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Organizing Immigrant Workers

by Fran Schreiberg

Recent organizing gains involve significant numbers of immigrant workers. The AFL-CIO focus on organizing and the encouraging gains within unions committed to organizing recognizes the importance of immigrant workers and also acknowledges the need to organize documented as well as undocumented workers. We don't care about green cards," stated Doug Dority head of the 1.4 million-member United Food and Commercial Workers International Union. "We care about union cards."

In January 400 deliverymen in Manhattan joined a union winning $3 million back pay. The primarily undocumented workers were from W Africa. One noted, "It didn't matter who we were. We are human beings first. The question was, Were we taken advantage of?"

Approximately 130 reinforcing iron workers joined four northern California Iron Worker locals after a Fresno valley contractor signed a collective bargaining agreement with the District Council of Iron Workers of California & Nevada in late August, 2000. Upon the signing of the agreement, the workers were eligible for and organized in as full members in either apprentice or journey person classifications. The organizing process which continues to this day has brought in close to 200 new members.

In Los Angeles, SEIU is bringing in home-care workers, most of whom are immigrant workers, and many undocumented. In Minneapolis, HERE organized Latina chambermaids last year, who were hauled off to jail after the union vote. But the union posted their bonds, the EEOC investigated, and the Holiday Inn agreed to pay a $72,000 settlement and let the maids continue to work.

Organizing immigrant workers isn't easy. Even if the worker is legally in this country, she may have family here illegally, and the retaliatory threats of the employer often hit the mark. The bullying goes on in the fields, on the factory floor, in the sweatshops, on construction sites. But despite it, the organizing is succeeding.

What's the Organizing Secret? When the California Iron Workers District Council targeted a contractor in California's Fresno valley, the victory was tied in part to an **industry-wide campaign**. Because in construction the worker is by definition mobile, moving from job to job for a primary employer or moving from company to company in search of steady employment, the process of identifying and making contact with the workers of the targeted employer became, to a large extent, a process of identifying the non-union workforce in that entire industry in that geographical area. Organizers contacted workers on the job and in the community where they lived, in person, on the phone, and through community based resources.

Coupled with this need to organize industry-wide in a particular market was the need to recognize that the largely immigrant worker population was rooted in a community having strong cultural and social ties. This ***industry-wide community-based union organizing***, although not entirely a new strategy for labor, having historical roots in major organizing campaigns in the 1930's, was new for this period, and may have broad application. Although this campaign involved construction, the strategies and tactics may be useful whether the industry is janitors, garment workers, or strawberry pickers because in those industries as well, immigrant workers are in mobile industries that use similar exploitive work tactics such as piece work, etc.

Industry-wide community-based union organizing involves such things as hosting a picnic for workers and their families and friends in order to educate them about the wages and benefits and other aspects of union membership. It involves the labor union working with the community to provide services to meet the particularized needs of the workers it is organizing such as English as a second language. It involves bi-lingual apprenticeship classes. It involves making the union hall available to the workers for meetings. It involves meeting the workers in their community as well as at their jobsite.

The rest of the secret is that successful organizing involves every strategy and tactic possible. There is no one right way to organize. Try one thing and if that doesn't work, try another.

Sometimes union organizers stripped the best workers from non-union work places offering the journey level worker membership and placing apprentices in an appropriate level of a program.

Union organizers also helped workers become spokespersons for the union. The workers collected names and phone numbers of those with whom they worked, and in doing so became organizers - a part of the union. The workers helped each other take statements on wage violations, and by becoming involved also became a part of a union. Dan Prince, organizer and President of Iron Workers 377, one of the locals involved in the Fresno area campaign, stated, "The campaign was rooted in the notion that unions are at bottom organizations of workers. When the workers make demands and negotiate their concerns, they begin to perceive themselves differently. They organize themselves more effectively. By the time the agreement was signed, the workers had already coalesced into a union. At that point, the membership card was only a formality."

Sometimes organizers picketed job sites and shut down the job. Sometimes organizers called in OSHA because jobs were unsafe. Sometimes organizers filed prevailing wage or apprentice violations - following up with unfair competition lawsuits. Sometimes union members and apprentices salted jobs.

But at all times, the organizers of the *industry-wide community-based* campaign regarded the right to organize as inviolable. "If workers are organized this way, they're organized no matter who they work for. And if those workers join the union, they are union memberd wherever they work," commented Prince.

So what's the difference between organizing immigrant workers and organizing other workers? Recognizing and addressing special needs and fears is part of it. The other part is the need to address immigration status related legal issues so they don't deter organizing.

Several union reps organizing immigrant workers will speak and immigration law issues will be also be addressed at the NLG L&EC breakfast on May 17 at 7 a.m. at the AFL-CIO LCC in SF.

JOIN US!

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Progressive Attorneys Join Together To Work for Fair Judiciary

The Bush Administration is gearing up on federal judicial nominations. A team of young conservative lawyers in the White House Counsel's office has reportedly interviewed more than 50 judicial candidates for the federal district courts and courts of appeals. Recently the Bush Administration terminated the American Bar Association's longstanding role in evaluating potential judicial nominees.

AFL-CIO President John Sweeney noted, "President Bush's decision to terminate the American Bar Association's longstanding role in evaluating candidates for federal judicial appointments is an outrage.

