What's New at the NLRB, EEOC and MCAD?

By:

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Agenda

- "Politics" and Implications of the Current and Recent NLRB Appointees
- Review of Private Sector Labor Law Basics
- Key NLRA Definitions and NLRB Procedures
- New NLRB Posting Requirement Effect January 31, 2012
- Proposed NLRB Regulations To Shorten Election Timelines
- Important Recent NLRB Decisions and Potential Implications
- Trends in the Higher Education Workforce
- Adjunct Faculty– Issues and Challenges
- Status of "Research Assistants, Teaching Assistants and Graduate Assistants" and Predictions

The 2011 NLRB
"The Obama Board"

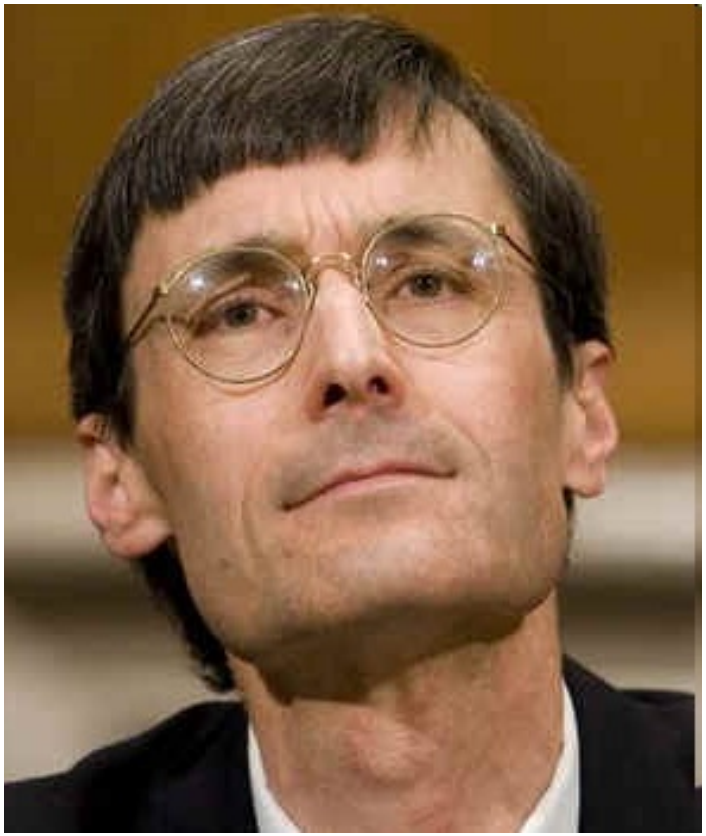
- President Appoints Members for Five Year Terms
- Historically, the Pendulum Swings Between Democrat and Republican Boards
- "Dissenters" Become the Majority

Wilma B. Liebman

- Member of the "Bush Board"
- Previously Counsel to Bricklayers Union and Teamsters Union
- Often "dissenting" on "Bush Board"
- Appointed Chairman January 20, 2009
- Term Expired August 27, 2011
- Had Previously "Invited" Unions to challenge precedent – e.g. the *Brown University* decision from 2004

