

Mass Dissent

Massachusetts Chapter

National Lawyers Guild

14 Beacon St., Boston, MA 02108

November 2007

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BOARD MEETING

November 20, 6:00pm

14 Beacon St., 1st Fl.
Boston

Labor and Employment Law

November's edition of *Mass Dissent* provides us with a glimpse into the jungle of employment law.

Our November edition begins with an article by long-time Guild member, Robert Cohen, who began his practice in 1970 fresh out of law school. In his article, Cohen recounts his experience in one of the first cases taken on by his firm involving gender discrimination. Despite the disparity in resources and experience at the time between Cohen and the defendant-corporation, he prevailed in challenging a hospital's discriminatory compensation scheme. In doing so, the case would mark an exciting new precedent for employment law in Massachusetts.

Our November edition also features articles from Eleanor Newhoff and Susan Church discussing the 2007 raid on the Michael Bianco, Inc. factory in New Bedford. In her article, Newhoff

updates us on the efforts being undertaken by several not-for-profit agencies and private law firms to help displaced workers recover unpaid overtime wages and redress for the physical injuries they suffered while employed at the factory. In her article, Church pays close attention to the challenges that undocumented workers face, highlighting the mounting discrimination facing this particular class of the workforce.

Finally, our November edition of *Mass Dissent* closes with a piece from David Conforto who, like Robert Cohen many years ago, recently began his own practice. Conforto discusses his first employment case out of law school and evaluates the Supreme Court's recent decision in *Ledbetter v. Goodyear*.

We hope you enjoy this month's edition of *Mass Dissent*. Strength in numbers!

- David Conforto -

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Join a Guild Committee

Street Law Clinic Project: Community legal education workshops on 4th Amendment Rights (Stop & Search), Landlord/Tenant Disputes, Workers' Rights, Civil Disobedience Defense, and Immigration Law. Conceptualized and coordinated by law students, the Street Law Clinic project provides workshops for the Boston community which address community legal needs. Clinics are held at community organizations, youth centers, labor unions, shelters, and pre-release centers. If you are a student, legal worker or attorney interested in leading workshops, contact the Project at 617-723-4330 or nlgmass-slc@igc.org.

"No to MBTA Searches": Works in coalition with the American Arab Anti-Discrimination Committee, American Friends Service Committee and ACLU of Massachusetts to stop searches on the MBTA. If you would like to be involved in the campaign, either on its political or legal end, please call the office at 617-227-7335.

Lawyer Referral Service Panel: Members of the panel provide legal services at reasonable rates. Referral Service Administrative/Oversight Committee members: Neil Burns, Neil Berman, Joshua Goldstein, Jeremy Robin, and Azizah Yasin. For more information, contact the Referral Service Coordinator at 617-227-7008 or nlgmass@igc.org.

Independent Civilian Review Board: In coalition with the American Friends Service Committee and Greater Boston Civil Rights Coalition, the NLG has been pushing for the creation of an independent civilian board to review complaints against Boston police officers. To get involved in the campaign, please contact the office at 617-227-7335.

NLG National Immigration Project: Works to defend and extend the human and civil rights of all immigrants, both documented and undocumented. The Committee works in coalition with community groups to organize support for immigrant rights in the face of right-wing political attacks. Ongoing projects include asylum advocacy and the rights of immigrant minors. For more information contact the NLG National Immigration Project at 617-227-9727.

NLG Military Law Task Force: Provides legal advice and assistance to those in the military and to others, especially members of the GIRights Hotline, who are counseling military personnel on their rights. It also provides legal support and helps to find local legal referrals when needed. The MLTF and the Hotline exchange many questions and information through their listserves. Calls to the GIRights Hotline from phones in New England are handled from the AFSC office in Cambridge. To get involved, please contact Neil Berman (njberman2@juno.com) or Marguerite Helen (mugsm@mindspring.com).

COALITIONS:

Jobs with Justice, a coalition-based organization addressing workers' rights. The NLG is a member of Jobs with Justice; any interested Guild members can attend meetings & events.

