



Think there's no difference between Gore & Bush? Think Again!

2000 election will affect us for generations

by Fran Schreiber

The Bay Area Chapter of the NLG asked me to participate in an election debate with 3 opponents - all of whom turned out to be for Nader - although their initial billings were each different (none for Bush, of course). I provided my bona fides to try to shield myself, and then launched into my analysis of what is at stake, why there is a significant difference between Gore and Bush, and why a vote for Nader (or simply not voting) is a vote for Bush.

A day ago, from Texas, an e-mail arrived from Ken Molberg, a Texas attorney I don't know. It was forwarded by NLG labor and employment attorney David Kern. I appreciated seeing a Texas attorney who also feels a vote for Nader is a vote for Bush, particularly in light of the argument so many on the left are making: that in states where either Bush or Gore are a lock, vote for Nader.

This piece is my presentation - improved upon with a little help from my friends, including my debating opponents (also friends) who helped me to clarify arguments I hope will rebut their positions.

For many American families, Election 2000 will be nothing less than a referendum on their economic futures. The decisions made by the next President, the next Congress, and the next Supreme Court - which is also at stake in this election - will have a major effect on our lives for generations to come.

Issues at stake include preserving Social Security and Medicare, creating an affordable drug benefit in Medicare that benefits consumers not insurance companies, protecting patients' rights, quality public education, civil rights, and a woman's right to choose, to name just a few.

Also at stake are workers' rights - including the basic right to organize a union. Our unions do a lot for us. In the last few years with the new AFL-CIO leadership, our unions became involved in politics. We set up independent political operations, and when we defeated Prop 226 in California, we assured that here, at least for now, our unions could communicate openly and honestly with our membership about political matters that really affect our lives.

Our political work gives us a seat at the table where we can bargain for issues that affect all working families. Our victories come from our political strength, and **we are not so naive as to believe that electing a particular candidate will solve every problem.** When we rely on our movement, we are not betrayed by individual officials. And when we mobilize to consolidate our gains, we have greater success if we are on the offensive - not the defensive.

Our unions not only bargain for union workers' wages, hours and conditions, but for social legislation that affects all workers.

Historically it was the union movement that secured occupational safety and health protection in the workplace. Looking further back, we fought for and won social security. And still further back, workers were instrumental in the battles for the 8-hour day and minimum wage.

Today, the fight for social benefits - such as increasing the minimum wage - still tops the union agenda, although that increase affects most significantly workers who are not union members. Our unions fight for social benefits for **all** workers, and the union movement is the only movement that continually fights for working people's issues.

Victories - as few as they seem in our time - are accomplished by inches, not miles. Ralph Nader, who is due much respect, is hardly a *people's candidate*. And your vote for Nader is a vote for a candidate who will NOT be elected, nor will any of his votes move either Bush or Gore in any direction.

There are significant differences between Gore and Bush that matter to millions of people in this country: to the people who are part of the middle class and are overworked for modest salaries, often with no benefits; to the overwhelming majority of people who are part of the working class and work for hourly wages (and if non-union, usually with no benefits); to the people who work for minimum wage; and to the people with no jobs at all. Will it matter economically to those of us reading this newsletter? Probably not. I'm sure we can survive, but we're not wage workers. Yet we are progressive attorneys; we are dedicated to improving the lives of others - and it will matter to many. **That's why I'm asking you - as a progressive - to vote for Gore.**

One significant difference: minimum wage. Texas workers employed in agriculture or domestic services earn the state minimum wage of \$3.35 rather than the federal minimum of \$5.15 an hour. Bush opposed increasing the Texas minimum wage of \$3.35 per hour and opposes a national minimum-wage law. (*Associated Press*, September 24, 1999) Bush says states should be able to opt out of wage laws. (*Dallas Morning News*, September 10, 1999; *Memphis Commercial Appeal*, October 14, 1999).

Do Gore and Bush always differ on the issues? No. Will either of them oppose the death penalty? No. But **Bush's record number of executions** reveals a pattern of deliberate cruelty and injustice. There *is* a very real difference between these two men. Should we refuse to vote for a candidate unless they are 100% in support of every one of our issues?

What about education? Do you believe it makes a difference for poor and working families to have a strong public education system instead of money squandered on vouchers? If you don't, then vote for Bush, vote for Nader, or just stay home.

What about racism? Do you believe that Gore, with the strong support of the NAACP, the Congressional black caucus and numerous other civil rights organizations, will issue an Executive Order stopping racial profiling, and this can begin to make a difference? If you don't, then vote for Bush, vote for Nader, or just stay home.

What about social security? Do you believe that Gore will keep the system from being raided and a portion dumped into the stock market, and that this can make the difference for millions of folks who rely on their social security income during retirement? If you don't, then vote for Bush, vote for Nader, or just stay home.

What about choice? Do I need to point out the difference? Do I need to remind any of you that the Supreme Court is at stake? If you don't care, then vote for Bush, vote for Nader, or just stay home.