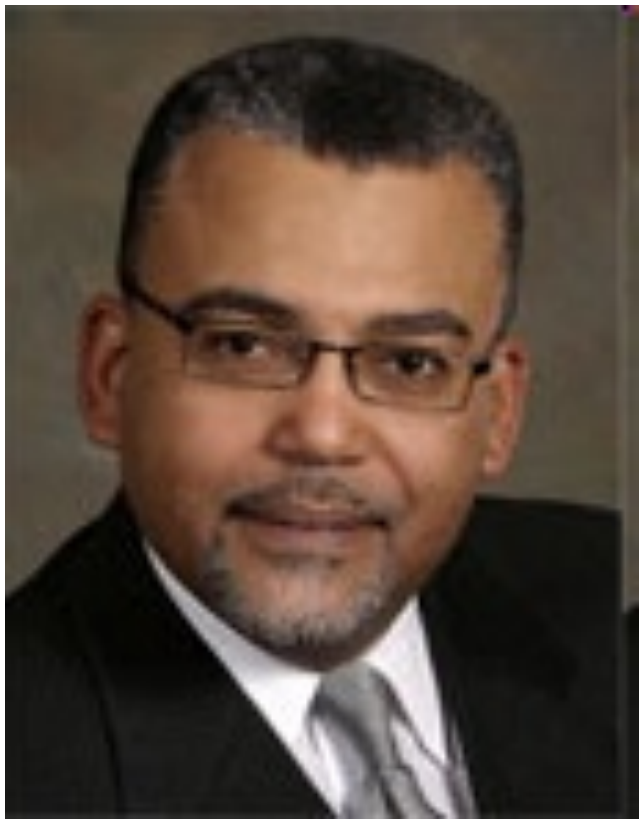
Craig Becker

- Former Associate General Counsel for SEIU and AFL-CIO Staff Counsel
- Appointed to Recess Appointment by President on April 5, 2010
- Term Expires December 31, 2011
- Re-nominated for Term Ending in 2014
- Currently Opposed By 47 Republican Senators
- Unlikely to be Re-appointed



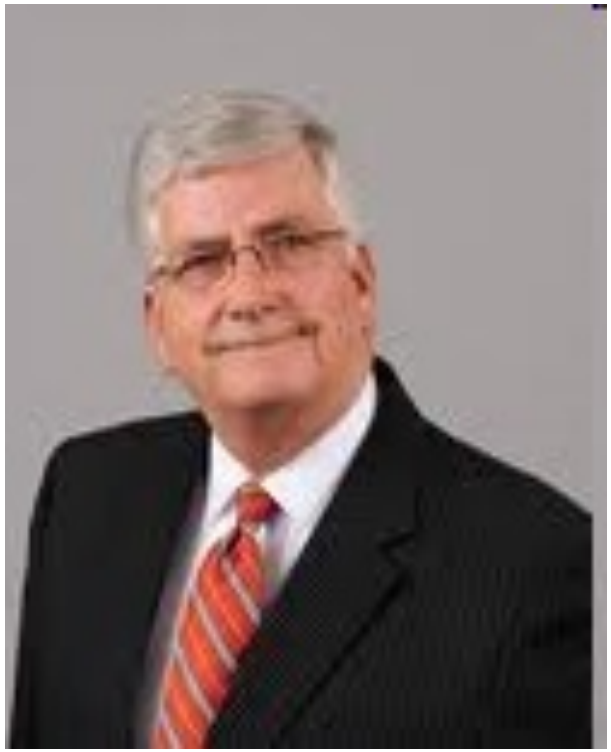
Mark G. Pearce

- Former Partner in a Buffalo, N.Y. law firm Representing Unions
- Previously Worked as NLRB Staffer in Region 3 – (Buffalo, N.Y.)
- Appointed April 7, 2010
- Current Term Expires August 27, 2013
- Appointed Chairman to Replace Liebman in August, 2011



Brian Hayes

- Started career with NLRB
- 25 years of private practice as a management lawyer
- Served as Republican Labor Policy Director for U.S. Senate Committee on Health, Education, Labor and Pensions
- Appointed on June 22, 2010
- Current term ends on December 16, 2012
- Opposes New Posting Rule and Proposed Election Changes



The Current Percentage of U. S. Employees Belonging to Labor Organizations

In early 2011, neither the Bureau of Labor Statistics of the U.S. Department Of Labor nor the U.S. Department Of Education, National Center for Education Statistics could provide an accurate percentage of unionized faculty in private colleges and universities

Review of the Current NLRB Representation Process

- Authorization Cards -- "shelf life" of one year
- Representation Petition (Form NLRB 502)
- Representation Hearing or…
- Stipulated Election Agreement
- Average Time is now 38 days
- An Appropriate bargaining Unit
- Eligible Voters – [4 hours per week]
- "The Campaign Period" – Winning the Hearts & Minds of Eligible Voters
- "Laboratory Conditions" – *In Re General Shoe Corp*., 77 NLRB 124, 127 (1948)
- Secret Ballot Election – Conducted By NLRB Officials on Employer's Premises …or…

Update on Key NLRB Issues

- New Posting Requirements – Effective January 31, 2012
- Proposed Regulations To Expedite NLRB Representation Elections
- Published in Federal Register June 22, 2011
- All Comments Due by August 22, 2011
- According to NLRB 30,000 Comments Were Received
- Another 20,000 “reply” Comments Received
- Highly Controversial Regulations
- Proposed To Amend 29 C.F.R., Part 101, 102

Update on Key NLRB Issues

- Current Long-standing procedures result in a median 38 calendar days between filing of the "petition" and the secret ballot election
- Under proposed regulations the time period could be reduced to 10-14 calendar days
- Remember the proposed "Employee Free Choice Act?"

