

COMMON GROUND

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION FOR WESTERN NEW YORK



FALL 1992



PRESIDENT'S MESSAGE

by Robert Doren

As the newly elected president of the Western New York Chapter of the IRRA, I am looking forward to helping direct the Association during the next year. This can only be done with assistance from officers and members, and requires each of you to make a diligent effort to attend each of the monthly meetings. I will even be calling you from time to time during the year to encourage your attendance. I am sure you will not disappoint me.

The Western New York Chapter of the IRRA is perhaps the largest nationally; certainly it is the most fiscally stable. Its viability as an ongoing organization is based largely on the mutual respect of union and management practitioners. The monthly gatherings help preserve an understanding that although parties have different obligations and constituencies, the success of any business enterprise is better achieved through the joint efforts of management, union representatives, and employees.

But are external forces changing the ability of union and management, however willing, to achieve mutual agreement along traditional lines? Was the Caterpillar dispute created by traditional profit motives, or was it the natural outgrowth of international competition, directing management leaders to reject pattern bargaining as a provincial rule that no longer has a place in today's world? Or is the cost of health insurance increasing so rapidly so as to overwhelm the parties' ability to reach agreement despite sincere efforts? The theme of the monthly meetings for the Fall of 1992 is intended to address these questions.

In September, National Labor Relations Board member Dennis M. DeVaney gives us his comments regarding

the extent to which the National Labor Relations Act limits employers from speaking directly with employees concerning, for example, Total Quality Management. Ask yourself, is the NLRA out of date with today's work place, where employees' participation with management is necessary to compete in an international arena? Tough questions for DeVaney to answer.

In October, Bernard E. DeLury, the Director of the Federal Mediation and Conciliation Service, will address us. DeLury is the mediator handling the Caterpillar dispute. Who could better comment on the edge of change than DeLury, who is a vital part of this saga? His thoughts for the future may be prophetic.

In November, Owen Bieber, the International President of the UAW, will join us. The UAW has perhaps been a leader in changing the traditional approach to labor-management relations. Certainly, employee participation is now an integral part of UAW-management relations. The Saturn operation is perhaps the most well-known and dramatic adjustment in this traditional relationship. Yet, obviously the Caterpillar attempt to eliminate pattern bargaining went too far from center for the UAW. Where should the line be drawn. Owen Bieber will give us his perspective on these issues which we face every day.

We are constantly looking to improve, and we welcome any suggestions. If you have any questions or suggestions on programs, policy changes, or other matters concerning the organization, please feel free to call me at my office at 853-7262 or write me a letter at 135 Delaware Avenue, Suite 210, Buffalo, New York 14202.

I look forward to seeing all of you in the upcoming year.

REASSIGNMENT OF A DISABLED EMPLOYEE BY A UNIONIZED EMPLOYER

SOLVING CONFLICTS BETWEEN THE
AMERICANS WITH DISABILITIES ACT AND THE
NATIONAL LABOR RELATIONS ACT

By Laura Scirri and Robert A. Doren

The Americans with Disabilities Act of 1990 ("ADA") requires employers and labor organizations to provide reasonable accommodations for employees with disabilities. A unionized employer also has the obligation under the National Labor Relations Act to uphold the terms of collective bargaining agreements. Contract terms may, however, conflict with the obligation to provide reasonable accommodations to disabled employees. Unfortunately, there has been little guidance from the statute, regulations, or the EEOC up to this time regarding how an employer should address conflicts between the NLRA and the ADA.

One of the areas of conflict is the extent to which the employer has an obligation to provide a disabled employee with alternative employment consistent with the employee's ability to perform the essential functions of the alternative job. These light duty positions are often designated classifications which are subject to job posting provisions and are often held by the most senior employees within the bargaining unit. When a disabled individual can only perform such position, does he or she acquire rights under the ADA which exceed those of the more senior employees who may wish to bid on such vacancy?

EEOC regulations address the unionized setting in only two limited sections. First, the employer can use the collective bargaining relationship to negotiate a job's essential functions, and secondly, an employer may claim that a job accommodation may impose an undue hardship on the employer. "An employer could demonstrate that a particular accommodation would be unduly disruptive of the other employees or to the functions of its business. The terms of a collective bargaining agreement may be relevant to this determination."