GUILD NEWS

NLG HAPPY HOUR

The NLG Massachusetts Chapter is proud to announce that our new program, **NLG Happy Hour**, has been a great success - over 30 people came to the first Happy Hour in October! The Happy Hour is for Guild members and non-Guild members, and will take place on the **2nd Wednesday of every month, between 5:30 and 7:30pm, at Felt Billiards Club** (533 Washington St., Downtown Crossing, next to Paramount). We hope you will join us for the next NLG Happy Hour on **November 14** - and bring friends!

a forum on wrongful convictions with Ronald Keine, Michael Avery, and Stephen Hrones. The forum will be on **Friday, November 16, 5:30-7:00pm, at Suffolk Law School** (for details, please see page 4, Student Corner).

HOLIDAY PARTY

All Guild members are invited to the Chapter's Annual Holiday party on **Friday, December 7, 2007, from 5:30 to 9:00pm**. Once again, the party will be hosted by **Stern Shapiro Weissberg and Garin** (90 Canal St., 5th Fl. Boston). We are currently collecting items for the holiday raffle drawing, so if you have any item(s) you would like to donate - a restaurant certificate, theater tickets, massage certificates, foreign craft, please contact the office (617-227-7335 or nlgmass@igc.org).

LIFE AFTER DEATH ROW

The NLG student chapter at Suffolk Law School organizes

SLC Report

September 26: Nancy Kelly and John Willshire-Carrera led a clinic on immigration law and "Know Your Rights" for members of the Brazilian Women's Group in Allston.

CONGRATULATIONS TO NANCY KELLY!

In October, the Women's Bar Association presented Guild member Nancy Kelly with the prestigious 2007 Lelia J. Robinson Award for her "exemplified leadership in the legal community and her strive for progress and justice in our society."

NANCY, WE ARE SO PROUD!

Downtown Boston Office for Rent:

One large office and one small office for rent at 6 Beacon Street. Conference room, kitchenette, copy machine, reception area. Rent a function of services needed.

Call Neil Burns at 617-227-7423.

GUILD MEMBER LOOKING FOR A JOB

I am a recent Suffolk grad and am waiting for my bar results. I was a student attorney in the Juvenile Justice Clinic and have experience representing clients, researching cases and statutes, drafting legal memoranda, and making oral and written arguments. I am interested in criminal defense, tenants rights, consumer rights and family law. (Some of you may know me as the last year's Street Law Clinic coordinator.)

Please let me know if you are hiring or have any work related suggestions. Thank you. *Laura Alfring*
tel. 303-349-3837, laura.alfring@gmail.com

ARTICLES FOR MASS DISSENT

The December issue of *Mass Dissent* will review **the Chapter's work in 2007**.

If you are interested in submitting an article, essay, analysis, or art work (cartoons, pictures) related to the topic, please e-mail the articles to nlgmass-director@igc.org.

The deadline for articles is November 15th.

STUDENT CORNER

On September 20, the **BOSTON COLLEGE LAW SCHOOL CHAPTER OF THE NLG** organized a discussion event in connection with the nationwide day of solidarity in support of the Jena 6. At the event we showed a video segment produced by Democracy Now! to provide a factual background on the case, followed by a discussion led by local civil rights attorney and Guild member Barbara Dougan and BC Professor of Law Mark Brodin. The event, which drew a sizable audience and lasted well-beyond its allotted time, successfully helped raise awareness of both the plight of the six and the case's greater implications for American criminal justice.

In addition, the chapter is finalizing its first Street Law Clinic training which will be on "stop and search." Also, we plan to expand our community outreach programs by collaborating with the Criminal Justice Law Project at Boston College Law School.

NEW ENGLAND SCHOOL OF LAW NLG CHAPTER is excited to further the success of last year, and we are pleased to announce that our annual budget has been significantly increased. The NESL Student Bar Association has budgeted us \$1,100, up from \$400 the previous year. We believe that the increase is a reflection of last year's accomplishments, most notably our Same Sex Adoption Panel, which featured Justice Robert Cordy of the Supreme Judicial Court and Attorney Katherine Triantafillou from Adoption of Tammy. We are excited to put the funds to work!

With an even larger executive board, the NESL NLG Chapter intends to make an even greater impact this year. Our new board includes the following dedicated students: Sarah Roxburgh, Co-President; Lauren Vitale, Co-President; Nancy Wheeler, Event Planner; Laura Mannion, Street Law Clinic Coordinator; Caitlin Cianflone, Treasurer; and Tracy Kowalski, Evening Division Liaison.