"For nearly 50 years, through Democratic and Republican Administrations alike, the American Bar Association has played an important role in evaluating whether judicial candidates are qualified to serve as federal judges. These are lifetime appointments. Presidents should want to know, and the American people deserve to know, whether nominees to the federal bench are viewed by their colleagues in the profession as having the sort of experience, temperament, and credentials necessary to meet their judicial responsibilities.

"Now President Bush has decided to break with tradition and abolish the ABA's role in evaluating judicial candidates. This action is unfortunate and misguided on its own terms. But equally disturbing is the fact that this action appears to be part of a series of actions by this Administration that reveal a White House more concerned with pleasing the right wing of its party than achieving good government."

It is clear that the Bush Administration is poised and ready to make its conservative mark on the federal judiciary.

Attorneys seeking a fair judiciary are developing a network both to provide background information on nominees as well as to lobby Senators. If you would like more information, please e-mail AFL-CIO Associate General Counsel Lynn Rhinehart at lrhineha@aflcio.org or call her at 202-637-5053.

Cuba Si, Bloqueo No!

by Jason Huber, Roger Forman, Michael Crane

A thousand attorneys from over fifty different countries traveled to Havana Cuba for the International Association of Democratic Lawyers (IADL) conference October 14, 2000 through October 21, 2000. Delegates attended numerous workshops addressing international economic, political and social issues and met with many Cuban officials including the Attorney General, Members of the Cuban Supreme Court, the Minister of Labor, the Dean of Havana law School and Fidel Castro. Delegates were surprised at the minimal security present during these events notwithstanding the attendance of high-level Cuban officials. In addition to the official functions, delegates freely traveled in Havana and the countryside, talked with Cuban residents and visited historic, cultural and scenic attractions.

For the United States delegation it became exceedingly clear that our government continues to misrepresent the Cuban reality. Comparing Cuba to the United States on only a few internationally recognized standards of human rights exposes the fallacy of the U.S. government's Cuban foreign policy.

The Cuban Constitution guarantees everyone a free primary, secondary and post secondary education. As a result, Cuba has 0% illiteracy while the U.S. maintains a staggering 4%.

The Cuban constitution guarantees women full and equal participation in society. Women comprise 50.9% of the work force and are well represented in all fields including government, science, medicine and labor. Sexual assault and violence against women is virtually nonexistent in Cuba. In the U.S. 12.5 million women over the age of 12 are victims of violent assault every year.

Cuba's constitution guarantees free medical services to every individual. Cuba has 55,000 Doctors (one for every 200 inhabitant, the highest per capita in the world), 72,700 nurses, 308,000 health workers, 65,600 beds in 277 hospitals, 83 intensive therapy wards and health care budget of over one billion pesos annually. Whereas the U.S. profit driven, private sector health care fails to provide adequate services to millions.

Cuba's constitution guarantees housing for everyone. There were no homeless people huddled under bridges, in abandoned buildings or around steam vents as found in every major U.S. city.

The Cuban constitution guarantees a job with a safe work environment, a union and a social security system for disabled workers. In the U.S. just approximately 12 to 15% of the workforce has a collective bargaining representative; the rest are "at-will" employees. Further, disabled U.S. workers are forced battle well-heeled employers, state compensation systems or the federal government for benefits.

Regarding human rights, by most international standards, these include the right to housing, health care, education and food. As the above has demonstrated, Cuba equals or surpasses the U.S. in these areas.

Further, a 1994 document sent from the United States Interest Section in Cuba to Washington summarizing the Cuban refugee program candidly admits that "The processing of refugee applications continue to show weak cases. Most people apply more because of the deteriorating economic situations than a real fear of persecution. Common allegations of fraudulent applications by activists and of the sale of testimonials by human rights leaders have continued in recent months. Due to the lack of verifiable documentary evidence as a result U.S. Interest officers and INS members have regarded human rights cases as the most susceptible to fraud."

All of the above described information establishes that the vocal Cuban Miami community and the U.S. government continue distort the reality in Cuba in order to justify the longstanding economic blockade. It is time to recognize that the blockade is the result of a terribly misguided foreign policy as well as a violation of numerous international standards.

This is in part why the U.N. Generally Assembly has in 1992, 1993, 1994, 1995, 1996 and 1997 voted to condemn the blockade. Reasonable minds can differ regarding the strengths and weaknesses of a socialist state versus a capitalist economy. However, it is a clear violation of Cuba's sovereignty for the U.S. to impose its will on the Cuban people where they have chosen and continue to choose a system of government which provides for all of its citizens in a very egalitarian fashion. It was for these reasons that on our second to last day in Cuba many of the U.S. and international delegates marched with one million Cubans through the streets of Havana chanting **"Cuba si! Bloqueo No!"**.

Affirming the Status Quo: The Supreme Court's Latest Reckoning with Pre-Dispute Binding Arbitration of Individual Statutory Rights

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The Supreme Court's recent decisions in two cases involving important arbitration-related issues produced surprisingly little change in the law that governs employers' attempts to impose pre-dispute binding arbitration of individual workers' statutory claims. In ***Circuit City Stores, Inc. v. Adams***,[1] the Court held that the Federal Arbitration Act (FAA)[2] applies to arbitration clauses in employment contracts between employers and most non-unionized workers, thereby creating a presumption in favor of enforcing these contracts when they are applied to individual employees' statutory claims.[3] In ***Green Tree Financial Corp. v. Randolph***,[4] the Court held that an arbitration clause may be enforced despite its silence as to the allocation of arbitration costs between a lender and an individual consumer in a case arising under the federal Truth In Lending Act.[5] Although in both cases the Court enforced a contractual arbitration clause in the face of issues on which federal courts previously had been divided, these decisions do not substantially erode the bases for employees to resist pre-dispute binding arbitration contracts that employers typically attempt to enforce as a requirement of employment.[6]