Update on Key NLRB Issues

- Proposed regulations would delay adjudication of pre-election disputes until after the election
- Proposed regulations would be some of the most significant changes in labor relations in 75 years

Update on Key NLRB Issues

Under proposed regulations employers would be required to provide employee names, home addresses and e-mail information to union officials two days after the NLRB authorizes the election [current law requires the list of home addresses within 7 days of NLRB approval]

Update on Key NLRB Issues

- Employers would also be required to submit a detailed "statement of position" summarizing the employer's legal position within 7 days
- Highly Partisan Debate – Obama NLRB appointees Liebman, Becker and Pearce strongly support the proposed regulations
  - Member Hayes is Strongly Opposed
  - Chairman Liebman's term expired August 27, 2011
  - Member Pearce was appointed Chairman

Update on Key NLRB Issues

- As expected, organized labor is zealously supporting and the business community is strongly opposed
- Predictions?
- Republican Senators Have Threatened To Block or Stall Any New NLRB Nominees
- Remember: 2010 U.S. Supreme Court decision in *New Process Steel v. NLRB* (invalidating all NLRB decisions issued by NLRB panels of two Members)

Important Recent NLRB Cases

- *Nova Southeastern University and Service Employees International Union, Local 32B-32J*, 357 NLRB No. 74 (August 26, 2011)
- University sought to prevent employees of UNICCO, its maintenance contractor from engaging in organizational hand-billing on campus
- Service Employees International Union seeking to organize the UNICCO workers

Nova Southeastern University

- In August, 2006, UNICCO employees on the University campus began distributing flyers to co-workers
- “Janitors For Justice” – National Campaign by SEIU
- University Public Safety Officer ordered the UNICCO employee to stop, citing a campus no-solicitation rule

Nova Southeastern University

- UNICCO employee complained to University officials and asserted his statutory right to distribute literature during non-working time
- University officials notified UNICCO manager on-site and the employee was given a copy of the policy and issued a disciplinary warning by UNICCO
- SEIU filed unfair labor practice charges against the University

Nova Southeastern University

- Unfair labor practice charges alleged that the University, as "property owner" had violated Section 8(a)(1) of the NLRA by interfering with the Section 7 rights of its contractor's employee
- University justified its actions based upon need to "ensure security on its campus"
- NLRB did not accept University's rationale

Nova Southeastern University

- NLRB Ruled -- UNICCO employee's fundamental right to distribute handbills to co-workers for organizational purposes must prevail over the University's lesser interests of security and cleanliness
- University's case was weak – very little evidence to support their assertion

Nova Southeastern University

- Lesson?
- Still another example of how actions relating to your contractors' employees can create liability for the college or university

Polytechnic Institute of New York University and UAW

- On May 5, 2011, UAW filed a petition pursuant to Section 9(c) of the NLRA seeking to represent a bargaining unit of 555 Research Assistants (RA's), Teaching Assistants (TA's) and Graduate Assistants (GA's)
- Following a representation hearing in Region 29 of the NLRB, Regional Director issued a Decision and Order

Polytechnic Institute of New York University

- NLRB Regional Director concluded that Research Assistants, Teaching Assistants and Graduate Assistants were not "statutory employees" under the NLRA, pursuant to the NLRB's holding in *Brown University*, 342 NLRB 483 (2004)
- NOTE: The *Brown University* decision is one of the cases discussed by former NLRB Chairman Wilma Liebman when she urged union leaders in higher education to "seek reversal" of prior cases