For our first event, in October, we hosted a Stop & Search clinic training for NESL students with NLG Attorney Bob Cohen. We successfully attracted 1Ls to participate in the Clinic and anticipate more student involvement. We hope to attract many 1L's to participate in Street Law Clinics as the project is an excellent way for students to obtain meaningful practical experience.

Interested in speaking at a NESL event? We are seeking NLG speakers for our Local Lawyer Lecture in November. A possible topic is public interest law career paths. If you are interested in speaking, or have an idea for a topic, please contact Sarah Roxburgh (sarah_roxburgh@hotmail.com) or Lauren Vitale (laurenvitale@gmail.com.)

NORTHEASTERN SCHOOL OF LAW'S STUDENT CHAPTER OF THE NLG is actively working on four projects. First, we've been meeting with various Roxbury community members to discuss Northeastern's buy-outs of community housing. Although NEU has a long and complicated relationship with its neighbors, as students, we hope to encourage NEU to re-engage in dialogues with its neighbors about its plans for growth. Second, along with the undergraduate Progressive Student Alliance, we are supporting NEU's janitors in their struggle to raise wages and job conditions via their new contract. Also, on behalf of the SF8, a group of former Black Panthers who have been arrested on murder and conspiracy charges, we are culling through COINTELPRO discovery documents in for use by the defense team. Finally, the NEU Chapter has planned an exciting series of events for this fall. With three successful events already this fall -- the September talk with David Cole on his book "*Less Safe, Less Free. Why America is Losing the War on Terror,*" the October film screening and panel discussion of "*Legacy of Torture: The War Against The Black Liberation Movement,*" and legal observing at the anti-war march -- the Chapter also plans to hold a presentation by Chaplain James Yee, a discussion on the crisis in Burma, a talk on Brazil's Landless Workers' Movement, and a panel on the Real ID Act.

THE SUFFOLK SCHOOL LAW NLG CHAPTER is enjoying one of its larger memberships in the past three years. This is in part due to student's interest in Street Law Clinics and in legal observing. Last month Attorney Myoung Joun came to Suffolk Law and held a Stop and Search Training.

Prof. Michael Avery, faculty adviser for the Suffolk NLG, welcomed members of the Suffolk Chapter into his home for a night of pizza, drinks, conversation, and playoff baseball. The students took a break from the library and had a great time meeting and getting to know some local Guild members. The Suffolk NLG students thank Prof. Avery for his hospitality!

In November, the Suffolk NLG will host an event on wrongful convictions, *Life After Death Row*, with Ronald Keine, a former death row prisoner in Michigan who was exonerated after nearly two years, and with two Guild members, Michael Avery and Stephen Hrones. Keine will tell his amazing story while Avery and Hrones will speak about their work to exonerate and gain compensation for those who have been wrongfully convicted in Massachusetts. The event will be held on November 16, 2007, from 5:30-7:00pm at Suffolk Law, with a reception to follow. For more information or a flyer please call Tony Naro at 617-365-2990 or e-mail at anthony.naro@suffolk.edu.

Humble Beginnings Lead to Significant Precedent: A Look Back on Bournemouth Hospital

by Robert G. Cohen

The letterhead stated “Shenfield, Silberberg & Cohen, Attorneys at Law, 177 Heath Street, Boston, Massachusetts. I was the Cohen of the partnership that was formed by three 1970 Boston College graduates. When asked by other lawyers where was 177 Heath Street I had to inform the inquirer that it was opposite the Heath Street housing projects where Roxbury meets Jamaica Plain. The Shenfield Silberberg & Cohen office also fulfilled the function of furnishing me a humble abode.

One of the first cases to be handled by the office involved none other than the damsel Ellen Silberberg, wife of my partner Alan. Ellen was working at Bournemouth Hospital in the occupational therapy department and was upset because she was being paid ten cents per hour less than males doing similar work. Believing that this disparity must be challenged. I wrote a letter to the Bournemouth Hospital indicating that I represented Ellen Silberberg in her claim against Bournemouth for violating Chapter 151B. In a conversation that occurred shortly after I sent the claim letter, the head of Bournemouth, a male, stated that Ellen Silberberg was “one of those women liberationist frontiers”. As the old geezers reading this no doubt recall, the early 1970’s was a potent period in the women’s movement’s fight for fairness and equal opportunity. The Bournemouth executive claimed that Bournemouth did not pay women the same rate as men

because men had to support families. I suspect neither men nor women could support a family on Ellen’s \$94.00 a week salary. The extra \$4.00 a week paid males would not change that unfortunate fact. It was clear to me that women were paid less not out of concern for men but more as a result of Bournemouth’s greed for profit.