Employment contracts in which individual non-unionized employees are required as a condition of hiring or continued employment to waive their right to sue on any future federal or state statutory claims and instead must submit these claims to binding arbitration raise serious concerns as to whether there is meaningful consent in the face of the employer's superior bargaining power and as to whether the loss of access to courts diminishes an employee's substantive legal rights. Since these problems are discussed extensively elsewhere,[7] this article focuses on the effects of the Supreme Court's most recent arbitration decisions on the ability of individual workers to resist having these mandatory and binding arbitration contracts enforced and to preserve their right of access to court.

Circuit City and Arbitration of Employees' Statutory Claims

The Supreme Court's decision in ***Circuit City*** answers the question of whether the Federal Arbitration Act ever applies to employment contracts. Section 2 of the FAA states that a "written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[8] The Supreme Court has interpreted Section 2 as a general rule of substantive federal law which creates a presumption favoring the enforcement of arbitration contracts, applies to the fullest reach of Congress' constitutional power to regulate interstate commerce, and preempts state laws that single out arbitration clauses for less favorable treatment than other contract provisions.[9] But the FAA also contains a broadly worded definitional exception to the Act's application whereby "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[10] When the Supreme Court held in ***Gilmer v. Interstate/Johnson Lane Corp.***[11] that the FAA applied to enforce a contract compelling arbitration of a securities broker's claims under the Age Discrimination in Employment Act,[12] the Court did not examine the scope of Section 1's exemption because it found that the arbitration clause was not part of an employment contract.[13]

In ***Circuit City***, the Supreme Court held by a five to four vote that Section 1 creates only a narrow exemption for employment contracts of transportation workers from the FAA's coverage so that the Act applies to employment contracts of virtually all other non-unionized workers.[14] In reaching this holding, the majority focused entirely on the text of Section 1 and found that the general phrase "other...workers engaged in foreign or interstate commerce" was narrowed by the preceding references to "seamen" and "railroad employees" so as to refer only to transportation workers and that Section 1's "engaged in commerce" language was immensely narrower than Section 2's "involving commerce."[15] The Court afforded no significance to statements in the FAA's legislative history disavowing the Act's application to any employment contracts, and was not phased by the anomaly that it was interpreting the FAA to *apply* to contracts of workers who Congress had no constitutional authority to regulate when these provisions were enacted in 1925, and to *exempt* only those few workers who Congress did then have authority to regulate.[16]

Despite the countervailing considerations which led four Justices to dissent from the majority's interpretation,[17] ***Circuit City***'s holding that the FAA applies to most employment contracts affects little change in the law because nearly every federal court of appeals that previously had considered this question reached the same conclusion as does ***Circuit City***.[18] The ***Circuit City*** majority repeatedly cited to these appellate decisions in justifying its holding.[19] Even the Ninth Circuit, the one federal appellate court that had construed Section 1 more broadly to exempt all employment contracts from the FAA's coverage,[20] later held that arbitration clauses in employment contracts could be enforced even in the absence of the FAA's presumption of enforceability.[21] Similarly, the California Supreme Court in ***Armendariz v. Foundation Health Psychare Services, Inc.***[22] concluded that the California Arbitration Act would generally enforce arbitration clauses in employment contracts even if the FAA did not apply.[23]

Thus, while ***Circuit City*** may be significant as a lost opportunity because of its apparent foreclosure of the possibility that states may prohibit employers from using pre-dispute binding arbitration as a condition of employment for non-unionized workers,[24] this decision does not appear to diminish the availability of previously existing defenses to the enforcement of arbitration clauses in individual employment contracts.[25] As is discussed below, the Supreme Court addressed one of these defenses to arbitration in another recently decided case.

Green Tree and the Effect of Prohibitive Arbitration Costs

Although the Supreme Court's decision in ***Randolph*** addresses arbitration of a consumer claim against a mobile home mortgage lender under the Truth In Lending Act (TILA), the underlying question of whether and when the costs of proceeding in arbitration are so great as to preclude an individual plaintiff from effectively enforcing her statutory rights has significant implications for employment cases. Since arbitration is a private system of law enforcement, the parties themselves rather than the general public bear the costs of creating a forum for resolution of their claims. These costs can be substantial, as private arbitrators often charge fees in excess of $500 per day for their services.[26] Employers therefore can gain substantial advantage over individual employees by imposing arbitration as a condition of

[*continued on p. 4*]

employment when forum costs rival or even exceed the value of an employee's statutory claim.[27] Here again, though, the effect of the ***Randolph*** decision on employees facing prohibitive arbitration costs may be slight, and the decision may even prove helpful to employees who are resisting arbitration because of the Court's resolution of a separate procedural issue that the case presented.