Legislative history reveals that Congress discussed at some length the effect of the collective bargaining agreement on the employer's duty to provide accommodations, but it never resolved the issue. For example, the House Labor Committee report indicates "reassignment need only be to a vacant position. 'Bumping' another employee out of a position to create a vacancy is not required." In addition, "if a collective bargaining agreement reserves certain jobs for employees for a given amount of seniority, it may be considered as a factor in determining whether it is reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue." On the other hand, legislative history makes it clear that "an employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under the ADA" and the statute specifically provides that an employer cannot enter into a contractual relationship which discriminates against persons with disabilities.

To get a more accurate assessment of the employer's obligation concerning the filling of vacancies by those considered disabled under the ADA it is necessary to look at the case law under §504 of the Rehabilitation Act of 1973, as amended. The legislative history under the ADA makes it clear that case law under this earlier statute governing federal contractors may be equally applicable to interpretations of an employer's obligation under the ADA. A review of the case law under the Rehabilitation Act indicates that courts generally have given deference to the collective bargaining process enabling employers to avoid major difficulties. It must be remembered, however, that we are speaking about conflicts which could arise between the NLRA and the ADA.



The following cases are illustrative of the deference given to collective bargaining agreements under the Rehabilitation Act of 1973:

1. Florence v. Frank, 774 F. Supp. 1054 (N.D. Tx. 1991). An employee who suffered back injury and was unable to resume his full time duties for an unspecified time was not entitled to another position which could only be obtained through seniority. The district court stated that the "employer could not be required to accommodate handicapped employee by reconstructing a job in a manner that would usurp the legitimate rights of other employees in a collective bargaining agreement."

2. Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989). An employer was not required to accommodate a disabled Vietnam veteran who suffered from an anxiety disorder who requested a job assignment closer to home. This accommodation would violate the collective bargaining procedure for open job bidding. See, also, Burst v. United States Postal Service, 653 F. Supp. 259 (N.D.Ga. 1986), finding that a disabled veteran with a knee and abdomen injury was not entitled to a position for which he would have to bypass the collective bargaining procedure for job bidding.

3. Davis v. Postal Service, 675 F. Supp.225 (M.D.Pa. 1987). An employee who has chronic arthritis and hemophilia and could not perform duties under any entry level position was not entitled to assignment to a non-entry level position which, under the applicable collective bargaining agreement, was to be filled on the basis of seniority through a bidding system.

4. Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987). An employee who had asthma and was unable to continue his duties was not entitled to a permanent light-duty position because it would have violated the seniority provisions in the collective bargaining agreement. The Court found that the employer's duty to provide a reasonable accommodation would not defeat the provisions of the collective bargaining agreement unless it had the effect or intent of discriminating. The court concluded that the seniority system governing assignment to permanent light duty positions did not have a discriminatory effect or intent.

5. Daubert v. U.S. Postal Service, 733 F.2d 1367 (10th Cir. 1984). An employee was not entitled to have his position altered by including only machine work or to be reassigned to a permanent light-duty position because this would violate seniority provisions of the collective bargaining agreement. The court upheld her discharge reasoning that she was not qualified for the position she held and the employer's collective bargaining agreement clearly constituted a legitimate business reason for the discharge.

In each of the above cases the employer was able to demonstrate the adverse effect on other employees who maintain greater seniority rights. In instances of providing accommodations to disabled employees which do not conflict with seniority rights, however, the courts will probably give far less deference to the terms of the collective bargaining agreement. Each case must be decided on its own facts, since under the ADA the employer's obligation is to look at the individual's abilities to perform essential functions of the job and not generically to presume the disability of those covered under the ADA. Labor and management practitioners should consult with their legal advisors when problems in this area arise, as they certainly will.



OPEN FORUM

ODE TO BUNGEE JUMPERS

By Robert Doren

So your employer is Ross Perot, and you heard he fires adulterers, and you found your bags packed on your doorstep last night. Or he's an animal lover and won't employ anyone who shoots woodchucks. Perhaps you are a fatalistic bungee jumper, but your employer is Prudential Insurance and you have to choose between your job and your next jump. You feel you're between a rock and a hard place.

But don't worry. The New York State Legislature found time between spending your money, along with every dollar it could borrow, and selling State property to itself to pay for it, to pass a law to ensure you have the right to smoke, drink, run for office (this one goes along well with the first two), climb mountains, and, yes, bungee jump.