Bournemouth refused to increase Ellen’s wages and in short order a complaint was filed before the Massachusetts Commission Against Discrimination. Subsequently I filed a second complaint alleging that Bournemouth had retaliated against Ellen for her filing the original complaint by offering her a supervisory position with no increase in pay. A lot of legal hocus pocus followed and eventually hearings were held before the Commission. As a wet behind the ears newly minted lawyer, I stumbled into the hearing, unaware that there was no case law in Massachusetts supporting the power of the MCAD to order emotional distress damages and attorney’s fees and probably only vaguely realizing that these were issues. I guess I should have taken the law school course in damages instead of international law. I clearly had not thought through what types of evidence should be presented to support an award for emotional distress.. In the presentation of our case I focused on the wage differentiation and the evidence supporting the claim that males and females did essentially the same work. I did however ask a few questions about the impact on Ellen of the ten cents per hour differential and the retaliation. She responded

that it upset and depressed her. There was no testimony about doctor’s visits or any medical treatment relative to any emotional distress.

The Commission found that Bournemouth had violated Chapter 151B and ordered that Ellen be awarded the wage differential along with \$2000.00 for her emotional distress. The Commission also ordered that Silberberg’s hardworking attorney, namely me, be awarded \$2000.00 in attorneys’ fees. It appeared that justice had been done but, much to my chagrin, I received notice of Bournemouth’s filing a Petition for review of the Commission’s order in the Superior Court. The case was assigned to the Honorable Judge Vincent Brogna, not the most liberal judge of the era. The procedure, at least at that time, was that the MCAD attorneys handled all the proceedings after the Commission found in the plaintiff’s favor. All I had to do was sit back and watch the Commission’s attorneys fight for justice. Unfortunately, the Commission’s attorneys didn’t have much fight in them. Months after the filing of the petition for review I received word that the Honorable Judge Brogna had thrown out the award for emotional distress damages and the award of attorney’s fees. At this time I began to question the MCAD’s commitment to the case and decided that I would file a Motion to Intervene so that I would get notice of any proceedings and be able to monitor the situation. The Motion to Intervene was allowed and Ellen was now the official intervener. The MCAD

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MEMBERSHIP MEETING

The Massachusetts Chapter of the NLG held its Membership Meeting in October. After a reception with wonderful cheese and wine, we heard brief committee reports and Judy Somberg's summary of the constitutional amendments and resolutions that will be discussed and voted on at the National Convention in D.C. Susan Akram, a Professor at Boston University Law School and a long time Guild member, concluded the meeting by providing an in-depth analysis of five resolutions that addressed Middle East issues.



Jeff Feuer, Allison Garren (Northeastern)

All photos by Urszula Masny-Latos



Bonnie Tenneriello, Jason Corral



Susan Akram, Allison Garren, Judy Somberg

Bournemouth Hospital

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and I both appealed from Judge Brogna's judgment. While the appeal was pending in the Appeals Court, the MCAD decided to file a motion to withdraw their appeal that was allowed by the Appeals Court. Because I had intervened in the Superior Court case I was able to prosecute the appeal.

The S.J.C. transferred the case from the Appeals Court to the S.J.C. In *Bournemouth Hospital v. MCAD* 371 Mass.303 the SJC held for the first time that the MCAD did have the power to award emotional distress damages and reinstated the \$2,000.00 emotional distress damages. Unfortunately the Court did not accept either of my two arguments that the Commission had the

power to award attorneys fees based on statutory interpretation of Chapter 151B or under the "private attorney general" theory. However, subsequent to Ellen's case, the Commission was given the power to award attorney's fees to successful claimants.

The Bournemouth case's allowance of emotional distress damages has been periodically attacked by employers' attorneys. The issue appears to have been finally put to rest in the 2004 S.J.C. case of *Stonehill College v. MCAD* 441 Mass. 549. The S.J.C. in *Stonehill* reaffirmed Bournemouth but at the same time cautioned that emotional distress damages must be based on substantial evidence and the basis of the award must be clear on the record. So if you have an MCAD case make sure you are better prepared than this aging hip-

pie was back in 1970 and be ready to establish the causal connection between the discrimination and the emotional distress.

