CONGRESSIONAL TESTIMONY BEFORE THE
COMMITTEE ON EDUCATION AND THE WORKFORCE

UNITED STATES HOUSE OF REPRESENTATIVES

NLRB DEVELOPMENTS AFFECTING INSTITUTIONS OF HIGHER EDUCATION

Wednesday, September 12, 2012

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Statement:

I wish to thank Committee Chairman Kline, Committee Ranking Member Miller, Subcommittee Chairwoman Fox, Subcommittee Chairman Roe, Ranking Subcommittee Members Hinojosa and Andrews and Members of this Committee for inviting me to testify before you on this important topic. It is a great honor and privilege to appear before you today.

My name is Walter Hunter. I am a Shareholder in the law firm of Littler Mendelson, P.C. and co-chair of Littler's higher education practice group. With over 900 attorneys, Littler is the largest law firm in the world dedicated exclusively to the practice of labor and employment law. The views I express to you here today are my own. They are based on thirty years of experience in labor relations – 22 as an attorney in private practice representing employers in many industries, and eight years as an executive – Brown University's Vice President of Administration from 2000-2008. I am not, however, appearing here today on behalf of Brown, Littler Mendelson, any client or any organization.

As a labor lawyer with the unique perspective of having been a former VP of Administration, I would like to share some of my views regarding NLRB issues that may particularly affect higher ed.

First, I am confident that you will agree with me that higher education in America is a national treasure. This noble enterprise promotes learning, supports research and inspires creativity in ways that are the envy of the world.

In the field of private sector labor law, higher ed is also quite different from private industry. Although you can expect colleges and universities to fiercely protect academic freedom, teaching, learning and research, my experience is that colleges and universities have a very intense desire to be leaders in the promotion of positive labor relations. After all, colleges and universities educate the future labor leaders of the world. Colleges and universities may disagree with the positions of organized labor on some issues, but they do with a profound sense of respect for the labor movement and the value of unions to our society. They insist on advancing the cause of positive labor relations and have a deep respect for the collective bargaining process where appropriate.

There are a number of significant legal issues currently being considered by the NLRB or the General Counsel in areas that have a direct impact on private sector colleges and universities. Some of the ones that are the most concerning to me are the following:

1. Grad Student Unions.

As you know, in *Brown University*[1], the NLRB held that graduate student assistants who perform services at a university in connection with their studies are not

[1] 342 NLRB 483 (2004)

statutory employees within the meaning of Section 2(3) of the National Labor Relations Act, because they "have a primarily educational, not economic, relationship with their university." The Board has announced its interest in revisiting this question and has invited briefs on the question of whether the Board should overrule *Brown*.

I believe *Brown* was correctly decided, and that overruling *Brown* would be a terrible mistake. In *Brown*, the Board said that: "imposing collective bargaining would have a deleterious impact on overall educational decisions ...These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research – the principal prerogatives of an educational institution ... Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations."

This does not mean that graduate students would not have a voice, because they do. Whether it is individually, through graduate student councils or via other mechanisms for communication, the interests of grad students are robustly presented and debated inside our colleges and universities. However, for the reasons articulated by the Board in its well-reasoned decision in *Brown*, I feel strongly that collective bargaining is not the proper model to address these issues.

2. Revisiting *Yeshiva*

On May 22, 2012, a divided NLRB issued a *Notice and Invitation to File Briefs* on a number of issues related to the Supreme Court's decision in *NLRB v. Yeshiva University.*[2] This invitation was issued in connection with a case that began almost ten years ago involving an effort by the Communications Workers Union to organize faculty at Point Park University.[3]

The Union petitioned to represent faculty at Point Park University in October, 2003. The University argued that under *Yeshiva*, its faculty members are managerial employees and therefore exempt from bargaining. The Board ruled against the University in 2005, but in August 2006 the U.S. Court of Appeals for the D.C. Circuit vacated that decision and remanded the case to the Board for a fuller analysis under *Yeshiva*.[4]