Effective August 7, 1992, the law in New York State now provides:

- [I]t shall be unlawful for any employer or employment agency to refuse to hire, employ, license or to discharge from employment or otherwise discriminate against an individual in compensation, promotion, or terms and conditions or privileges of employment --

for various reasons, including the following:

- 1) Political activities . . . if such activities are legal. [Our State representatives recognize that political activities may be illegal.]
- 2) Legal use of consumable products prior to beginning or after working hours. [Lay's potato chips -- you can't have just one.]
- 3) Legal recreational activities. [Pee Wee Herman need not apply.]

However, under the law, an employee is not protected if:

- 1) Such employee is employed by a public employer and knowingly violates . . . a directive of a Mayor or any agency head of a city . . . when such directive concerns proper discharge of official duties.
- 2) The employee creates a conflict of interest to the employer's . . . business interests. [Mommy, isn't that my first grade teacher in Daddy's Playboy magazine?]
- 3) The employee violates the collective bargaining agreement. [Never!]
- 4) The employer believes his own actions were permissible under the collective bargaining agreement. [This exception is perhaps because the employer may indeed violate the collective bargaining agreement.]
- 5) The employee's actions were deemed by the employer . . . to constitute habitually poor performance, incompetency or misconduct. [This is just in case the employer is not creative enough to come within the other exceptions.]

There probably is a purpose for this statute other than to make employment in New York State more complex and to keep lawyers busy. The statute, however, is a prime example of forgetting why taxidermists do not shoot ducks with cannons.



OSHA REGULATES THE TRANSMISSION OF BLOODBORNE DISEASES

By John J. Christopher

The United States Occupational Safety and Health Administration (OSHA) has promulgated regulations designed to prevent the transmission of bloodborne pathogens.

The regulations, in addition to providing strict controls in the operation of HIV and HBV research laboratories and production facilities, require employers having employees with occupational exposure (defined as "reasonably anticipated skin, eye, mucous membrane, or parenteral [by needle] contact with blood or other potentially infectious materials that may result from the performance of an employee's duties") to implement the following:

1. An Exposure Control Plan. This plan must identify all job classifications where some or all employees have occupational exposure and list all tasks and procedures in which such exposure occurs. A copy of the Exposure Control Plan must be accessible to employees and updated at least annually. It must also be updated whenever necessary to reflect new or modified tasks and procedures with direct occupational exposure and to reflect new or revised employee positions with occupational exposure.
2. A schedule and method of implementing:
 - (i) Universal precaution procedures to prevent contact with potentially infectious materials, including blood;
 - (ii) Engineering and work practice controls, including, but not limited to, provisional readily accessible handwashing facilities and procedures for the storage of needles and other contaminated sharp objects;
 - (iii) The provision and use of personal protective equipment at no cost to the employee, such as gloves and eye protection. The employer is responsible for cleaning, laundering, disposal, repair, and replacement of such equipment; and
 - (iv) Housekeeping procedures to maintain the worksite in a sanitary condition and to clean

up any contamination that might occur, including the proper labeling of waste materials and contaminated laundry.

3. Hepatitis B vaccinations. These must be at no cost to all employees with occupational exposure and must include post-exposure follow-up for all employees who have had an exposure incident, including a medical evaluation, documentation of the routes of exposure and the circumstances of the exposure incident, and testing of the source individual's blood for HBV and HIV, where consent is obtained.

4. Policies and procedures for communicating hazards to employees, including the use of appropriate labels and color coded containers, and the implementation of initial and annual training programs which consist of the following minimum requirements:

- (i) access to, and explanation of, the OSHA bloodborne pathogens regulations;
- (ii) a general explanation of the epidemiology and symptoms of bloodborne diseases and the modes of transmission of such diseases, recognition of activities that may cause exposure, and prevention methods;
- (iii) an explanation of the employer's exposure control plan procedures and available protective equipment, along with an explanation of the basis for selecting that equipment;
- (iv) information on the Hepatitis B vaccine;
- (v) information on post-exposure reporting, evaluation, and follow-up;
- (vi) an explanation of signs, labeling, and color coding.

5. Record keeping for each employee with occupational exposure, including the results of examinations, medical testing, and follow-up. The record keeping must insure confidentiality, and be maintained for the duration of employment plus thirty years; records of training sessions documenting the contents of the sessions, the qualifications of the trainers, and the names of the trainees need only be maintained for three years. Medical records shall be made available for inspection by the subject employee and OSHA. In addition, employees shall have access to training records.