The first question addressed in ***Randolph*** was whether a district court's order compelling arbitration and dismissing the entire case where a plaintiff brought substantive claims and arbitration was raised by the defendant may be immediately appealed before the case is sent to arbitration. The availability of a pre-arbitration appeal is important in individual employee or consumer cases because a trial court's arbitration order would effectively end a case without any appellate review where arbitration costs would prevent the plaintiff from vindicating her claims in arbitration. Despite this danger, Section 16(b) of the FAA prohibits pre-arbitration appeals of federal district court orders granting a stay of litigation in favor of arbitration under Section 3 of the Act or directing arbitration under Section 4 of the Act.[28] At the same time, however, Section 16(a)(3) permits an immediate appeal of a "final decision with respect to an arbitration that is subject to this title."[29] Prior to ***Randolph***, most federal appellate courts held that arbitration orders were never immediately appealable in cases where substantive issues in addition to arbitrability had been raised before the district court (so-called "embedded" proceedings) and that Section 16(a)(3)'s only application was to cases that were brought for the sole purpose of obtaining an arbitration order ("independent" proceedings).[30] A minority of circuit courts allowed immediate appeals of all orders dismissing cases in favor of arbitration.[31]

The Supreme Court in ***Randolph*** embraced the minority position on this issue and held that a district court's order directing arbitration and *dismissing* all claims is immediately appealable.[32] Although the Court also noted that an order *staying* litigation in favor of arbitration is not immediately appealable,[33] the availability of an immediate appeal in at least some cases where arbitration is ordered will be helpful to workers seeking to avoid arbitration of their statutory claims. ***Randolph***'s rejection of the distinction between embedded and independent proceedings as the basis for appealability is significant because cases where employees sue employers and arbitration is raised as a defense are always embedded proceedings and therefore were never previously appealable in most courts. ***Randolph*** therefore enhances at least some employee claimants' access to judicial review of the arbitrability of their statutory claims.

After recognizing the availability of the consumer plaintiff's initial appeal, the Supreme Court in ***Randolph*** held that an arbitration clause is not rendered unenforceable based solely on its silence as to the amount and allocation of forum costs that would be incurred in arbitrating an individual's statutory claim.[34] The Court restated its baseline understanding that arbitration must allow claimants to effectively enforce their statutory rights and emphasized that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."[35] The Court found, however, that the party opposing arbitration bears the burden of demonstrating that it would be prohibitively expensive and held that the individual consumer plaintiff before it failed to sustain this burden because the record was bereft of any evidence as to the costs she would bear in arbitrating her Truth In Lending Act claims.[36]

Since ***Randolph*** discusses neither what constitutes prohibitive arbitration costs in a particular case nor what evidence would establish such a cost, the effect of the ruling may be limited to the few cases where there is no evidence on costs. ***Randolph*** does explicitly reject the argument that the *risk* of high arbitration costs alone poses a deterrent to a plaintiff's vindication of her statutory rights that renders arbitration unenforceable.[37] But the Supreme Court's failure to examine this issue any further allows courts to prohibit arbitration where there is evidence relating to costs. In ***Shankle v. B-G Maintenance Mgmt. of Colo, Inc.***,[38] for example, the Tenth Circuit refused to enforce arbitration of an employee's statutory discrimination claims where the arbitration clause required the parties to split the forum costs and the designated arbitrator's announced fee structure would require the employee to pay between $1,875 and $5,000 in order to arbitrate his claims.[39] Likewise, the Eleventh Circuit has held that an arbitration clause's adoption of American Arbitration Association rules requiring a Title VII plaintiff to pay a $2,000 filing fee is a "legitimate basis for a conclusion that the clause does not comport with statutory policy."[40] Since these refusals to enforce arbitration were based on specific evidence found in the terms of arbitration contracts and in the fee schedules of designated arbitrators, nothing in ***Randolph*** would upset these courts' findings that arbitration costs would have prohibited employment discrimination plaintiffs from effectively vindicating their federal statutory rights.

After ***Randolph***, courts that have imposed strict limitations on the arbitration costs that an individual employee may be required to bear should still be able to enforce those limits. In ***Cole v. Burns Int'l Security Services***,[41] for example, the D.C. Circuit noted that employers may use their bargaining power to impose arbitration on a "take-it-or-leave" basis and that the costs of arbitration hearings may exceed $1,000 per day so that, as a matter of effective federal statutory enforcement, "where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer."[42] Although a primary concern in ***Cole*** was the risk of high arbitration fees, the D.C. Circuit's holding simply eliminated that risk rather than refuse to enforce the contract. The California Supreme Court in ***Armendariz v. Foundation Health Psychare Services, Inc.***[43] similarly held in an employment discrimination case arising under state law that because "imposition of substantial forum fees is contrary to public policy," employers may not impose any arbitration forum costs on employee plaintiffs that they would not have to bear if they were allowed to sue in court.[44]

By answering in advance of arbitration the question of whether forum costs would prevent the plaintiff from effectively vindicating her federal statutory rights, ***Randolph*** appears to side with those courts that have found it appropriate to address cost-related issues before arbitration takes place. The California Supreme Court so held in ***Armendariz***, explicitly rejecting the defendant employer's contention that fee issues should only be addressed when courts are reviewing arbitration awards.[45] The Fourth Circuit in ***Bradford v. Rockwell Semiconductor Systems, Inc.***,[46] one of the first post-***Randolph*** federal appellate opinions concerning allocation of arbitration costs, also found that cost-based objections may be raised in advance of arbitration based on forecasted fees and costs.[47] The ***Bradford*** decision, however, enforced an employer's use of arbitration against an ADEA plaintiff where the plaintiff had already been charged over $4,400 by the American Arbitration Association, finding that these costs had no deterrent effect where the plaintiff initiated and pursued arbitration and produced no evidence of his inability to pay these costs.[48] In the aftermath of the Supreme Court's ***Randolph*** decision, therefore, parties opposing arbitration on the basis that the forum costs would prohibit effective enforcement of their statutory rights should present in advance of arbitration all relevant evidence as to the costs that they would bear if the arbitration contract were to be enforced.