The D.C. Circuit remanded the case to the Board because it felt that *Yeshiva* requires a detailed analysis of the faculty members' degree of control over academic matters, including curriculum, course schedules, teaching methods, grading policies, matriculation standards, admission standards, size of the student body, tuition to be

[2] 444 U.S. 672 (1980)
[3] Case No. 6-RC-12276.
[4] *Point Park Univ. v. NLRB,* 457 F.3d 42 (D.C. Cir. 2006)

charged, and location of the school. The Court instructed the Board to identify which of the relevant factors set forth in *Yeshiva* are significant, which are less so, and why.

Rather than limiting itself to the mandate of the D.C. Circuit and examining the relevant facts in the Point Park University case, the NLRB seems to be using this case as an opportunity to set the stage for a revisit of *Yeshiva* itself. I believe that *Yeshiva* was properly decided. The Court clearly understood that not every university is the same, and the decision wisely left enough room for the Board to conclude that faculty at some universities do not meet the managerial standard. There is no reason to revisit the principles announced in *Yeshiva*, however, because those principles have not changed over time.

The Supreme Court recognizes that higher education is unique. The Court explained that "the 'business' of a university is education, and its vitality ultimately must depend upon academic policies that largely are formulated and generally are implemented by faculty governance decisions." [5] "The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry." [6] The Court observed that "in contrast, authority in the typical 'mature' private university is divided between a central administration and one or more collegial bodies." [7]

The Court made poignant observations in *Yeshiva* which still hold true at universities today:

> They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.
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> …
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> The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise

[5] 444 U.S. at 688
[6] 444 U.S. at 680
[7] *Id.*

> is indispensable to the formulation and implementation of academic policy.[8]

To the extent that a factual inquiry reveals that a particular university operates on a completely different model under which faculty do not participate in such governance, *Yeshiva* allows for that factual inquiry to yield a different result. However, my experience is that the fundamentals described in *Yeshiva* are still true today. No revisit of *Yeshiva* by the Board is necessary or appropriate.

It is also instructive to consider the wise counsel of the Seventh Circuit Court of Appeals in *NLRB v. Lewis University.*[9] The Court decisively rejected the argument that the faculty's decisions were merely exercises of their independent professional judgment rather than as managers. The court urged the NLRB to exercise caution in applying the managerial analysis so as not to interfere in the delicate balance of a college's governing structure. The court noted that private colleges are plagued with reductions in government support, spiraling costs and declining enrollments, and must rely on faculty and the collegial decision-making process to produce educational excellence within the bounds of limited financial resources.[10] I agree.

Many of those outside of higher ed fail to appreciate, or even fail to respect the unique ways in which our colleges and universities govern themselves. But this system of governance, unusual as it is, has created the most amazing system of education in the world.

3. Social Media and Other Policies

The NLRB and the General Counsel's office have become very active with respect to the interplay between communications through social media and the Section 7 rights of employees. The NLRB's Office of the General Counsel has been particularly active in its efforts to mold policy in this area.[11] I have significant concerns over what the impact of future decisions in this area might have on colleges and universities with respect to issues of safety and the maintenance of a climate conducive to learning.

Colleges and universities treasure their environments. They work hard to foster environments that are safe, collegial, engaging and respectful. They publish policies that urge members of the community to behave in a manner that engenders mutual respect, and treat each other with courtesy and civility. Recognizing the incidence of violence in the workplace, some policies expressly incorporate the goals of civility, respect and integrity in their workplace non-violence policies.

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[8] *Id* at 686, 689
[9] 765 F.2d 616 (7th Cir. 1985)
[10] *Id.* at 625
[11] See, *NLRB Memorandum OM 12-31* (January 24, 2012), *NLRB Memorandum OM 11-74* (August 18, 2011) and *NLRB Memorandum OM 12-59* (May 30, 2012).