My new friend from Texas said something quite significant in his e-mail. "... if you want to vote for Bush, say, in Oregon, Wisconsin, Illinois and elsewhere, there are two ways to do it: you can vote for Bush or you can vote for Nader. If that's a 'thrill' you want to have, please don't make the rest of the country suffer through it. As for Texas: Please don't expect me NOT to cast my vote for the most formidable opponent that George Bush has - which is Gore - not Nader. **The stronger signal I can send to W and the Republican Right Wing, the better.**"

To those that say political independence means breaking clearly with the two existing corporate parties - the Democrats and the Republicans - I can only say that **you cannot measure what is progressive by issues alone.** I support a political bloc including a Labor Party, but that's not an option in this election. So how is political independence being expressed? **There are several thousand candidates running for local, state and national offices as a result of the AFL-CIO's conscious strategy of political independence.** Granted, most of their candidacies are within the constraints of the Democratic Party, but **labor's strategy will move us towards political independence in a much more concrete way than voting for Nader.** In this election Nader doesn't represent political independence at all. He represents issues.

And we can't build this labor movement or labor strength when we are fighting George Bush for the basic right to organize. **Gore says**, "the right to organize and bargain collectively is a fundamental American right that should never be blocked, never be stopped and never, ever be taken away." (Chicago Tribune, 9/4/99)

Bush says union workers undermine the economy and bragged that "Texas is a right-to work state, with low unionization of the workforce." (www.tded.state.tx.us/TXoverview)

My friend from Texas noted there are "things about the Democratic Party that I want very much to change, but . . . does it mean you want to punish it for the laws, programs and positions [it brought] such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Family & Medical Leave Act, protective labor legislation, the Equal Pay Act, etc."

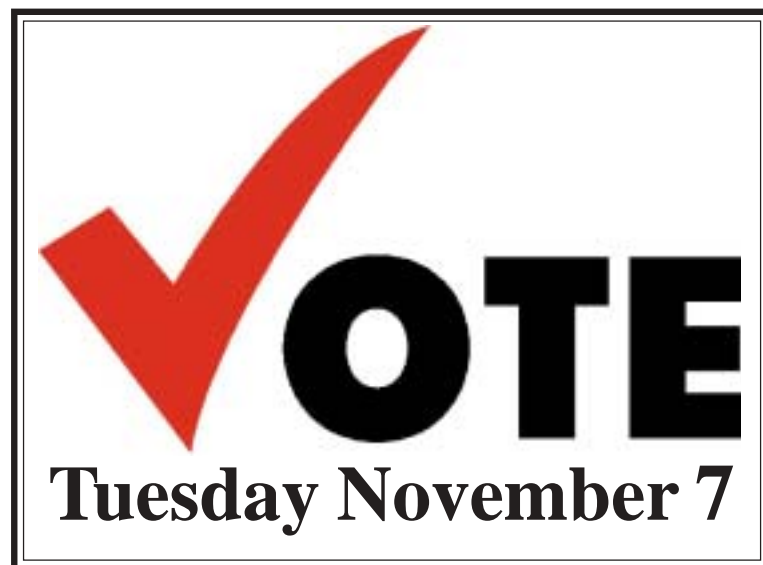
To those that say there's only just a slight difference between Gore and Bush, let me remind you there's a lot riding on your minimization of that difference for the majority of poor and low wage workers in this country. Let me remind you as well how difficult it is to make gains from a defensive position.

To those that say we just have to bite the bullet and start voting our conscience, I say we are biting the bullet. Let's face it, voting for Nader isn't much of a statement. Nader is spending his time attacking Gore - that's not what I call progressive - that's probably why Nader's support includes a number on the far right.

For those who would vote for Nader -- how many of you honestly believe there will not be a difference? Do you really think there will not be a significant deterioration of economic rights for a huge number of folks? Are you sure your political and personal rights will not be impacted by a right wing administration? Do you really want to spend the next 4 to 8 years fighting defensive battles?

Don't vote for a Bush presidency by voting for Nader - if not for yourself then for the millions who will suffer under it. Every vote counts and don't believe the polls. As my Texas friend said: the stronger the signal we can send to W and the Republican Right Wing, the better - and a vote for Nader signals nothing for them.

Don't vote for Bush, don't vote for Nader, don't stay home. Put your vote where it counts. Then do more, call your local labor council and volunteer in labor's efforts to get out the vote.



Mandatory Arbitration of Statutory Rights

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Many observers believe that the employment relationship is regulated largely by statutes. However, the statutory regime inaugurated in the 1960s, and its correction of market failures, is fast disappearing under a cloak of judicial decisions upholding contracts in which applicants and employees are found to have waived their and the public's statutory rights. In a variation on the nineteenth century's transformation from status to contract, we have the contemporary move from statute to contract.

This article discusses one means of privatizing statutory rights, employers' insistence that applicants and employees agree, as the price of securing or retaining a job, that all employment-related disagreements, including alleged violations of statutory rights, will be decided in arbitration rather than litigation.¹ Misleadingly termed waivers of fora, rather than waivers of rights,² courts that enforce these agreements ignore the qualitative differences between arbitration and litigation, including arbitration's relaxed or absent evidentiary and procedural rules, arbitration's limit on pre-hearing discovery, the circumscribed opportunity for judicial review of arbitration decisions, and the bias against awarding significant back and front pay or punitive and compensatory damages in arbitration.³ Instead of contributing to a body of public law that reinforces legislative recognition of systemic and corrosive wrongs at the workplace and that establishes new rules of the game consistent with the statutory goals, complainants are forced to seek compensation or promotion or freedom from harassment in a context that suggests the problem—be it racism or favoritism—is trivial because it occurs in isolated and individualized, perhaps even atypical, situations.⁴

The good news is that some courts are questioning the enforceability of these compelled agreements to arbitrate. The bad news is that these courts are also issuing instructions on how to write valid arbitration provisions which deprive employees of the right to pursue, in a judicial forum, meaningful remedies for violations of statutory claims arising at the workplace.