[*continued on p. 5*]

Conclusion

The Supreme Court's most recent decisions applying the Federal Arbitration Act have produced surprisingly little change in the law governing arbitration of individual plaintiffs' statutory causes of action. The holding in ***Circuit City*** that the FAA applies to employment contracts of most non-unionized workers affirmed existing law in most federal courts and did not eliminate or diminish the availability of defenses to enforcement of arbitration clauses contained in these contracts. Likewise, the Court's holding in ***Randolph*** that parties cannot avoid arbitration based on prohibitive costs without producing evidence of what those costs are likely to be affects only the rare case where an arbitration clause is silent as to cost allocation and the party opposing arbitration shows no other evidence. ***Randolph***'s preliminary holding that court orders dismissing substantive claims in favor of arbitration are immediately appealable, although of uncertain effect because the Court issued no guidance on when district courts should dismiss claims and when they should issue a non-appealable stay, may be helpful to individual plaintiffs who oppose arbitration by allowing them to obtain a final judgment on whether or not an arbitration contract can be enforced before they submit their statutory claims to arbitration.

The author works on the Mandatory Arbitration Abuse Prevention Project at Trial Lawyers for Public Justice and may be contacted at mquirk@tlpj.org. *For information on legal arguments for preventing enforcement of contractual arbitration provisions visit the briefs page of TLPJ's website:* http://www.tlpj.org/tlpjf/briefs.htm

Endnotes

fn1 - -S. Ct. - -, 85 Fair Empl. Prac. Cas. 266, 2001 WL 273205 (March 21, 2001).

fn2 9 U.S.C. §§ 1-16

fn3 Enforcement of collective bargaining agreements with arbitration provisions for claims of unionized workers is governed by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. See ***Circuit City***, 2001 WL 273205 at *14 (Stevens, J. dissenting).

fn4 531 U.S. 79, 121 S. Ct. 513 (2000)

fn5 15 U.S.C. § 1601 *et seq.*

fn6 The Supreme Court also decided a third case involving arbitration this term, finding that a labor arbitrator's reinstatement of a truck driver who had twice tested positive for marijuana pursuant to the just cause provision of a collective bargaining agreement did not violate public policy and therefore was enforceable. See ***Eastern Associated Coal Corp. v. United Mineworkers of America, Dist. 17***, 531 U.S. 57, 121 S. Ct. 462 (2000). Because this case involves contractual rather than statutory rights and because the Court emphasized that the employee's union and the employer bargained for the contractual just cause and arbitration provisions, *Id.* at 466-67, the ***Eastern Associated*** decision involves separate issues from those addressed in this article.

fn7 See, e.g., Eileen Silverstein, *Mandatory Arbitration of Statutory Rights*, The National Lawyers Guild Newsletter of the Labor and Employment Committee (Nov. 2000); Harry T. Edwards, *Where are We Heading with Mandatory Arbitration of Statutory Claims in Employment*, 16 GA. ST. U. L. REV. 293, 296-97 (1999); see also ***Cole v. Burns Int'l Security Services***, 105 F.3d 1465, 1476-77 (D.C. Cir. 1997).

fn8 9 U.S.C. § 2

fn9 See ***Allied-Bruce Terminix Cos. v. Dobson***, 500 U.S. 265, 272 -77 (1995)

fn10 9 U.S.C. § 1

fn11 500 U.S. 20 (1991)

fn12 29 U.S.C. § 621 *et seq.*

fn13 *Id.* at 525 n.2

fn14 ***Circuit City***, 2001 WL 273205 at *8

fn15 *Id.* at *6, 8. The Court offered no elaboration on what constitutes a "transportation worker" for purposes of finding an exemption from the FAA under Section 1.

fn16 *Id.* at *9

fn17 See *Id.* at *12 (Stevens, J. dissenting), *15 (Souter, J. dissenting)

fn18 See *e.g.*, ***Dickstein v. duPont***, 443 F.2d 783, 785 (1st Cir. 1971) (holding that Section 1 of FAA exempts only workers engaged in the movement of goods across state lines); ***Erving v. Virginia Squires Basketball Club***, 468 F.2d 1064, 1069 (2nd Cir. 1972); ***Tenney Engineering, Inc. United Electrical & Machine Workers of America***, 207 F.2d 450, 453 (3rd Cir. 1953) (en banc); ***O'Neil v. Hilton Head Hospital***, 115 F.3d 272, 274 (4th Cir. 1997); ***Rojas v. TK Communications, Inc.***, 87 F.3d 745, 747-48 (5th Cir. 1996); ***Asplundh Tree Co. v. Bates***, 71 F.3d 592, 596 (6th Cir. 1995); ***Pryner v. Tractor Supply Co.***, 109 F.3d 354, 358 (7th Cir. 1997); ***McWilliams v. Logicon, Inc.***, 143 F.3d 573, 575-76 (10th Cir. 1998); ***Cole v. Burns Int'l Security Services***, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997).