Polytechnic Institute of New York University

- Regional Director's Decision and Order of August 30, 2011, is an invitation to the current NLRB to overturn the 2004 decision in *Brown University*
- The 19 page decision contains many facts relating to the specific duties and responsibilities or RA's, TA's and GA's and the nature of their relationship with the Institute

Polytechnic Institute of New York University

- Regional Director reviewed the holding of *Brown University*
- Holding of *Brown:*
- Graduate assistants are primarily students and have a primarily educational, and not economic relationship with their university. Therefore, they are not "employees" as defined in Section 2(3) of the NLRA and are not eligible to be unionized

Polytechnic Institute of New York University

Accordingly, Regional Director dismissed the petition, pursuant to the holding in *Brown University,* but noted in his decision that the evidence showed that the individuals in the petitioned for unit had both an academic relationship and an economic relationship with the university

Polytechnic Institute of New York University

- Update on status of the case -----
- This case may be the opportunity former Chairman Liebman and organized labor were looking for…

Unions and Their Interest in Higher Education

- Growing number of adjunct faculty nationwide
- Interested Unions – AAUP, AFT, NEA and…
- UAW, SEIU
- AFT 2010 Study: "A National Survey of Part-Time/Adjunct Faculty"
- Concerns of Adjuncts: job security, salaries, lack of benefits and other key issues
- Colleges and universities rely on adjunct faculty for a variety of reasons: cost, flexibility and real life experience

Unions and Their Interest in Higher Education

- Recent Examples of Successful Adjunct Unionization
- St. Francis College – Brooklyn Heights, N.Y.
- March, 2010 –150 adjuncts voted by a 2 to 1 margin in favor of the St. Francis Adjunct Faculty Union, affiliate of New York State United Teachers and the NEA

Unions and Their Interest in Higher Education

- Manhattanville College – Purchase, N.Y.
- March, 2011 – adjunct faculty vote 221 to 50 in favor of unionizing with New York State United Teachers

Unions and Their Interest in Higher Education

- In 2010 AFT Director of Higher Education Lawrence Gold commented on *Brown University* and stated:
- *"With the new majority on the NLRB, it is high time to overturn that wrongheaded decision. AFT will participate actively in that struggle and offer assistance to graduate employees at both public and private universities seeking the benefits of unionization."*

Unions and Their Interest in Higher Education

- The AFT has 25,000 graduate student members at public universities across the United States and is excited to grow its membership in the private higher education sector.
- Do private colleges and universities present an opportunity for organized labor?
- AFT Local 1521, LA College Faculty Guild's
- "Adjunct Survival Guide," published Fall, 2010, is a 25 page document

Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9, 357 NLRB No. 83, (August 26, 2011)

- This case involves an organizing drive by the Steelworkers at a healthcare facility
- QUESTION: Why are we discussing it at a higher education conference?
- ANSWER: This NLRB decision has implications far beyond healthcare

Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9, 357 NLRB No. 83, (August 26, 2011)

- Brief Summary: The NLRB held that small groups of employees in just one job classification are eligible to petition for a union for only their classification
- Holding reverses a longstanding decision aimed at preventing a "proliferation" of bargaining units in healthcare

Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9, 357 NLRB No. 83, (August 26, 2011)

- NLRB Set forth a new "clear test"
- In cases where an employer contends that a proposed "bargaining unit" is inappropriate because it excludes certain employees, the employer must show that the excluded employees share an "overwhelming community of interest" with the petitioned-for employees.

Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9, 357 NLRB No. 83, (August 26, 2011)

- Practical Implication 1: The burden is on the employer to argue against the petitioned-for unit – usually a smaller unit – to argue that it is not an "appropriate unit"
- Supreme Court and NLRB precedent call for "an appropriate unit" NOT "the most appropriate unit"
- Introducing "Micro-Units"

Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9, 357 NLRB No. 83, (August 26, 2011)

- Practical Implication 2: Smaller bargaining units are easier for labor unions to successfully organize
- Do colleges and universities have any groups of employees seeking union representation?
- Remember the *Polytechnic Institute of New York University* case?.....

