule more often than any other attorney on Earth. (We can't actually prove that, but it seems like it has to be true.) We have petitioned "Black's Law Dictionary" to list the principle by its correct name.

This case is important to Unions because it is so often the union that wants the arbitrator's award to stand. Occasionally, it is the other way around. But as a general rule, the arbitration process is a fair and efficient one and its outcome must be respected by all involved.

Courts will usually not let a party object to an arbitrator's jurisdiction when the party failed to raise the objection before the arbitration

We believe the court may have made a misprint in failing to properly credit Hugh Beins as being the primary "inventor" of the "Adverse Inference Rule"



Federal Court Decisions on Overtime Issues

Second Circuit Holds Employer Accountable For Overtime Payment

The United States Court of Appeals issued a favorable ruling for “per diem” nurses who were wrongly denied proper payment for overtime work hours. The plaintiff nurses in [Chao v. Gotham Registry, Inc.](#), were employed, as are many nurses around the country, by a temporary staffing agency. The agency was hit by a federal lawsuit over ten years ago for its failure to properly pay overtime wages to the nurses. In response to the earlier lawsuit, the temp agency (Gotham), informed the nurses that they could only work overtime hours with prior authorization from Gotham. In many situations, the nurses did work overtime hours because the needs of Gotham’s clients, and the needs of the patients, required such work with little advance notice.

Gotham argued to the court that it should not have to pay for those overtime hours because it actually incurred substantial administrative costs in managing the overtime work issues. The court wisely rejected this argument, as it would “permit the employer to avoid the Act whenever the overtime provisions threaten success in achieving Congress’s goal of curtailing overtime by bringing its cost above its benefit to the employer.”

The Court also rejected Gotham’s argument that the overtime in question was unauthorized and thus not compensable. Gotham knew of the overtime work and permitted it. By law, that is enough to obligate the employer to pay overtime wages. The court stated, “An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance. A simple instruction to employees that they cannot work overtime is not enough to free the employer from obligation to pay for overtime hours worked.

The court pointed out that there is a general shortage of qualified nurses in the economy right now. It also found, however, that nurses themselves should not be forced to bear the burden of this shortage. The court continued, “Employers, not employees, are in the best position to address the evils of overwork and underpay.”

The court’s opinion truly upholds the principles of “New Deal” legislation such as the Fair Labor Standards Act. Here we see the importance of federal judicial appointments.

Ninth Circuit Affirms ULP Against IRS For Refusal to Pay Overtime Wages

In [Dept. of Treasury-IRS v. Federal Labor Relations Authority](#), the 9th Circuit Court of Appeals decided that the IRS had improperly refused to comply with an arbitrator’s award. The case began when the IRS assigned employees to report to an office other than their home office. The Union grieved, alleging that the CBA prohibited the assignments because they had the affect of increasing the employees’ commuting time. The arbitrator upheld the grievance and order back pay compensation for the additional commuting time spent by the employees.

The IRS refused to comply. The Union filed a ULP charge with the FLRA. The IRS argued that as a government agency it could not be required to pay such compensation. The court concluded that the applicable statutes had waived the government’s immunity from such obligation. The court would not allow the IRS to shirk the obligations put upon it by our Congress. The IRS’s arguments were stretched and convoluted.

The decision was issued on April 3rd. It may still be subject to appeal by the IRS.

Many government employees are covered by overtime pay requirements under federal and sometimes state law. If anti-employee forces want to change that, they can lobby for legislation in Congress. For now, though, it is only fair to hold our government accountable for the requirements of the law.

The 2nd Circuit agrees that employers cannot issue a supposed prohibition on overtime work but then sit by idly and let employees work overtime without proper compensation.

The Federal Government is immune from many types of claims. Overtime payment claims by federal employees is generally NOT one of them.

Holding Big Business Accountable



Unions Fight Corporate Power In The Boardroom

As we have discussed in previous issues, unions and union sponsored pension funds can and should play a vital role in demanding corporations behave like responsible entities in our society. Though corporations are creatures of state law, they increasingly set aside any loyalties to American communities, searching the globe for short-term profits at all costs. The shareholder voice may be the last thread of accountability reaching corporate management. Unions, in keeping with their traditional role as corporate watchdogs at the bargaining table and as shareholders, continue at the forefront of “active ownership” efforts.

This 2007-2008 proxy season, multiemployer and public employee pension funds submitted hundreds of proposals challenging management practices detrimental to shareholders and the public. High on the agenda for unions are proposals to mortgage companies tied to the sub-prime lending fiasco, and “say for pay” proposals requiring shareholder consideration of out-of-control executive compensation packages.

In this way, multiemployer and union funds are not only serving their members – plan participants and beneficiaries – but they are also complying with Department of Labor mandates requiring fiduciaries to vote proxies on issues that “may affect the value of the plan’s investment.” 29 CFR §2509.94-2. Funds generally must monitor compliance with this rule and maintain records as to their proxy voting as well, the Department of Labor says. Beins, Axelrod, P.C. has been advising its Fund clients for some time now to ensure their shareholder proxies are voted pursuant to responsible policies that reflect the best interest of plan participants and beneficiaries.