fn19 ***Circuit City***, 2001 WL 273205 at *3, 5

fn20 See ***Craft v. Campbell Soup Co.***, 177 F.3d 1083, 1094 (9th Cir. 1999)

fn21 See ***Chappel v. Laboratory Corp. of America***, 232 F.3d 719 (9th Cir. 2000) ("While the distinctive procedural apparatus of the FAA would fall away, ***Chappel*** would still be required under the law of contract to arbitrate in accordance with the clause."). It is worth noting that ***Chappel*** involved an employee's claims under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, because the Ninth Circuit also continues to hold (alone among federal appellate courts) that the 1991 Civil Rights Act amendments prohibit employers from requiring binding arbitration of Title VII claims as a condition of employment. See ***Duffield v. Robertson, Stephens & Co.***, 144 F.3d 1182 (9th Cir. 1998).

fn22 6 P.3d 669 (Cal. 2000)

fn23 *Id.* at 678

fn24 The preemptive effect of ***Circuit City*** on state law may only be apparent because the Court noted that not all members of the bare five vote majority in that case had previously accepted the Court's holdings that the FAA may preempt contrary state laws. See ***Circuit City***, 2001 WL 273205 at *10.

fn25 For a discussion of available defenses against the enforcement of particular arbitration clauses, see F. Paul Bland Jr., *To Fight Arbitration Abuse, the Devil is in the Details*, TRIAL 31, 32-35 (July 2000); see also Silverstein, *Mandatory Arbitration of Statutory Claims* at 3-6.

fn26 See ***Cole v. Burns Int'l Security Services, Inc.***, 105 F.3d 1465, 1484 (D.C. Cir. 1997).

fn27 For an extended discussion of the problem of arbitral forum costs on individual enforcement of statutory rights, see Brief of *Amicus Curiae* Trial Lawyers for Public Justice, National Employment Lawyers Association, and the Association of Trial Lawyers of America in Support of Respondent in ***Green Tree Financial Corp. v. Randolph***, 2000 WL 1022874 (July 24, 2000). This brief is also available at www.tlpj.org/tlpjf/briefs/green.htm.

fn28 9 U.S.C. § 16(b)(1) and (2). It is important to note that these procedural rules of the FAA have not generally been found to preempt contrary state rules, so that state appellate courts may permit immediate appeals of all orders directing arbitration without frustrating the substantive policy goals of the FAA. See ***Wells v. Chevy Chase Bank, F.S.B.***, - -A.2d - -, 2001 WL 225741 at *5-9 (Md. March 8, 2001).

fn29 9 U.S.C. § 16(a)(3)

fn30 See *e.g.*, ***Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.***, 143 F.3d 626, 628-29 (1st Cir. 1998); ***Pisgah Contractors, Inc. v. Rosen***, 117 F.3d 133, 136 (4th Cir. 1997); ***Altman Nursing, Inc. v. Clay Capital Corp.***, 84 F.3d 769, 771 (5th Cir. 1996); ***Napleton v. General Motors Corp.***, 138 F.3d 1209, 1212 (7th Cir. 1998); ***Gammaro v. Thorp Consumer Discount Co.***, 15 F.3d 93, 95 (8th Cir. 1994); ***McCarthy v. Providential Corp.***, 122 F.3d 1242, 1244 (9th Cir. 1997)

fn31 See ***Arnold v. Arnold Corp.***, 920 F.2d 1269, 1276 (6th Cir. 1990); ***Armijo v. Prudential Life Ins. Co. of America***, 72 F.3d 793, 797 (10th Cir. 1995)

fn32 ***Randolph***, 121 S. Ct. at 521

fn33 Id. at 520 n.2. The Court in ***Randolph*** never discusses when it is appropriate for a district court to issue a stay of litigation and when to dismiss claims, so courts will likely have considerable discretion over how to fashion their arbitration orders.

fn34 *Id.* at 522-23

fn35 *Id.* at 521-22

fn36 *Id.* at 522

fn37 *Id*

fn38 163 F.3d 1230 (10th Cir. 1999)

fn39 *Id.* at 1232-1234

fn40 ***Paladino v. Avnet Computer Technologies, Inc.***, 134 F.3d 1054, 1062 (11th Cir. 1998)

fn41 105 F.3d 1465 (D.C. Cir. 1997)

fn42 *Id.* at 1477, 1482-85

fn43 6 P.3d 669 (Cal. 2000)

fn44 *Id.* at 687 -689

fn45 *Id.* at 687

fn46 238 F.3d 549 (4th Cir. 2001)

fn47 *Id.* at 558 n.7; But, see also ***Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.***, 170 F.3d 1, 3 (1st Cir. 1999) (rejecting cost-based challenge to arbitration based entirely on practices of the arbitration service in other cases, and noting that the Title VII/ADEA plaintiff would be free to bring a post-arbitration challenge to enforcement on the basis of forum costs).

fn48 *Id.* at 558; see also ***Williams v. Cigna Financial Advisors, Inc.***, 197 F.3d 752 (5th Cir. 1999) (upholding arbitration in ADEA case despite charges to plaintiff in excess of $3,000 based on ability of plaintiff with six-figure income to bear costs).

NLG L& EC ORGANIZES SECOND DELEGATION TO CUBA

by Tim Belcher

In February, a delegation organized the Labor and Employment Committee, along with the U.S. Health Care Trade Union Committee, visited Cuba and met with lawyers and leaders from the Central de Trabajadores de Cuba. The US delegation included labor and employment lawyers, several administrative law judges, one arbitrator, legal workers, as well as trade union leaders and organizers.