I look back fondly on the Bournemouth litigation. It was exciting showing Bournemouth Hospital that they could not get away with treating Ellen unfairly. An even greater "high" was knowing that as a young lawyer I had the ideals, the legal skills and the fight in me to contest an injustice and thereby contribute my two cents toward making the job market just a tiny bit fairer. No amount of a legal fee can top that feeling.

Robert Cohen is a partner at Ganeck and Cohen in Boston. He is a criminal defense attorney.

The Implications of the New Bedford Factory Raid for Employees

by Eleanor Newhoff

More than six months have passed since the March 6, 2007 raid on the Michael Bianco, Inc. factory in New Bedford, Massachusetts. On that date, 361 undocumented employees of the factory were arrested by agents of the Department of Homeland Security, Immigration and Customs Enforcement. Some of the 361 people were released on humanitarian grounds after arrest, but most were detained in detention facilities in Massachusetts, Texas and other locations. The workers were charged with immigration violations and placed in removal proceedings. A lawsuit filed on behalf of the workers who were transported to Texas detention facilities located in remote areas of that state was filed in the United States District Court in Boston on March 8, 2007 by a coalition of dedicated and quick-thinking attorneys, especially including the Immigration Unit of Greater Boston Legal Services, Kaplan, O'Sullivan and Friedman, Dechert LLP, Catholic Social Services and the ACLU. This case, alleging violations of due process and requesting redress for abuses occurring during arrest and detention remains pending on appeal at the First Circuit Court of Appeals as of this date.

As another component of the response of the Boston legal community to the Bianco raid, a coalition consisting of the Employment Unit of Greater Boston Legal Services, South Coastal County Legal Services and Gordon Law Group began to investigate the working conditions which had been present at the Bianco factory. It was established that a Department of Defense contract

with Michael Bianco, Inc. had motivated a search for rapidly increasing numbers of qualified workers to cut, sew, finish and pack protective vests, backpacks, holsters and other equipment for the US military. As increases in the production requirements occurred, the owners of the factory sought and hired workers as young as 14 to work two shifts daily. The first shift began in the morning and ended in the afternoon with an additional one and a half hours of overtime. A second shift began in the early evening lasting until late evening, with an additional shift on Saturdays. Many Bianco employees worked more than 15 hours daily.

Workers who were interviewed by GBLS provided evidence that substantial violations of labor law had consistently occurred at Michael Bianco, Inc. They further provided oral and documentary evidence that in 2005, the owners of the Bianco factory had formed a second company, Front Line Defense, Inc. which issued paychecks for the second shift at straight hourly wages. Minor disciplinary issues, such as a few minutes' tardiness, talking during work hours, or taking a bathroom break of more than two minutes' duration would subject a worker to disproportionate docking of pay, threats of dismissal or verbal reprimand. Some workers reported being injured on the job without receiving Workmen's Compensation benefits.

To obtain redress for the unpaid wage and overtime claims, on May 15, 2007, the Employment Unit of Greater Boston Legal Services, South Coastal Counties Legal Services and Gordon Law Group filed a federal court class action civil lawsuit in the United

States District Court at Boston, including three types of wage claims for unpaid wages and overtime on behalf of the Bianco factory workers. The defendants are named as "Michael Bianco, Inc." and "Front Line Defense, Inc. and their corporate officers." After service of the summons, the defendants have responded with a Motion to Dismiss the lawsuit. Oral argument on this motion is scheduled for December 5, 2007. The attorneys of the Employment Unit at GBLS are confident that the Motion to Dismiss will be denied and anticipate that formal discovery will proceed quickly after disposition of the motion.

What has emerged from the raid on the Michael Bianco, Inc. factory is a range of social, immigration, labor law and issues of national concern, both to the undocumented people who were arrested on that date, and to the larger community. The DHS policy of worksite enforcement has focused the problem that confronts the US as a part of the global economy – how will the manufacturing sector respond to the need for goods such as the military equipment contracted for by the Department of Defense from Michael Bianco, Inc.? The thought occurs to us that the reason for contracting with MBI in New Bedford, Massachusetts rather than in a manufacturing facility in China may have been that the Department of Defense oversight which must accompany the production of military equipment is an essential part of the contract. And yet, MBI could not find enough skilled, documented workers to fill the jobs which were created in order to satisfy the production requirements of the contract.

