Through The Lens Of A Seasoned Employment Lawyer

The Editor interviews ***Lawrence Z. Lorber****, a Washington, D.C.-based Partner in the Labor and Employment Law Department at Proskauer Rose LLP.*

Editor: Please tell us about your professional background.

Lorber: After clerking on the Maryland Court of Appeals, I got a job at the U.S. Department of Labor in the Solicitor's office. It was a great time, because OSHA had just passed, ERISA was about to pass, and they began to ramp up the affirmative action programs. I was in the right office at the right desk and wound up being named the director of the Office of Federal Contract Compliance Programs by Secretary of Labor John Dunlop, where I was responsible for enforcing all the affirmative action obligations for government contractors, including race, gender, national origin, veterans and the Rehabilitation Act, which had just passed. We enforced Section 503 of the Rehab Act and issued the first regulations under Section 503 – the first regulations issued by the government on nondiscrimination on a basis of disability – so, it was quite a portfolio, and I was extraordinarily young for it, but in those days there were a lot of young people running things at the Labor Department. Secretary Dunlop, a Harvard professor, said he was used to working with "young assistant professors." After President Carter won, I left government and went into private practice.

Editor: Doing?

Lorber: I've been involved in a lot of legislative activities, primarily due to my relationship with the Chamber of Commerce of the United States, and before that with the Society of Human Resources Management (SHRM) and the National Association of Manufacturers. I enjoy public policy, was very heavily involved with the 1989 Americans with Disabilities Act, and also with the 1991 Civil Rights Act and various legislative activities leading up to the ADA Amendments Act.

Editor: Your continuity gives you a unique vantage to see how this has evolved and where it's headed.

Lorber: Well, I've certainly seen the ADA and affirmative action develop as well as the changes to Title VII. It helps to bring that sort of background when advising clients or dealing with new legislation. People forget that in the '70s this was all extraordinarily new. Defining "handicap" (in those days that was the term) in employment was difficult, because nobody quite knew what it really meant.

Editor: Please describe your work with the U.S. Chamber of Commerce on the Americans with Disabilities Act Amendments of 2008. Have these amendments been adequately enforced?

Lorber: The Chamber has grown to become the premier business employer organization in terms of policy in these areas. I chair its EEO Committee, which consists of lawyers and employer representatives and gathers twice a year to discuss public policy issues and pending legislation. I have testified before Congress on employment matters, and it is fascinating to see how this all works. The Chamber is a very dynamic organization, and it enables me to be involved in the cutting edge of policy issues. The Chamber of Commerce was the lead employer organization dealing with the ADA Amendments, and I was its counsel. We were asked by the congressional leaders to meet with the disability community to see if we could work out a consensus. This was a unique experience, but it worked and perhaps could serve as a model for other legislative activities. The ADA Amendments were drafted to recapture the original intent of the ADA. Unfortunately, the EEOC seems to be trying to "amend" the Amendments Act with proposed regulations which will change some of its provisions. Hopefully, the new leadership there will understand that the agency has to follow the statute.

Lawrence Z. Lorber

Editor: Please tell us about the religious discrimination case, *Bourselan v. Aramco*, which you argued before the Fifth Circuit in 1989-90. What are its ramifications?

Lorber: The issue before the court was whether Title VII had extraterritorial application. We argued that it did not. Bourselan had sued Aramco, claiming he was discriminated against as a Shiite. The Fifth Circuit found that Title VII did not have extraterritorial application, and the Supreme Court upheld the decision. But the Congress said "thank you very much" and amended the statute in the 1991 Civil Rights Act and reversed the decision. That case was the beginning of the globalization of employment matters and the application of U.S. law to U.S. companies overseas. Now you have to meld the local customs and laws with U.S. laws and requirements.

Editor: And that settled a good part of the jurisdictional venue issues?

Lorber: Yes, and there have been lots of cases since then. Rice University was staffing King Faisal Hospital in Saudi Arabia. Could it send over female or Jewish doctors? How does it combine U.S. law with local laws? Very interesting questions. I represented a large Japanese bank in the U.S., and we had to reconcile their foreign employment practices with our laws.

Editor: You filed briefs in several landmark U.S. Supreme Court cases. Tell us about those.

Lorber: Let me talk to two of them. *NLRB v. Detroit Edison* back in 1977 involved whether the National Labor Relations Act gave the union a right to review an employment test and the studies supporting it. The NLRB argued strenuously that it did, and we filed an *amicus* brief arguing that revealing the tests to the union would destroy their validity, because there would be no test security. Further, those industrial psychologists that develop and administer the tests are bound by the ethical rules of the American Psychological Association not to reveal such tests. We also asserted that the NLRB didn't have the expertise to deal with the issue. The Supreme Court, surprisingly to a lot of people including the NLRB, adopted our argument. *Detroit Edison* involved the intersection of significant regulations over testing by the government for employment purposes and the labor and employment laws as well as how to maintain the confidentiality and validity of professionally developed tests. These same issues are now being faced in *Daubert* decisions: "Who is an expert?"