(continued on next page)

OSHA REGULATES THE TRANSMISSION OF BLOODBORNE DISEASES [CONTINUED]

Employers who have not already done so must immediately complete and implement the exposure control plan provided under these regulations. The provisions concerning information, training, and recordkeeping requirements took effect on June 4, 1992. The provisions concerning engineering and wash practice controls, personal protective equipment, housekeeping, Hepatitis B vaccination, post-exposure explanation and follow-up, and labeling and signs took effect on July 6, 1992.



CORNELL LABOR STUDIES

Cornell University New York State School of Industrial and Labor Relations is again offering courses in the Fall 1992 and Spring 1993 terms. The Fall courses are Contract Administration, Labor History, Dispute Resolution, Law of Employment Practices, and Survey of Worker Participation. The term begins September 16. Late registrants may be accepted.

For the Spring term starting January 13, the following courses will be offered: Collective Bargaining, Labor and the American Economy, Effective Writing for Trade Unionists, Advanced Arbitration, Law of Collective Bargaining (private sector), Law of Collective Bargaining (public sector), and Crisis in Health Care.

The second Spring term beginning April 21 will offer Labor Films and Oral Communication.

For more information regarding courses and the certificate program, call Yvonne Rebholz, Programs Coordinator, at 842-6180.

EDITOR'S NOTE

The editors graciously accept articles from members of the IRRA and from others in the community on subjects of general interest to the labor relations community. We also accept submissions from all interested persons on changes of address, affiliation, or anything else of interest. Members interested in covering various meetings of the IRRA and other labor functions are also encouraged to call John J. Christopher of Hogdson, Russ, at 856-4000, or Robert J. Reden of Lipsitz, Green, at 849-1333 Ext. 314. Those of you with a bent for reportage are encouraged to call.

We also seek persons interested in helping to edit the newsletter. Please contribute your time and effort so that future issues may continue to be representative of the labor relations community.

WELCOME TO NEW MEMBERS

Judith A. Dusza

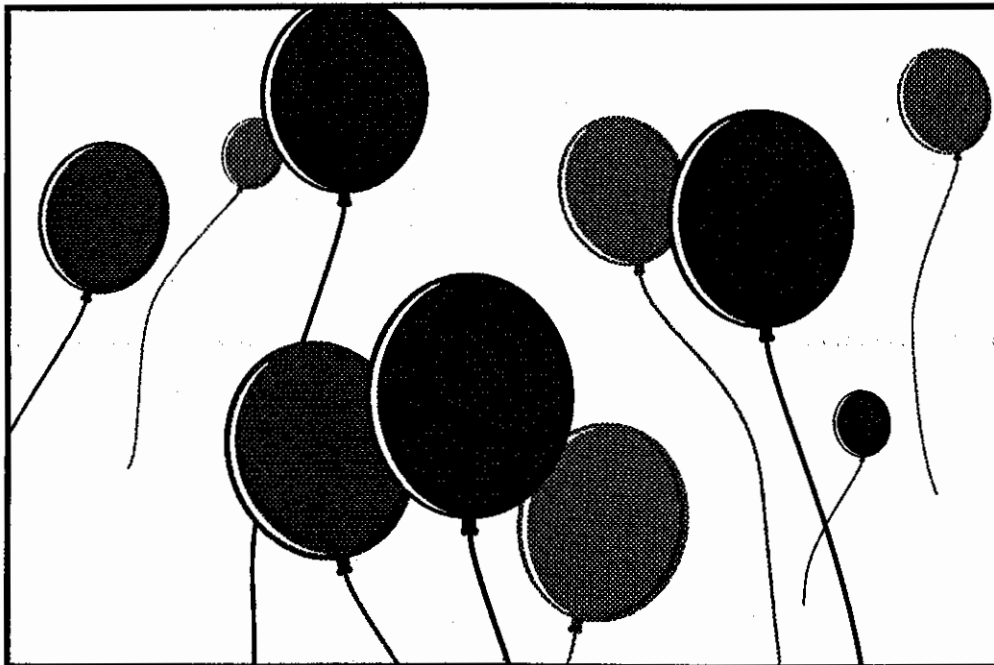
- Supervisor of Human Resources
- Trico Products Corporation

Thomas D. Moore

- Mediator/Fact Finder
- PERB

Jeffrey M. Freedman

- Attorney



NOTE TO READERS

Send us your notes and announcements regarding events of particular significance to the labor relations community for inclusion in future issues of this newsletter. If we do not get the information from you, we cannot publish it. Please contribute.



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