EEOC Update

The ADAAA and EEOC's Regulations

Fair Pay in the Workplace

Arrest and Conviction Records in Employment

EEOC's Regulations to the ADAAA May 24, 2011

- Provide regulatory guidance for the most significant changes to the ADA made by the 2008 Amendments Act
  - - Major Life Activities/Major Bodily Functions – Section 1630.2(i)
  - Substantially Limited – Nine Rules of Construction – Section1630.2(j)
  - Predictable Assessments - Impairments Virtually Always or Easily Found to be disabling – Sections1630.2(j)(3)(ii) and (iii)

Implications

- First two prongs of the definition of "disability" will primarily be relevant where someone needs reasonable accommodation or claims an accommodation was unlawfully denied
- "Regarded as" prong will probably be most likely basis for coverage in non-accommodation cases

Implications

- Where accommodation is requested, focus should be on NEED for accommodation rather than coverage
- Where accommodation is requested, employers may still ask for documentation to substantiate existence of non-obvious disability, but it will be different from, and likely less extensive than, documentation pre-ADAAA

Implications

- "…the primary object of attention in cases brought under the ADA should be whether entities covered by the ADA have complied with their obligations…"
- Consider the review/creation of policies and procedures related to reasonable accommodation, discrimination prevention, and complaint processes
- Train managers and employees on rights and responsibilities under the ADAAA

EEOC and ADAAA Activity

- Record number of ADA charges in 2010
- 21 ADA cases filed in past 8 weeks!
- Boston Area Office has filed two

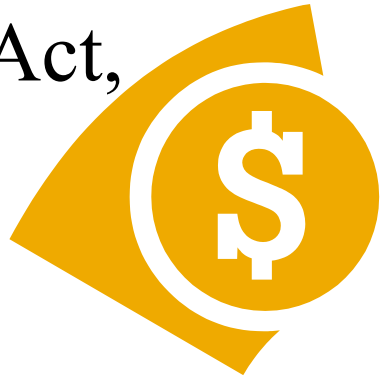
Fair Pay

May 23, 2011 – Boston's Fair Pay Day Celebration

Women still earning less than men – disparities even more significant for women of color and immigrant women

"Second Generation Discrimination" - Unconscious Bias and pay disparities

Tools: EPA, Title VII, Lilly Ledbetter Act, Agency Collaboration



Arrest and Conviction Records in Employment

- E-RACE Initiative
- Public Hearings in 2011 on Criminal Records and Discriminatory Impact
- Original 1987 Guidance Still in Effect
- State Laws Provide More Coverage - MCAD Guidance on CORI Amendments and Criminal Records in Employment

MCAD Update

4 Questions / 10 Minutes

A Speedy Update

on Key Developments

at the MCAD

1. True or False?

The MCAD may order a University to promote a professor from the rank of Associate Professor to Full Professor.

True. In an "unprecedented" decision, the Commission ordered U/Mass-Dartmouth to promote an associate professor to full professor after finding that the she had been subjected to discrimination and retaliatory actions. *Professor Lulu Sun and MCAD v. University of Massachusetts, Dartmouth.*

Sun v. U/Mass, Dartmouth:
Background

- Associate Professor, a woman of Chinese ancestry, applied for Full Professor, submitted glowing dossier, and was unanimously recommended for promotion by her Department
- Dean rejected recommendation, called the dossier as "an embarrassment," and ended a meeting by patting her on the back and saying, "It's okay Lulu"
- Professor refused to withdraw dossier
- University denied travel funding and withdrew course releases
- Professor filed discrimination and retaliation claims

Sun v. U/Mass, Dartmouth:
MCAD Finds Discrimination and Retaliation

"…Complainant was subjected to disparate treatment by an administration which indulged in every presumption against her candidacy while, at the same time, extending every benefit of the doubt to similarly-situated comparators who did not belong to Complainant's protected groups. Complainant's attempt to climb to the highest rung of the academic ladder was stymied by decisions which held her to different and higher standards than those applied to her counterparts who were not Asian females."