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Undocumented Workers: The New Wave of Discrimination in the Workplace

by Susan Church

The New Bedford Raids and other “crackdowns” on undocumented workers are forcing us once again to confront the age old tactic of divide and conquer. The Bush administration, while giving lip service to pro-immigration policies, has begun a full scale assault on the dangerous “criminal aliens” – or undocumented workers. The steady attack on right wing news channels has desperately tried to convince us that coming to this country to work and put food on the table is suddenly a criminal act, turning the worker into a “criminal alien.” However, those of us who practice immigration law and advocate for immigration reform know these people as the janitors, cooks, poultry plant workers, housekeepers, meat packers, factory workers and babysitters that keep this country afloat.

The Bush administration hopes this crackdown will continue to keep people fighting amongst themselves. Then maybe “the people” won’t pay any attention to what is really going on in the country – the useless and deadly war in Iraq predicated on false information and greedy motives. The New Bedford Raid in particular shows the utterly unfair and unbearable mistreatment of undocumented workers. The owner of the factory left federal court the next day after paying a modest bail. The factory workers were handcuffed, jailed and shipped off to Texas despite court orders mandating them to stay in Massachusetts. Their children were left at daycare without a provider to pick them up and without ever having a chance to say

goodbye to their mother or father.

This so-called “crackdown” has fueled other venomous attacks on immigrants throughout the country. The Southern Poverty Law Center Web site contains a “hate group” map. The majority of civil rights attacks in Arizona and Texas occurred on “Hispanic” or “Muslim” individuals. All of this animosity stems from the utterly untrue and hopelessly misguided idea that “they” are coming here to take our jobs and ruin our standard of living.

The reality is exactly the opposite. Immigrants in large part work the hardest jobs, with the least amount of pay, and the lowest level of benefits. For example, according to the National Immigration Law Center, approximately one in five of all low wage workers in the United States are immigrants. Benefits are equally difficult to come by. Only 32% of all immigrant workers in this country even have health insurance. Everyone by now is familiar with the poultry and meat-packing plants that are so often stacked with immigrant workers, documented or undocumented. A 2000 Labor Department study found that 100% of all poultry packing plants violated Federal Labor laws designed to protect workers. Similarly, 67% of all garment factories in Los Angeles violate wage and hour laws designed to assure that the weak and vulnerable among us are not exploited.

The reason immigrant communities today live in complete fear of immigration knocking at the door stems from the brutal and draconian immigration laws they will face when they arrive in court. Immigration Judges lack almost any discretion regarding deportation, including immigrants with United States citizen children.

The laws expediting and streamlining the deportation process, has served, according to Human Rights Watch, to separate over 1.8 million family members from their mothers, fathers, sisters and brothers. Most of those people are permanent residents or citizens.

The supposed “crackdown” on illegal immigrants includes, allegedly, tighter security at the border. The border police have new gadgets including night vision goggles and high security cameras. The initial focus on tightening border security included much of Texas. The result? Immigrants go through Arizona. Big surprise. From 1996 to the present, the General Accounting Office reports that twice the number of people died trying to cross the border from Mexico than before the border crackdown. Sure, we are keeping people out of the country. We are just doing it by killing them instead of catching them.

What can possibly be the result of this massive crackdown and lock up? Less terrorism? No way. Better jobs for American workers? Clearly not. The result can only be more trauma and heartache for people who come here to live the American dream. Many undocumented workers, when caught up in the raids, then face the heart wrenching decision of leaving their children in this country with only one parent or sometimes none. Nothing could contribute more to the likelihood of juvenile delinquency than losing one or both parents out of the home. Nothing screams angry young teenager more than watching your parents, who have done nothing other than ask to work and support their families, being locked up, shackled, and shipped

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Still Chasing the Blender: Achieving Equal Pay for Equal Work Across Genders

by David Conforto

Throughout law school, I never had any interest in taking a course in employment law. I was dead set in becoming a union-side labor lawyer. After graduation, I joined a firm that concentrates in labor and employment law. While the large majority of the work I did involved representing unions, there was one employment case that piqued my interest. At the time, I was training for my third Boston Marathon. As an avid runner, I was naturally drawn to the prospect of representing a former Olympian. Oh yes, her case involved a novel employment law issue as well.