As usual, the Teamsters are seriously engaged in this arena. On behalf of the International Brotherhood of Teamsters General Fund, for instance, Secretary Treasurer C. Thomas Keegel wrote to United Airlines management demanding an overhaul of its compensation practices. “On the heels of a three-year bankruptcy, UAL rewarded its CEO with \$39.7 million,” he wrote. “This level of excess is indefensible.” If the company fails to satisfy the Teamsters Fund, the Union will urge fellow shareholders to withhold votes from directors serving on the committee that set UAL’s executive compensation. That’s shareholder activism.

Also at United Airlines, in late February the airline’s mechanics voted overwhelmingly to support the Teamsters Union as their collective bargaining representative.

The ouster of finance committee chairwoman Mary Pugh at mortgage lender Washington Mutual, Inc. was aggressively demanded and achieved by a number of union-related shareholders tied to AFSCME, Change to Win, and SEIU. About 40 percent of shareholders also voted against a number of directors who serve on WaMu’s human resources committee, according to vote totals recently announced. WaMu, the largest U.S. savings and loan company, lost \$1.1 billion in this year’s first quarter partly due to home-equity and home-loan portfolios. The AFL-CIO found the mortgage crisis tied to management pay incentives at its website www.paywatch.org. In a recent “debate” on CNBC, AFL-CIO attorney Damon Silvers criticized this irresponsible practice. Both CNBC hosts and another invited talking head did their best to quell the criticism, but the irresponsibility is too blatant to cover up. (CNBC is the same media outlet that showcases “expert” Jim Cramer who advises investors not to buy stock in unionized companies.)

Other shareholder concerns this proxy season include director interlocks, independent board chair, homeland security, corporate political contributions, fair lending practices, golden parachutes, investment in China, human rights, health care principles, board declassification, and responsible employment principles.

Fund investors should seriously consider the impact of their shareholder vote at each and every company in their portfolios. Beins, Axelrod, P.C. clients with questions should give us a call.

In today’s corporate dominated economy, unions have been creative and started new fronts in the war against corporate greed

The war against corporate power is one with many fronts: The bargaining table, the courtroom, the picket line, the corporate boardroom, the media, the White House, the Congress, the State House...the list goes on...



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When Did Resigning From an Unfair Employer Become a Crime?

In a case that should worry and outrage all working people (as well as their lawyers), ten nurses at a Long Island health care facility and the nurses' attorney have been indicted on criminal charges for allegedly endangering patients lives by resigning from their employment.

The prosecutors allege that the nurses acted in conspiracy with one another to resign en masse and put the employer in the quandary of not having adequate staff to care for patients. The nurses contend that they tried repeatedly to force management to address their serious concerns about ethnic discrimination and substandard working conditions. Two different State of New York regulatory agencies have independently investigated the incident and concluded that the nurses did not jeopardize the well being of the patients.

The nurses' attorney was also indicted for allegedly "soliciting" the nurses to resign en masse, which the prosecutors contends is a crime in itself. That a lawyer can be indicted for advising clients in their decision whether to remain in a job is a very disturbing development.

The indictment seems to have some political motive behind it. The employer is well connected politically. Obviously, a group of Filipino immigrants does not have any real political influence.

The right to withhold one's labor would seem to be a most fundamental right in our country. The 13th Amendment of the Constitution was ratified over 140 years ago, but it still prohibits slavery in this country. Why are the nurses being blamed for any lapses in patient care? Shouldn't the facility management itself have the ultimate responsibility for ensuring patient care?

Who is Prominent "Democratic" Attorney Looking Out For?

Walter Dellinger is a prominent attorney who served as President Bill Clinton's Solicitor General and in other key positions in the Clinton administration. Dellinger is a partner at the corporate law firm O'Melveny & Myers.

In a 2007 case in the US Court of Appeals, Dellinger represented the US Chamber of Commerce. The Chamber of Commerce is always at the forefront of anti-union slander. He argued to the US Supreme Court on behalf of Exxon Mobil in the recent case in which Exxon tried to limit its damages for the Exxon Valdez disaster. (Exxon did not want to pay the \$3 billion in punitive damages; then they would only have \$37 billion in profits left this year! Poor Exxon!) But oil companies and the Chamber of Commerce are only at the top of the list of loathsome corporate clients: He also represented FedEx in the recent California Supreme Court litigation in which FedEx employees sought to recover their rightful wages due them as employees. (FedEx continues to promote the myth that their drivers are "independent contractors", which is a convenient way to avoid paying taxes and giving the employees workers' compensation coverage. Fortunately, even the brilliant Dellinger could not convince the California Supreme Court to buy into FedEx's sham. Several years ago, Dellinger also represented the Venetian Hotel in Las Vegas at the US Court of Appeals when the Venetian argued that union activists should not have been allowed to use a public sidewalk in front of the hotel. Like many big corporations, the Venetian believes that they can own everything in our society, even employees and public sidewalks.

Dellinger is among a small group of highly talented lawyers who would be considered for high ranking judicial and Justice Department appointments by the Democratic President that will be inaugurated next January. We expect to get pro-corporate, anti-worker, anti-environment judges and attorneys from a Republican administration, but shouldn't we expect more from Democrats? The answer is yes- and our Democratic Presidential candidates and our Senators and Members of Congress need to be reminded of that.

If an employee is indicted for resigning his employment, how different is that from slavery?

We must be work hard to make sure that the next President appoints judges and Justice officials who do owe allegiances to the people, not to big money interests