During the first days of the meeting, Cuban and US delegates offered presentations on various aspects of our respective legal and trade union systems. We then visited several work sites in Havana, and traveled for two days to the Santa Clara, Sancti Spíritus and Trinidad. We visiting several additional work sites in the provinces, as well as the Ché Guevara Memorial. We returned to Havana and met again to evaluate our efforts.

A detailed report on the delegation is being prepared, and will be made available soon. Our efforts were helped immensely by Debra Evanson, who allowed us to review an early draft of her upcoming book on the Cuban trade union movement and its labor laws. Her work will be a tremendously valuable contribution. In addition, several members participated in last year's delegation, or had visited Cuba before. While no one would claim that a single week was enough to gain a thorough understanding of the Cuban system, the visit was both exciting and productive.

For anyone who doubted Cuba's ability to survive the collapse of Eastern European socialism: Cuba lives. While the nation clearly suffered in the early 1990s, Cuba is now just as clearly rebuilding and moving forward. We saw new cars on the streets, factories with new equipment, renovation of older buildings, and people who appeared healthy and were well dressed. The art and music is both vibrant and diverse. There were certainly problems, including some evidence of emerging inequalities, perhaps based on the dollar and peso economies. Nonetheless, most of the delegation was deeply moved by the Cuban people's commitment to building a more just society.

The trade unionists spoke proudly of their role in the revolution, and their contribution to building a more just society, particularly in the areas of health care, nutrition, education and employment rights. A historian told us of labor organizing going back to the 1800s. The Central de Trabajadores de Cuba was formed several decades before the revolution, and Cuban labor struggles have always combined militancy with political radicalism. The CTC continues to play a leading role in the transformation of Cuban society.

We met trade unionists from all levels of the CTC, from the work sites through the local and provincial leadership to the national leaders. They were sincere, dedicated individuals who spoke with pride of their role in the improving the lives of their members. It was a real pleasure to get to know them and the reception given to our delegation was truly moving.

Cuban trade unionists face many of the same problems we face in our workplaces, from protecting workers from injuries to providing a fair disciplinary procedure. The environment in a socialist enterprise, however, is dramatically different from a private corporation in the US. While it was clear that the unionists and managers we met were at odds over work place issues typically involved in collective bargaining, there was no evidence of the deep antagonism and distrust that pervades US labor relations. The union leaders and workers we met appeared genuinely interested and concerned about the overall survival of the enterprise. Similarly, the managers seemed to value the workers, and respect the union.

In some ways, the scope of collective bargaining in Cuba appears more limited than in the US private sector. While Cuban unions would not strike over health care or retirement benefits, they do not need to. Those benefits, and a broad array of other economic rights, are provided by the state, outside of the collective bargaining context.

The CTC as a whole appears to exert broader influence in the overall direction of the economy and the individual enterprises. The role of the union is comparable to a strong public sector union in the US, where collective bargaining is restricted, economic warfare is often illegal, but unions can exert substantial leverage through the political process. Indeed, Cuban workers are all, in effect, public employees. It was apparent that many shared a culture of public service that was similar to attitudes that prevail in some government employment in the US. The analogy breaks down, though, when it is noted that the Cuban workers, through the CTC Congress, play an official role in planning the country's future direction and promulgating the legislation to bring about those changes. Even the strongest public sector unions here are limited to the role of outside interest groups.

No one would pretend that a one-week visit is enough to thoroughly evaluate any country's system of worker rights or labor relations. While many express skepticism that Cuba has meaningful unions, we believe we saw an active labor movement, contributing in a meaningful way to the lives of their members. Rather than claiming that we have the answer, however, we would urge more US lawyers and unionists to visit and see for themselves.

In the final analysis, US progressives, unionists and workers have a stake in understanding Cuba. It is one of our closest neighbors. With or without the embargo, it is part of our regional economy. Moreover, understanding Cuba is essential for anyone interested in finding alternatives to the global vision being offered by international capital, the WTO, and the United States government. We also have a responsibility, as members of a global community, to help end our own country's embargo, as well as all other efforts to interfere with Cuba's sovereignty.

NLG Labor Law Guide - Contributions Sought

The Guild began publishing its Employee and Union Member Guide to Labor Law more than twenty years ago. We launched it in order to offer a practical guide for workers and their unions, one that not only laid out the black letter law but also offered concrete suggestions for new strategies and tactics.

Over the years we have updated and revised it extensively: it now covers new topics, such as the ADA, as well as all of the recent developments in traditional labor law, Title VII, ERISA, bankruptcy law and all of the other topics we cover. We recommend it for every Guild member who practices employment law of any sort.

We are always looking for ways to improve the book as well. In particular, we want to talk to Guild members who are willing to review and edit a particular chapter, or major portion of a chapter. We submit revisions every six months; the next deadline will be this November. If you're interested, contact either Elise Gautier at gautier@teleport.com or Henry Willis at hmw@ssdslaw.com.

Finally, we would like to get the book into the hands of more unions. In order to do that we need to collect the names and addresses of unions in major metropolitan areas. If you're able to help please contact Henry Willis at hmw@ssdslaw.com.

Whistleblower Book a Great Buy

review by Richard Renner

Retaliation is ever present among those who stand up for their rights at work.

Finally employment practitioners have a comprehensive volume devoted to protecting those who do speak up. ***Concepts and Procedures in Whistleblower Law*** provides the nuts and bolts of retaliation claims. As chair of the National Whistleblower Center in Washington, D.C., and a partner in the preeminent whistleblower law firm of Kohn, Kohn & Colapinto, author Stephen Kohn corrals the vast landscape of this law and makes it useable.