Background. Initially, the Supreme Court declared contractual waivers of the judicial forum for resolving alleged violations of statutory employment rights unenforceable,⁵ even while upholding similar prospective waivers of statutory rights in antitrust and securities cases.⁶ But in 1991, the Court reconsidered whether certain pre-dispute waivers of the judicial forum for resolving statutory claims could be binding on employees, and extended the presumption in favor of an arbitral forum from commercial to employment cases.⁷

In *Gilmer v. Interstate/Johnson Lane Corporation*,⁸ a manager signed the standard, mandatory securities industry registration form requiring arbitration of "any" disputes as a condition of employment. When the manager subsequently claimed violations of the ADEA, the employer successfully argued that the appropriate forum for resolving the ADEA claim was arbitration; that is, that the manager's waiver of the judicial forum in the registration form, required of everyone in order to

work in the securities industry, was enforceable by the employer. Adopting the analysis used in the antitrust and securities cases, the Court found a presumption in favor of enforcement of contractually-based arbitration clauses unless the plaintiff could point to evidence of Congressional intent to preclude a waiver of judicial remedies for the statutory rights at issue. Evidence of Congress' intent to defeat the presumption in favor of arbitration may be found in a law's text, its legislative history, or an inherent conflict between the purpose of the statute and arbitration.

In *Gilmer*, the plaintiff argued only the inherent conflict prong of this test,⁹ having conceded that nothing in the ADEA as then enacted or in its legislative history demonstrated a Congressional intention to preclude prospective waivers of a judicial forum for ADEA claims. And the Court, wrongly or not, found the arbitral forum not to compromise substantive rights under the ADEA. Currently, lower federal courts use *Gilmer* as authority to enforce pre-dispute agreements to arbitrate claims under all employment laws.¹⁰

The good news. A few courts, unwilling to acquiesce in this curtailment of statutory rights, have either flatly rejected the rationale of *Gilmer* or, more commonly, found the prospective waivers unenforceable because they are one-sided, too costly for employees, and/or unconscionable.

The Court of Appeals for the Ninth Circuit, in *Duffield v. Robertson Stephens & Company*,¹¹ found direct evidence of Congressional intent not to permit pre-dispute waivers of the judicial forum for resolving employment disputes based on statutory rights.¹² But the Ninth Circuit's learning is either dismissed or denigrated by the other courts of appeals, which enforce prospective waivers as long as the employee could have conceivably been aware of the obligation to use arbitration to resolve future disputes involving statutory rights.¹³ Thus, some courts find a waiver if an employment application includes language that "any" dispute goes to arbitration;¹⁴ some courts test a waiver's "appropriateness" by insuring that the employer provided the information it promised to the prospective employee at the time of signing;¹⁵ and some courts find waivers "voluntary and knowing" because the employment application or personnel handbook referred to arbitration.¹⁶

Cases do exist in which the courts refuse to enforce the pre-dispute agreement to arbitrate; but they usually involve employer over-reaching to an unusual degree. For example, in *Hooters of America, Inc. v. Phillips*,¹⁷ the Court of Appeals for the Fourth Circuit, after reviewing Supreme Court authority and affirming that in general pre-dispute agreements to arbitrate Title VII claims are valid and enforceable, found that "Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith. . . . [T]he result was hardly recognizable as arbitration at all." At every point in the rules, the employer had no obligation to disclose information and was given flexibility as to the claims

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it could present while the employee was bound by specific time lines, early and detailed notice of claims, identification of witnesses, etc. In addition the Hooters system did not provide for compensatory damages and capped punitive damages at one year's gross cash compensation, estimated at \$13,000 since the plaintiff derived most of her income from tips. But the crowning insult was Hooters' total control of the list of arbitrators from which the employee had the "right" to choose one as her representative on the three-person panel. In addition to unilaterally determining the list of arbitrators, Hooters did not limit the selection criteria it employed to insure neutrality and in no way agreed to keep on the list any arbitrators who perchance upheld a plaintiff's claim. The appellate court was careful to note, however, that

[t]his case . . . is the exception that proves the rule: fairness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA. . . . To uphold the promulgation of this aberrational scheme under the heading of arbitration, would undermine, not advance, the federal policy favoring alternative dispute resolution.¹⁸

Other courts, similarly accepting *Gilmer* as establishing the presumption of arbitrability, have balked at enforcing pre-dispute agreements that impose significant costs on plaintiffs. In a widely-cited decision, *Cole v. Burns Int'l Sec. Services, Inc.*,¹⁹ the Court of Appeals for the District of Columbia determined that for an employer to secure the benefit of a pre-dispute arbitration agreement, the employer was required to bear the costs associated with arbitration, including the arbitrator's fee. Courts have also rejected fee-splitting provisions.²⁰ Alternatively, some courts view the possibility that arbitral fees will be imposed on the complainant as an insufficient reason for not enforcing the agreement to arbitrate, but note that judicial review can ultimately protect a complainant who is subjected to excessive fees.²¹