During her ten year tenure as the head coach of the women's track and field team at a local Division I university, my client had produced more All-Americans and won more Conference Championships than any other sport at the university. Notwithstanding her unequivocal success, after her tenth year of coaching, through an anonymous letter left in her office mailbox, she discovered that she was being paid approximately one-half the salary of her male counterpart: the head coach of the men's track and field team.

While distressed by this revelation, the predicament in which my client found herself was not new to her. As we sat in the firm's conference room, she recounted her success as a collegiate and professional distance runner. As a sophomore in college, she won the Division

I Cross-Country Championship – making her the best collegiate runner in the country at just nineteen years old. Her success continued as a professional runner. In a span of just two years, she dismantled numerous American records. With a hint of laughter, she also spoke of one of her first road racing experiences as a professional distance runner.

The road race had attracted a strong field of athletes. Bill Rodgers, a four-time champion in both the Boston and New York City Marathon, was the favorite to win on the men's side. Given the fierce competition in the women's field, my client simply hoped to finish in the top five. Rodgers cruised to victory. My client exceeded her expectations, finishing first among a throng of established and much more experienced runners.

Despite her impressive victory, the awards ceremony would tell a different story. For his victory, Rodgers received a roundtrip ticket to Bermuda. Although equally successful, my client would come away with far less: a blender.

The blender was something my client would need to live with. The disparity in salary, however, was not. We promptly filed a claim for unequal pay based on gender with the Massachusetts Commission Against Discrimination. Not long thereafter, I received a call from the university's in-house counsel. As a newly-minted attorney still carrying the BBO Pending designation, I felt intimidated. Fear is a great motiva-

tor. I had done my research and knew the obstacles that we faced.

After several weeks of posturing, the dust quickly settled. The issue was not whether my client had a viable claim, but how much her claim was worth. As expected, in-house counsel argued that the 300 day statute of limitations under G.L. 151B limited my client's recovery to less than one year's worth of the difference in pay between her and her male counterpart. Overcompensating for the lack of gray hairs on my head, I insisted that no such limitation applied en route to citing and summarizing cases from both coasts, and all places in between, that supported our position. In the end, only one thing seemed clear: we had an open issue.

A few weeks later we found ourselves in mediation. To my surprise, in-house counsel suddenly showed a genuine interest in reaching an informal resolution. I am willing to bet that the same thought went through his mind about us. After approximately ten hours of mediation, we had reached a middle ground. My client was pleased and, for the most part, so was I. Still, I wondered how the open issue would have been resolved in court.

Fast forward several years later in 2007 to the Supreme Court's ruling in Lilly Ledbetter v. Goodyear Tire & Rubber Co. In 1979, Lilly Ledbetter began working as a supervisor at Goodyear's tire assembly department in Gadsden,

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Still Chasing the Blender

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Alabama. During her first weeks of employment, her wages were identical to those of her male counterparts. Twenty years later, a rift in pay between Ledbetter and her male colleagues had become painstakingly clear.

In 1998, Ledbetter received an anonymous letter turned, which revealed that she made about \$15,000 less than her male co-workers at Goodyear. Inexplicably, Ledbetter's pay was not even on par with recent hires with far less job experience. Ledbetter filed a discrimination charge with the Equal Employment Opportunity Commission less than a month after receiving the anonymous tip. At trial, her attorneys highlighted the disparity in pay between males and females doing the same work at the Gadsen Goodyear plant. The jury ultimately sided with Ledbetter, awarding her over \$3.5 million in damages, which the district judge later reduced down to \$360,000.

Similar to G.L. c. 151B, Title VII contains a provision that requires discrimination complaints to be made within 180 days of the employer's discriminatory conduct (300 days for 151B). Goodyear appealed, arguing that the jury should not have considered each of the annual salary reviews that Ledbetter had received throughout her 20 year career with Goodyear. Citing Title VII, Goodyear maintained that the jury should only have evaluated the lone annual salary review that Ledbetter received in the 180 day limitations period before Ledbetter she her complaint.