Sun v. U/Mass, Dartmouth:
MCAD Orders Damages and Training

- Lost Wages: $154,503.00
- Emotional Distress: $200,000
- Civil Penalty: $10,000
- Training: mandatory session on “all aspects of employment discrimination” for HR staff, the Dean, the Provost, and the Chancellor, under the observation of a Commission representative

Sun v. U/Mass, Dartmouth:
MCAD Orders Promotion

- Using its authority to award "affirmative relief," the Commission ordered that University promote the Complainant to Full Professor, retroactive to the date on which her initial application was denied
- In the Commission's press release, this was described as an "unprecedented step"

Sun v. U/Mass, Dartmouth:

The Take-Aways

- Treat your Employees Consistently and Fairly
- Treat your Employees Consistently and Fairly
- Train Your Employees

2. True or False?

A Caucasian male employee cannot sustain a claim for racial discrimination against his Caucasian male employer, where the employer has made racially hostile remarks about black persons.

False. Where a Caucasian employee was targeted for abuse because of his relationship with his fiancée, a black Jamaican woman, the employer is liable to the employee for racial discrimination. *Grzych and MCAD v. American Reclamation Corp.*

Grzych
Discrimination By Association

To establish racial harassment, Complainant must show, among other things:

- He was a member of a protected class
- He was a target of speech or conduct based on his membership in that class

Hearing officer concluded, "Race is a protected class. Complainant, who is Caucasian, has standing to file a claim of racial harassment, and can prove injury by virtue of his association with his fiancée,… a black Jamaican woman."

Grzych

The Take-Aways

- The MCAD allows claims of Associational Discrimination for ALL protected classes
- The MCAD continues to read the anti-discrimination laws very broadly

3. True or False?

A *former* employee can sue her *former* employer for retaliation based upon actions that occurred *years after* the employment relationship ended.

True. A person does not need to be a current employee at the time of the retaliatory conduct to receive protection under Massachusetts anti-discrimination laws. *Psy-Ed Corp v. Klein*.

Psy-Ed v. Klein:
Background

- Former employee filed discrimination complaint against company at MCAD
- One of company's co-owners, who had signed an affidavit supporting the company's position, filed a second affidavit supporting employee
- MCAD issued a probable cause finding for employee
- Years after the termination, the Company filed various tort claims against employee and co-owner
- Employee and co-owner counter-sued for retaliation under Massachusetts anti-discrimination laws

Psy-Ed v. Klein:

Anti-Retaliation Laws Protect Former Employees

- The anti-retaliation and anti-interference provisions of Chapter 151B apply to "persons," not "employees"
- The "broad remedial purposes" Chapter 151B would be impaired if limited to employees
- "Sham" or "baseless" lawsuits may be retaliatory

Psy-Ed v. Klein:
The Take-Aways

- End of employment does not end obligation not to retaliate
- Treat former employees evenhandedly
- If you take an adverse action against a former employee who has previously engaged in protected activity, be sure that you have a legitimate, non-discriminatory reason for your action

4. Yes or No?

A university has an explicit agreement with its employees to arbitrate all employment-related claims, including claims of discrimination. An employee breaches the agreement and files a discrimination claim at the MCAD. Can the MCAD investigate?

Yes. The MCAD has the independent authority to proceed with an investigation and resolution of the discrimination claim. *Joule Inc. v. Simmons*, 459 Mass. 88 (2011)

Joule:
Background

- Employee signed contract requiring her to arbitrate any discrimination claims
- After termination, employee filed a discrimination complaint at the MCAD
- Employer filed a motion to compel arbitration in the Superior Court; MCAD intervened
- Superior Court denied motion to compel, stayed the arbitration, and found that the agreement did not bar employee from being a party to the MCAD proceeding
- Matter appealed directly to the Supreme Judicial Court ("SJC")

Joule:

MCAD Has Independent Investigative Authority

- SJC: Superior Court erred in denying motion to compel arbitration, and the employer was entitled to have that agreement enforced
- However, the arbitration agreement could not preclude the MCAD from conducting its own investigation
- Although employee was barred from being a party to the MCAD proceeding, she could testify and provide information to the MCAD, and the MCAD *could* afford her relief (but no "double recovery")

Joule:
The Take-Aways

- MCAD remains autonomous
- Agreements to arbitrate *still enforceable*: foster expediency; minimize publicity and "runaway" awards
- Possibility for inconsistencies between the findings of arbitrator and MCAD, but likely remote
- Just because the MCAD has the authority to conduct independent investigation *does not mean it will*

Thank You

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