Some courts refuse to enforce pre-dispute agreements to arbitrate because of the absence of minimal procedures and standards necessary to vindicate statutory rights. These courts expect pre-dispute agreements to: "(1) provide . . . for neutral arbitrators, (2) provide . . . for more than minimal discovery, (3) require . . . a written award, (4) provide . . . for all the types of relief that would otherwise be available in court, and (5) . . . not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum."²² Recently the Supreme Court of California took this approach in a decision applying the state's Fair Employment and Housing Act to claims of sexually based harassment and discrimination.²³ In *Armendariz v. Foundation Health Psychcare Services, Inc.*,²⁴ the agreement provided for a neutral arbitrator but was otherwise defective or incomplete. The agreement limited the employee's remedies to "a sum equal to the wages I would have earned from the date of the discharge to the date of the arbitration." The employer argued that this limitation applied to contract actions only; but the court refused that gloss because following the limitation language, the agreement stated:

"I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief."²⁵ Thus, the implicit exclusion of statutorily-available punitive damages and attorney's fees made the damages limitation contrary to public policy and unenforceable. The *Armendariz* court also joined with other courts in holding that employers "cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court."²⁶

On the issue of discovery, the court found that the employer had impliedly consented to sufficient discovery in order for the plaintiffs' to vindicate their discrimination claims because "when parties agree to arbitrate statutory claims, they also implicitly agree, absent express language to the contrary, to such procedures as are necessary to vindicate that claim."²⁷ Implying consent to discovery is a neat move. But the court did not indicate what it had in mind as the allowable "express language to the contrary." And further, the court stated that by incorporating the California Code of Civil Procedure, the parties did not necessarily incorporate the full panoply of discovery provided therein; the arbitrator would have to find the balance between the "simplicity, informality and expedition of arbitration" (*Gilmer*, 500 U.S. at 31) and "discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses."²⁸

On the question of a written award and judicial review, the court held that meaningful judicial review required that "an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based." Thus, even though the agreement in *Armendariz* was silent on the subject of a written award, an award pertaining to FEHA claims required one. It is difficult to assess the value of a requirement for written awards, in part because it is unclear what the standard of judicial review will be. It should be noted, however, that of the 44 arbitration awards in the securities industry from June 1991 to March 1997, only four included legal reasoning in support of the arbitrators' decisions; in the remaining 40 awards the written result stated in effect "claim upheld" or "claim denied."²⁹

With regard to judicial review, the *Armendariz* court viewed the question as premature. It is, of course, possible that the courts will establish a searching standard of review for arbitration awards mandated by pre-dispute waivers and involving statutory employment claims; but the current defense of arbitration *per Gilmer* as adequate to the task of enforcing public policy rests on the existing, circumscribed judicial review developed over the last 50 years.³⁰

Finally, a few courts will examine a worker's agreement through the lens of the common law, using the traditional concept of unconscionability. The California Supreme Court in *Armendariz* took this approach, refusing to enforce the agreement because it was unconscionably unilateral, since the employer had neither bound itself to arbitration as an exclusive forum nor limited the remedies it might have against the employees. The requirement of mutuality is not uniform

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however. The Supreme Court of Alabama reached a contrary conclusion in *Ex parte McNaughton*.³¹ And the leading authority on arbitration under the Federal Arbitration Act states that it is highly unlikely that "unconscionability or adhesion doctrine [will] result in the unenforceability of an arbitration clause."³²

The bad news. Thus, there are circumstances under which employees will not be bound by a pre-dispute agreement to have statutory claims heard in arbitration. But a series of cases involving Circuit City's pre-dispute agreement to arbitrate illustrate the complexity of the problem. The Circuit City arbitration agreement sets a one-year limit on filing claims, restricts discovery, bars class claims, limits back pay, does not allow front pay, and caps punitive damages at \$5000. It has met with mixed judicial responses, enforced by the Seventh Circuit Court of Appeals but not by the Fourth Circuit.³³

And it must be remembered that once minimal standards are incorporated into standard pre-dispute agreements to arbitrate, judicial scrutiny will probably cease. Thus, while mitigating the full impact of contracting around statutory rights, these decisions make the process a little fairer without ever addressing the underlying flaw in compelled arbitration:

[E]ven without . . . coercion, there is the fact that employees come to the question of evaluating risks and benefits of possible future litigation from very different perspectives. An individual employee will evaluate the likelihood that a litigable dispute will arise with regard to his employment as low, and therefore will likely trade away his future litigation rights rather freely to avoid the possible negative impact of failing to do so. Employers, on the other hand, are likely to recognize, on the basis of actual experience, that within the workplace as a whole, a certain number of litigable disputes will arise, and to fear—perhaps more than actual experience would justify—high end monetary liability in one or more such disputes. Employers, therefore will place a much higher value on the need to avoid litigation than individual employees will place on the need to prospectively preserve litigation rights.³⁴

Endnotes

¹ This discussion is limited to the non unionized workplace. For the law on a union's waiver of represented individuals' statutory rights, see *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) (utilizing a "clear and unmistakable" standard), and *Rogers v. New York University*, 200 U.S. App. LEXIS 17370 (2d Cir. 2000) (explaining the factors that go into determining if a waiver is "clear and unmistakable").

² See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 *Minn. L. Rev.* 703 (1999), citing cases and studies. But even if the waiver of the judicial forum is not a "substantive" right, it is a statutory one, as the Court recognized in 1974 in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

³ See David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims In An Age Of Compelled Arbitration* 1997 *Wisc. L. Rev.* 33, particularly text and notes nn. 18-56, for a case study illustrating and identifying the rights sacrificed when a dispute is resolved through arbitration rather than litigation; and nn. 242-265 for further discussion.