The U.S. Court of Appeals for the Eleventh Circuit, in part, agreed with Goodyear's argument and held that the jury should have not have been allowed to evaluate Goodyear's discriminatory pay decisions over Ledbetter's entire career in light of Title VII's 180 day limitations period. The Eleventh Circuit found no evidence of discrimination, reversing the District Court and dismissing Ledbetter's complaint.

Determined to seek redress, Ledbetter appealed to the United States Supreme Court, which granted certiorari. In a 5-4 decision, the Supreme Court ruled that Ledbetter's claim was time-barred by Title VII's 180 day limitations period. In a scathing dissent, Justice Ruth Bader Ginsburg called the majority's ruling "a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose" and suggested that "the Legislature may act to correct this Court's parsimonious reading of Title VII."

The Supreme Court's decision in Ledbetter attempts to undo the progress made since the civil rights movement to ensure equal pay across genders. Thankfully in Massachusetts, unlike Title VII, G.L. c. 151B has not been interpreted so narrowly. The Massachusetts Commission Against Discrimination's decision in *Tan v. Stonehill College*, affirmed by the Supreme Judicial Court in 2004, provides a clear reminder of 151B's breadth.

In that case, Soo Tang Tan, a tenured professor of mathematics at Stonehill College alleged that the College subjected him to disparate treatment in

compensation. Specifically, Tan alleged that he was compensated less than his Caucasian comparators and subordinates. During his eighth year as a full professor, for example, Tan was paid less than three associate professors. In deciding that his Charge of Discrimination was filed timely, the MCAD found that Tan first learned that he was paid less than lower-ranked professors in March 1995 and noted that the Charge was filed on April 27, 1995. Ruling that the evidence supported a finding of discrimination, the MCAD ordered Stonehill College to pay, among other things, back pay damages. Notably, the MCAD calculated back pay damages from the start of the discriminatory unequal pay treatment, which began approximately ten years prior to when Tan filed his Charge.

Had Lilly Ledbetter had the benefit of G.L. 151B, it seems likely that her case would have turned out differently. The outcome, however, provides a sobering example of how quickly years of progress can unravel through "cramped interpretations" and "parsimonious readings" of statutes designed to ensure equality across genders. The legislative efforts currently underway to prevent the Ledbetter decision from undoing years of progress are being watched closely. For now, Lilly Ledbetter is stuck still chasing the blender.

David Conforto is a partner at Conforto Law Group, an employment law office in Boston. He is also on the Board of the NLG Massachusetts Chapter.

Massachusetts Chapter Sustainers

In the spring of 2003, the Massachusetts Chapter of the NLG initiated the Chapter Sustainer Program.

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New Bedford Raids

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The solution which MBI chose, to employ undocumented workers as young as 14, had a hidden advantage to their profit motive. The possibility that these workers would find a way to protect their rights under the labor law of the United States without ending up in removal proceedings seemed remote, at best. But when the order is reversed, and the employer is held accountable for the documented status of the workers, the right of redress for unpaid wages or overtime has become a distinct possibility. On the immigration side, however, most of the MBI workers still face removal hearings, and in the case of about 100 people, have already been removed from the US. If there were a means by which immigrants arriving in the US could obtain lawful status, sufficient workers would be available for work in US manufacturing facilities and other worksites. The huge number of undocumented immigrants arrested and detained in recent months in "worksite enforcement" raids allows us to see the importance of their presence in the US. Now we must acknowledge that importance by urging Congress to reconsider and pass comprehensive immigration reform.

Eleanor Newhoff is an immigration attorney at Greater Boston Legal Services and a Co-Chair of the NLG Massachusetts Chapter.

Undocumented Workers

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off to another land.

The raids do not benefit the American worker, they do not promote safety or reduce terrorism. They probably will promote juvenile delinquency for the children left behind. The raids will undoubtedly fuel a more sophisticated business of false employment documents or social security numbers. We are creating a larger and scarier human rights catastrophe by the day in this country. Divide and conquer – documented workers versus undocumented workers – citizens versus non-citizens. We cannot let ourselves fall into the trap of generations of Americans before us – "no irish need apply" and the Chinese Workers' Exclusion Act – come to mind. Instead we need to work to improve the wages and standards for all workers, documented and undocumented and pass comprehensive immigration reform. Our opportunity to prevent yet another blight on this country's history of racial and ethnic discrimination is fading fast.

Susan Church is a partner at Demissie and Church in Cambridge and practices in criminal defense and immigration law.

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