In *Johnson v. Santa Clara County* we filed an *amicus* brief arguing that affirmative action was not violative of the Constitution. The County wanted its workforce to mirror the then availability of minorities and women and there was an operative dispatcher job opening. Of some 238 operative jobs not one was held by a female, so the county applied its affirmative action policy and chose Diane Joyce over Paul Johnson, who theoretically scored a 92 on the test on which she scored a 90. I say "theoretically" because the test was an eight-question verbal test and was scored by a panel, and there was some indication there was hostility towards females. The Supreme Court upheld affirmative action, and indeed the majority favorably cited our *amicus* brief with which Justice Scalia took issue in his dissent. The case was later cited in the *Bollinger* case involving the University of Michigan's affirmative action programs. The brief has had some legs as precedent going forward, and it was gratifying to see that the Court read the amicus brief.

Editor: You've managed to stand at the crossroads of several trends in social policy and their legal ramifications.

Lorber: As I said, I'm very fortunate.

Editor: Tell us about your work on the Fair Labor Standards Act and the labor and employment provisions in the Congressional Accountability Act.

Lorber: The Congressional Accountability Act applied 11 labor and employment laws to Congress and congressional entities. The statute created a board of directors, and I was chosen by the congressional leadership to be one of the original five directors. We had to apply these laws to Congress, many for the first time, including OSHA and the FLSA. It was interesting to see Congress grapple with the same laws it applied to everyone else, which was one of the purposes of the Act. The FLSA is an old 1938 statute that the Labor Department in 2003 decided needed updated regulations. The old regulations still dealt with such obsolete issues as whether a blacksmith was an exempt or not exempt job. While there was a lot of controversy during the regulation process with some claiming the changes would gut the statute, those claims were simply not true. In fact, when those regulations went into effect, the plaintiff bar realized that if they found one or two individuals misclassified in a job, there might be 200 other people with that same job title. Bingo! Even though the Act says you look to the job and not the title, and different people with the same titles do different functions, it has become a goldmine in terms of civil class actions. I think it's the most prevalent area of class litigation since 2005 in part because the old, vertical hierarchy of jobs is pretty well gone and the statute is really out of sync with the modern workplace. But there is lots of litigation applying a 1938 statute with regulations that, with all due respect to the folks in 2003 to 2004 who tried to update them, didn't change that much.

Editor: Is there an FLSA problem today? Does the information age impact how someone is classified?

Lorber: Classification of employees, and whether they are employees, has become the hot issue now. Employers have lots of issues as to whether or not people are employees or contractors. We do a lot of audits for companies to figure out whether people are appropriately classified. How people are paid under fluctuating work schedules and whether overtime is applied are only some of the complicating issues, and it gets very contentious. So it has just become a major focus of our employment practice.

The Labor Department has announced a major enforcement task force on it. Also, New York State and several others are passing statutes, some including criminal sanctions, if people are misclassified. New York now requires new employees to receive a letter explaining what their classification is when they are hired. It is a very complicated issue, because if you misclassify there may be back pay and back tax obligations, with penalties and interest, and benefits coverage, including healthcare coverage, vacations and all the rest. If you don't draft your 401k plans properly, there may be a lot of money at stake if there are misclassifications both for employees and independent contractors. This will become a bigger issue with the growth in the number people who have been hired as independent contractors or who want to be independent contractors for various reasons. It is an issue that is going to evolve very rapidly.

Editor: So you see enforcement shifting under the Obama administration?

Lorber: They have hired several hundred more inspectors and investigators and are taking the model of enforcement rather than counseling and compliance. There are two models for how you deal with these statutes. The Bush people did a lot of enforcement, but they also had compliance assistance as a major focus. I think that the Obama administration view is that you make people comply by putting the fear of God in them. They seem to have a more punitive view of their authority.

Editor: Where do the Employee Free Choice Act and card check provisions stand?

Lorber: It is an idea that was advanced by labor academics and labor unions, but it has not been received well in Congress. In my view it is a radical idea to take away the secret ballot and a misguided attempt to solve the unions' problem of decreasing penetration in the workforce by just putting people in unions without their informed consent. Card check *per se* is not going to become law. However, there is a new NLRB dominated by recess appointees. So, while I don't think they can get card check by legislation, they certainly can push expedited elections and many of the other components of the Free Choice Act to see if they can succeed by regulation or case reversal rather than by legislation.

Please email the interviewee at llorber@proskauer.com with questions about this interview.