⁴ The shielding from public view of systemic violations of employment laws is particularly pernicious in light of workers' misperceptions about

their legal rights. See Pauline T. Kim, *Norms, Learning and Law: Exploring Influences On Workers' Legal Knowledge*, 1999 *Univ. of Ill. L. Rev.* 447.

⁵ See *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

⁶ See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). For a critical assessment of these decisions and of arbitration in the securities industry, see *SYMPOSIUM: Contract and Securities Arbitration: Whither Consent* 62 *BROOKLYN L. REV.* 1335 (1996).

⁷ "So long as the prospective litigant may effectively vindicate [her or his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

⁸ 500 U.S. 20 (1991).

⁹ *Id.* at 26.

¹⁰ See e.g., *Williams v. Inhoff*, 203 F.3d 758 (10th Cir. 2000) (pre-dispute agreement requiring compelled arbitration enforceable as to ERISA claims, agreeing with second, third, fourth and eighth circuits); *Desiderio v. NASD*, 191 F.3d 198 (2d Cir. 1999) (same with regard to Title VII, citing cases from other circuits); *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999) (same as to ADA).

¹¹ 114 F.3d 1182 (9th Cir.), 525 U.S. 982 and 525 U.S. 996 (1998).

¹² The Court relied on the language and legislative history of section 118 of the 1991 Civil Rights Act. The text and committee report were drafted before the decision in *Gilmer*, but the legislation was enacted after that decision.

¹³ *Gilmer*, 500 U.S. 1, 24.

¹⁴ See *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3rd Cir. 1998), cert. den. 525 U.S. 1139 (1999).

¹⁵ See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1 (1st Cir. 1999) (refusing to compel plaintiff to submit her Title VII claim to arbitration only because the defendant, Merrill Lynch, used the standard Form U-4 but failed "to take the modest effort required to make relevant information regarding the arbitrability of employment disputes available to [the plaintiff] as it committed itself to do [in the Form U-4 waiver document]," thus making non-enforcement of the waiver appropriate. Under facts virtually identical to those in *Rosenberg*, the Court of Appeals for the Sixth Circuit enforced the agreement to arbitrate. See *Haskins v. Prudential Insurance Co.*, 83 FEP Cases 1329 (6th Cir. 2000).

¹⁶ See *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); see also *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999) (employer promise to be bound by arbitration contained in handbook is adequate consideration for employee's agreement to use arbitration contained in separate document).

¹⁷ 173 F.3d 933 (4th Cir. 1999) (A six-year employee complained, after a Hooters official and brother of the principal owner grabbed and slapped her buttocks; when management told her to "let it go," she quit her job. Her sexual harassment complaint was met with a lawsuit to compel arbitration of the dispute, pursuant to an eight-year-old alternative dispute resolution program, implemented as a condition for eligibility for raises, transfers and promotions. Phillips signed the agreement to arbitrate twice, but in both instances Hooters failed to give her the rules and regulations referred to in the document.)

¹⁸ 173 F.3d at 941. See also *Floss v. Ryan's Family Steak Houses Inc.*, 211 F.3d 306 (6th Cir. 2000) (prehire arbitration agreement between employees and arbitration service unenforceable, because service "reserved the right to alter the applicable rules and procedures without any obligation to notify, much less receive consent from, [plaintiffs]. [Service's] right to choose the nature of its performance renders its promise illusory.")

¹⁹ 105 F.3d 1465 (D.C. Cir. 1997).

²⁰ See *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999); and *Paladino v. Amet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998)

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California's Little Norris-LaGuardia Act - A Favorable Preliminary Report

by Henry Willis

Congress passed the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq., in 1932 in order to put an end to "government by injunction"—the federal courts' misuse of their broad injunctive powers to break strikes and negate laws with which they were not in sympathy. Before Norris-LaGuardia, the federal courts had used injunctions to bar unions from launching consumer boycotts of "unfair" goods, *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911), or urging workers to refuse to handle products from non-union employers, *Bedford Cut Stone Co. v. Journeymen Stone Cutters*, 274 U.S. 37, 47 S.Ct. 522, 71 L.Ed. 916 (1927), or attempting to organize workers who had been forced to sign "yellow dog" contracts. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260 (1917). Courts routinely enjoined even peaceful picketing, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189 (1921), and declared unions such as the United Mine Workers to be anti-trust conspiracies. *United Mine Workers v. Red Jacket Consolidated Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927).

The Norris-LaGuardia Act changed all that. Norris-LaGuardia bars the courts from issuing any injunctive relief against certain types of conduct, such as "giving publicity to the existence of . . . any labor dispute." [29 U.S.C. § 104]. The Act requires "clear proof" to hold an organization liable for the acts of individual officers, members, or agents. [29 U.S.C. § 106]. And it imposes strict substantive and procedural conditions on the federal courts' power to issue injunctions in labor cases. [29 U.S.C. §§ 107, 108]. In practical terms, the Act has taken the federal courts out of the job of policing picket lines. *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 369, 80 S.Ct. 779, 4 L.Ed.2d 797 (1960).