Concepts is well organized in eleven chapters. The first presents ten steps for analyzing a whistleblower case. This chapter is particularly well suited for less experienced attorneys, but contains a few gems for everybody. Kohn helps the practitioner choose the causes of action to pursue, and deftly suggests how a set of facts can lead to remedies through a variety of forums. The text provides questions that help assess the advantages and disadvantages of each available claim helping us to hone a strategy.

Each of the 50 states, and the District of Columbia, receive individual attention in Chapter 2. Heavily footnoted, it points us to the level of advancement in our states against the outdated doctrine of employment-at-will. Those of us in Ohio (reviewer's residence) can be thankful for the up-to-date list of appellate court precedent, but still pine for the richly developed law in California. An introductory article pulls together the trends in state laws and torts for wrongful discharge.

Chapter 3 provides a similar review of 19 categories of federal laws. Employees in the airline, banking, job training, maritime, migrant labor, mining, railway, and trucking industries receive particularized articles on the federal statutory remedies just for them. Other articles address employee protections under civil rights laws (Title VII, FMLA, ADEA and ADA), labor laws (ERISA, NLRA, FLSA and OSHA), and federal civil service (Whistleblower Protection Act and Merit System Protection Board).

Chapter 4 provides more detailed coverage of First Amendment claims, as enforced through 42 U.S.C. 1983, 1985 and 1986. Kohn addresses the Eleventh Amendment immunity, qualified immunity, and the non-application of *respondeat superior*. He also covers the application of 1985 to employees at will (*Haddle v. Garrison*) and the movement away from the intracorporate conspiracy doctrine (*McAndrew v. Lockheed Martin*).

Environmental whistleblowers benefit from extensive treatment of their specialized remedies. Chapter 5 is where ***Concepts*** shines. Kohn carries over the years of painstaking research from his treatise The Whistleblower Litigation Handbook. Updates and the full OALJ library are available at http://www.oalj.dol.gov/libwhist.htm.

Chapter 6 offers whistleblowers and their advocates their best chance of getting very rich. Through Qui Tam actions under the False Claims Act, the first person to reveal a fraud against the federal government can share in a percentage of the government s recovery. The original source however, must know how to stake that claim. On page 212, ***Concepts*** lays bare a common trap: those who publicly disclose the fraud can be barred from recovering their share. Needless to say, government attorneys are not always keen to share the government s collections, and practitioners must follow each requirement to the tee. ***Concepts*** explains them all.

Chapter 7 is appropriately short on the issue of workplace safety whistleblowing under OSHA. Since whistleblowers have no right to appeal from OSHA s informal decisions declining to issue complaints, OSHA is simply the weaker alternative to any other available claim a client might have. Advocates will do well to check Chapter 2 to determine if a state tort claim can be based on reporting OSHA violations.

Chapter 8 is cool. ***Concepts*** organizes the elements of a *prima facie* case, and then draws authority on those issues from the full range of retaliation law. The effect is that when a legal issue arises in a particular claim, an advocate can draw authority from any of the laws that contain anti-retaliation provisions. The section on the scope of protected activity includes detailed treatment of internal complaints, failure to follow the chain of command, direct reports to government, filing complaints, being a witness, threatening to complain, contacting media, mistaken beliefs, and the persistence of protection years beyond the protected activity. Methods of proof include direct evidence and circumstantial evidence. ***Concepts*** lists 32 accepted forms of circumstantial evidence of discriminatory motive, each footnoted (pp. 268-70). ***Concepts*** separately addresses discovery, preemption and mandatory arbitration.

Chapter 9 collects authority supporting a full range of remedies. Make whole remedies, including reinstatement, back pay, front pay, and compensatory damages are briefed. ***Concepts*** covers other remedies including equitable remedies (abatement and injunctions), punitive damages, interest, tax consequences, attorney fees and costs. Defense issues, such as mitigation and after-acquired evidence, receive additional treatment.

How often have we thought we settled a case and then cringed when defense counsel sends over a release requiring the plaintiff and attorney to forfeit their rights to disclose the settlement, the cases, or even the evidence in support of the original wrongdoing? In Chapter 10, ***Concepts*** advances the claim that such hush money agreements are void as against public policy. The authority against such provisions is detailed, together with practical considerations about severability, voiding the agreement, and illegality. Indeed, ***Concepts*** reports on cases holding that as such agreements are illegal, claimants can keep the settlement money even as they disregard the restrictions on their protected activities. (P. 373, fn 31-37.)

Concepts also issues the call for improved laws. Chapter 11 presents a Model Law to protect those challenging any form of unlawful or unprofessional conduct. Here here!

Appendices include federal regulations governing procedures for the seven environmental laws enforced through OALJ. One appendix provides the text of relevant employee protections from 38 federal laws. Pleasantly, the First and Fourteenth Amendments are included a reminder that the goal of protecting those who speak out has its roots in our Constitution.

Altogether, ***Concepts*** is a comprehensive reference that stands alone in providing the tools to assess any retaliation case. Practitioners get guidance on handling each phase of the case, with careful attention to the first steps in interviewing the client, choosing the causes of action, catching time limits, and recovering the full range of remedies available. The price is less than one billable hour. Truly a must have.

Concepts and Procedures in Whistleblower Law

by Stephen M. Kohn

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http://www.whistleblowers.org/concepts.htm