On January 1, 2000 California joined eighteen other states—Connecticut, Hawaii, Idaho, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wisconsin—and Puerto Rico in adopting its own "little Norris-LaGuardia Act," Labor Code § 1138 et seq. California's new law is nearly identical to the Norris-LaGuardia Act and, like the federal act, requires (1) that an employer must offer "clear proof" of actual participation or authorization¹ to establish union liability for the acts of others [Labor Code § 1138], (2) that the court must, with very limited exceptions, hold an evidentiary hearing and make specific findings before it may issue an injunction [Labor Code § 1138.1, 1138.3], and (3) that the plaintiff must show that it has made "every reasonable effort" to resolve the underlying labor dispute before seeking injunctive relief. [Labor Code § 1138.2]

The California courts must now apply these new restrictions. It is up to union lawyers to make sure that trial judges do not cut corners or allow their own pro-employer prejudices to dilute the stringent requirements of the Act.

The best way to do that is to persuade the courts to rely on federal precedents in interpreting California's version of Norris-LaGuardia. The federal courts have, on the whole, applied the Norris-LaGuardia Act's substantive and procedural restrictions on judicial power as strictly as Congress intended. Sixty-five years of stringent enforcement of the Act by the federal courts is the best argument for strict enforcement of this new statute by California courts.

The California courts have, moreover, relied on federal precedents in interpreting California's labor laws for years. See, e.g., *Fire Fighters Union, Local 1186 v. City of Vallejo*, 12 Cal.3d 608, 617, 116 Cal.Rptr. 507, 526 P.2d 971 (1974) (interpreting duty to meet and confer under Meyers-Milias Brown Act in line with duty to bargain under NLRA). We can use conservative notions such as "traditional reliance" to persuade the state courts to enforce a statute in a way that their conservative instincts might not normally permit.

Finally, we can point to those decisions from other states that have adopted "Little Norris-LaGuardia Acts" in which the courts have also followed federal precedent. See, e.g., *Jones v. Demoulas Super Markets, Inc.*, 364 Mass. 726, 308 N.E.2d 542 (1974); *Premium Distributing Co., Inc. v. Teamsters Local 174*, 35 Wash.App. 36, 664 P.2d 1306 (1983). Once again, it is important to impress on the court that it would be breaking with every other state that has a similar statute if it were to disregard federal precedents.

The first reported appellate decision interpreting California's new law, *United Food and Commercial Workers Union, Local 324 v. Superior Court of Los Angeles County (Gigante USA, Inc.)*, __ Cal.App.4th __, 99 Cal. Rptr. 2d 849 (2000),² shows how important federal authorities can be. The Court in that case relied exclusively on federal precedent in holding that the employer had not shown that the Los Angeles Sheriff's Department was neither unable nor unwilling to protect its property from picket line violence. While the Court shied away from laying down any bright line definition of the term "unable or unwilling" under Section 1138.2, and rejected the very high standard—"breakdown in law enforcement"—that the Sixth Circuit had suggested in *Cimarron Coal Corp. v. Mine Workers District 23*, 416 F.2d 844 (6th Cir. 1969), it nonetheless applied the statutory language strictly, ordering the court below to enter summary judgment for both union defendants.

[continued on p. 7 column 1]

[continued from p. 6]

The *Gigante* case dealt with only one of the many possible grounds for opposing injunctive relief under the new statute.³ The unions had not demanded an evidentiary hearing on Gigante's petition or objected to Gigante's failure to give notice to local police authorities, since Gigante's claim for injunctive relief was heard in Superior Court in 1999, before the new law took effect. The Court of Appeal went out of its way, on the other hand, to remind the lower courts that those new requirements would apply to any injunction proceeding after January 1, 2000. Those requirements, and the stringent bond requirements modeled on federal law, *see, Aluminum Workers Local 215 v. Consolidated Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982), should also take the state courts out of the business of enjoining strikes and picketing activities, while making bad case law such as *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal.App.4th 425, 86 Cal.Rptr.2d 442 (1999) and *UNITE v. Superior Court*, 56 Cal.App.4th 996, 65 Cal.Rptr.2d 838 largely irrelevant.

Endnotes

- ¹ The Norris-LaGuardia Act allows a third avenue to prove vicarious liability: by showing that the Union ratified a third party's acts. Section 1138 does not.
- ² Robert Cantore of Gilbert & Sackman represented UFCW Local 324 in this case; Henry Willis represented UFCW Local 770. The International Union filed an amicus brief that dealt with decisions from other states with "Little Norris-LaGuardia Acts."
- ³ The Court of Appeal did not reach Local 324's alternative argument that Gigante was barred from obtaining injunctive relief because it had not made "every reasonable effort" to resolve the underlying labor dispute.

JOB OPENING
Assistant Attorney General
General Labor Section of Labor Bureau
Office of the New York State Attorney General

The Section enforces worker protection provisions contained in the New York State Labor Law, including minimum wage and other labor standards, public employee safety and health and the prevailing wage law. The work will involve participating in investigations, trial and appellate litigation and legislative drafting.

The NY AG is seeking candidates with a background in litigation, excellent writing skills and a demonstrated commitment to public service.

Apply by sending a resume to: Lila Kirton, Assistant Attorney General in Charge of Legal Recruitment, Office of the Attorney General, 120 Broadway, New York, New York 10271. Candidates need not be currently licensed in New York State; however, they must be licensed in some state for at least two years.

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Sponsors 2ND Annual
U.S.-CUBA LABOR & EMPLOYMENT
LAWYERS AND PROFESSIONALS
RESEARCH EXCHANGE

Havana, Santa Clara, and Varadero, Cuba
Tentative Dates: February 25 - March 5, 2001

Meet with Cuban Workers!
Engage in Direct, Informal Exchange with Cuban
Labor Lawyers and Trade Unionists!
Check out the report from last year's delegation on
the NLG web site: www.nlg.org

As we embark on a new millennium, a variety of forces (such as the recent international political crisis over the detention in Miami of 6 year old Gonzalez, the infusion of Cuban music into the U.S. mainstream, changes in the AFL-CIO leadership and even a newly awakened sympathy in Congress for the normalization of U.S./Cuba relations), have combined to make the present moment ripe with the possibility for historic, constructive dialogue between the U.S. and Cuban labor movements

Last year's delegation (which traveled to Cuba at the height of the Elián crisis) met for two hours with Fidel Castro, met privately for several hours with Elián's father and grandparents, and, after our return, played significant roles in bringing about the eventual reunion of father and son and their return to Cuba. Will this year's delegation play a similarly important role on the international stage? It's impossible to say. What is clear is that, as relations between the U.S. and Cuba begin to thaw after 41 years in a Cold War deep freeze, we can and will have a significant impact on the resulting relationship between the U.S. and Cuban labor movements.



For more information and to pre-register

- National and New York:** Dean Hubbard: dean@eisner-hubbard.com
- California and the Northwest:** Cindy O'Hara: csohara@aol.com
- Mid-Atlantic (D.C., Maryland and Pennsylvania):** Gail Lopez-Henriquez: glopezhenriquez@freedmanlorry.com
- New England:** Mark Schneider: argoschnei@yahoo.com
- Southeast:** Elizabeth McLaughlin:
- Southwest:** Becky Jiron and Olga Pedroza: bjiron@nbar.org

Fighting for a Workplace Free From Disability Discrimination: The Vision and the Reality

A day-long skills seminar for plaintiff's and labor attorneys presented by NLG Disability Rights Committee and Labor & Employment Committee

November 2, 2000 --- 8:30 a.m. to 4:30 p.m.

Boston Park Plaza Hotel --- Boston, Massachusetts

This seminar, preceding the NLG Convention, is geared toward new and experienced practitioners . . . and anyone who seeks a broader political perspective. A brief overview of the practice area will introduce new practitioners to statutory and regulatory requirements. Other presentations are geared to a mix of introductory, intermediate and advanced levels. Also included is a panel discussion of disability-related issues raised by the intersection of union and individual employee rights. Printed materials include fundamental practical and analytical documents, papers from the faculty, sample pleadings and briefs.

HIGHLIGHTS: ADA Overview; Winning the Case & Advancing the Law: What Makes a Good Case? EEOC Issues; Hidden Disabilities, Disclosure, & Direct Threat; Disability Discrimination Claims After *Sutton*; Resources for Private Practitioners: Getting Help From Advocacy Groups: Co-Counseling, Amicus Briefs & free web, e-mail and print resources; ADA Claims in a Collective Bargaining Context: Potential for Alliances & Conflicts; Constitutionality Update

PRESENTORS: **Chris Griffin**, Disability Law Center, Boston; **Jane Alper**, Disability Law Center, Boston; **Peggy R. Mastroianni**, EEOC; **Lili Palacios**, EEOC Boston Field Office; **Aaron Frishberg**, New York City; **Ben Klein**, Director, AIDS Law Project, Gay & Lesbian Advocates & Defenders (GLAD), Boston; **Jennifer Mathis**, Bazelon Center for Mental Health Law, Washington, D.C.; **Brian East**, Advocacy, Inc., Austin; **Shannon Liss-Riordan**, Pyle, Rome & Lichten, Boston; **Shereen Arent**, American Diabetes Association; **Cordelia Martinez**, Santa Ana; **Marilynn Mika Spencer**, Law Offices of Marilynn Mika Spencer, San Diego; **Jay Hornack**, Healy, Davidson & Hornack, Pittsburgh; **Harold Lichten**, Pyle, Rome & Lichten, Boston

Attorneys \$100.00
Legal Workers \$ 50.00
Law Students \$ 50.00
Deduct 10% if paid by 10/15/00

Scholarships available

Name: _____

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MAIL REGISTRATION: Please send form with payment to
NLG Disability Rights Committee, PO Box 319, New York, NY 10040

FAX/CREDIT CARD REGISTRATION: Please include the following additional information and fax to NLG Disability Rights Committee at (619) 233-1314.
No faxes processed after 5:00 PM PST on 10/30/00.

Please charge \$ _____ to my: _____ MasterCard _____ Visa

16 digit account number: _____

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Full name on card: _____

Signature of Cardholder

Date signed: _____

Information or accommodation requests: NLG Disability Rights Committee
212-740-4544, PO Box 319, New York, NY 10040

Full schedule on NLG website: www.nlg.org Registration Fees:

NLG Labor & Employment Committee and

NLG Sugar Law Center Reception

Friday - November 3, 2000 - 6:30 - 9 p.m.

Law Offices of Stern, Shapiro, Weissberg & Garin
90 Canal Street - 5th floor - Boston (near North Station)

The easiest way to get to the party is by subway. The Arlington Street station is 1 block from the hotel. Take the Green line inbound a few stops to North Station. Walk 1 block down Canal Street. Mapquest indicates the office is about 1 1/2 miles from the hotel (4 minutes by car).



Another Strawberry Victory

State appeals court rejects growers' arguments

In a victory by the United Farm Workers, a California state appeals court early October rejected arguments by two strawberry growers that they should have been allowed to provide money to so-called worker committees that rivaled the UFW.

The ruling by the 6th Circuit Court of Appeal affirms a lower court decision that found Dutra Farms and Clint Miller Farms had violated the California Agricultural Labor Relations Act barring those employers from providing money to worker committees.

In their appeal, the two growers tried to argue there was a loophole in the statute that allowed them to give money to a committee as long as the committee was composed of employees other than their own, according to San Francisco attorney Scott Kronland, who represented the UFW.

"The Court of Appeal rejected all their arguments. It found they acted illegally by funding the committee," he said. "It means that in future efforts to organize workers, employers can't fund these phony worker committees."

The case stems from a lawsuit brought against about two dozen strawberry growers by the UFW, which questioned the relationship between strawberry growers and worker committees, arguing the committees lied when they claimed to be independent of their employers.

Last year, about 20 of the growers agreed to stop funding the committees as part of a settlement that included payment of attorneys' fees to the UFW. Most of the terms remained confidential.

For more information on the Farm Worker Movement visit the web site at <http://www.ufw.org> and/or subscribe to the Farm Worker Movement list serve by sending an e-mail to UFW-subscribe@topica.com.

²¹ See *Kovelskiev. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir.), cert. den. 120 S.Ct. 44 (1999); and *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999).

²² Cole 105 F.3d at 1482.

²³ The court repeatedly noted the similarities in federal and California laws.

²⁴ 83 FEP Cases 1172, 2000 Cal LEXIS 6120 (2000).

²⁵ Armendariz, 83 FEP Cases at 1181-1182.

²⁶ *Id.* at 1185.

²⁷ *Id.* at 1183.

²⁸ *Id.* But see *COMSTAT Corp. v. National Science Fdn.*, 190 F.3d 269 (4th Cir. 1999) (Federal Arbitration Act, 9 U.S.C. § 7, does not authorize arbitrators to subpoena non-parties to appear at pre-hearing depositions or to present documents during pre-hearing discovery; section 7 only authorizes arbitrators to subpoena non-parties to appear at hearings which is "consistent with the limited discovery process and efficiency that mark arbitration proceedings").

²⁹ See John D. Shea, *An Empirical Study of Sexual Harassment/Discrimination Claims in the post-Gilmer Securities Industry: Do Arbitrators' Written Awards Permit Sufficient Judicial Review to Ensure Compliance with Statutory Standards?* 32 SUFFOLK U. L. REV. 369, 411 (1998).

³⁰ For a reform proposal that focuses on more active judicial review, see Geraldine Szott Mohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH & LEE L. REV. 395, 447-459 (1999); see also Joseph R. Grodin, *Arbitration of Employment Dispute Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HERSH L.B.L.J. 1 (1996). But cf. *Williams v. Cigna Financial Advisors*, 197 F.3d 752 (5th Cir. 1999), cert. den. 2000 U.S. LEXIS 3043 (applying weak standard in reviewing arbitration award).

³¹ 728 So.2d 592 (1998).

³² II IAN R. MACNEIL, RICHARD E. SPIEDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 19.3.1, at 19:26.

³³ See *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir 1999), and *Morrison v. Circuit City Stores, Inc.*, 70 F.Supp.2d 815 (S.D. Ohio 1999); but see *Johnson v. Circuit City Stores*, 203 F.3d 821 (4th Cir.), cert. den. 2000 U.S. LEXIS 455 (refusing to enforce arbitration agreement because it did not provide for full remedies available under 42 U.S.C. § 1981).

³⁴ Marsha S. Berzon, Statement to the Commission on the Future of Worker-Management Relations 8-9 (April 6, 1994).

Convention Events of Interest to L&EC Members

apologies for conflicts - we had no control over scheduling

Thu	Nov 2	8:30 - 4:30	Seminar: Disability Rights
Thu	Nov 2	2:30 - 4:00	Labor & Employment Roundtable: Using the Internet for Organizing
Thu	Nov 2	4:30 - 5:30	TENTATIVE - NLG L&EC STEERING COMMITTEE meeting
Fri	Nov 3	8:45 - 10:15	Workshop - The Union Democracy Movement and the role of the Guild Labor Lawyer
Fri	Nov 3	10:30 - 12:00	Major Panel: Electoral Politics
Fri	Nov 3	2:15 - 3:45	Workshop - AFL-CIO Voice at Work/Freedom to Choose a Union Campaign
Fri	Nov 3	4:00 - 5:30	NLG Labor & Employment Committee MEETING
Fri	Nov 3	6:30 - 9:00	NLG L&EC and Sugar Law Center Reception at 90 Canal St 5th floor
Sat	Nov 4	8:30 - 10:00	Workshop - Living Wage Campaigns: Are They Meeting Their Goals?
Sat	Nov 4	1:45 - 3:15	Workshop - Disability Rights
Sat eve	Nov 4	7:30 - 10:00	Banquet honoring Jobs with Justice

WORKSHOPS listed are those with labor or employment orientation
Go to www.nlg.org for list of speakers and content and for all other workshops