The Office of General Counsel Memorandum Number OM 12-59 examined a number of social media policies, explaining why the felt certain policies were unlawful. Some of the results are surprising, even disturbing. For example, the Memorandum states that the Office found unlawful an employer's instruction that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline." The rationale for the Office's position was that the prohibition was ambiguous as to its application of Section 7. It believes an employee might believe that the policy prohibits criticisms of labor policies or treatment of employees.[12]

The Memorandum goes on to explain what employers would have to do to promulgate policies satisfying the General Counsel's view of the legal requirements. I believe universities and colleges would find the instructions confusing. More importantly, I believe the focus here is misplaced. Colleges and universities should be able to exercise their judgment on how best to promote a safe, supportive, nurturing, creative environment by publishing policies that promote these important values. These policies do not chill Section 7 activity, and colleges and universities would not use them to punish Section 7 activity.

4. Confidential Investigations

On July 30, 2012, in a ruling that affects both union and non-union employers, the National Labor Relations Board held that an employer must establish a specific legitimate business justification for requiring employees to maintain confidentiality during internal investigations of employee complaints. In *Banner Health System d/b/a Banner Estrella Medical Center*,[13] the Board, by a 2 to 1 majority, held that an employer may not maintain a blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct. According to the Board, such a rule violates Section 7 of the National Labor Relations Act, which protects employees' rights to engage in "concerted activities" for their mutual aid and protection, regardless of whether the employees belong to a union.

The facts at issue in *Banner Health System* are straightforward. The NLRB's general counsel alleged that the medical center's "Interview of Complainant Form," which included a general instruction that employees making internal complaints not discuss their complaints with coworkers during the ensuing investigation, violated Section 8(a)(1) of the Act. The medical center's human resources consultant did not provide employees with copies of the form during interviews, but instead used it as a guide for conducting those interviews. As such, the human resources consultant routinely – but not always – relayed the instruction to complaining employees.

The Board rejected the employer's argument that the confidentiality instruction was necessary to protect the integrity of its investigations and found the employer's "generalized concern" insufficient to outweigh employees' Section 7 rights. Instead, the Board concluded, in every investigation, an employer must identify a specific need to

[12] Memorandum OM 12-59 at 8.
[13] 358 N.L.R.B. No. 93 (2012),

protect witnesses, avoid spoliation of evidence or fabrication of testimony, or prevent a cover-up, before instructing employees to maintain confidentiality. Consequently, in the Board's view, the employer's blanket instruction violated the Act.

Colleges and universities have solemn obligations to investigate harassment and discrimination. They are required to have Title IX coordinators, and they are required to maintain policies and an atmosphere where students, faculty and staff feel comfortable reporting incidents of harassment and discrimination. I can tell you from personal experience that people reporting such activities are invariably concerned about the confidentiality of their interviews, or the confidentiality of the interviews conducted of other witnesses. Certainly, the effectiveness of an investigation itself could be compromised by an early disclosure. Colleges and universities should be able to set their own policies about how to address such confidentiality concerns consistent with their legal obligations under numerous federal laws. This can be done with appropriate recognition of the legitimate Section 7 concerns that may arise.

5. Other Issues

There are several other issues before the Board that impact higher education in important ways. They include procedures for representation elections, bargaining unit composition and property access rights.

a. Representation Procedures.

When the National Labor Relations Board adopted a new rule in December 2011 modifying certain NLRB election procedures, there was substantial speculation about how these changes would be implemented, and their practical effect. There have been legal challenges to these rules, of course, and there have been announced intentions of revisiting the issue, even if the rules are ultimately struck down. The proposed rules raise many concerns, the most significant of which is the expected timeline from petition to election.

General Counsel's Memorandum[14] was designed to provide detailed guidance to the NLRB's Regional Directors, who would be responsible for implementing the new rule. Currently, the NLRB has a time target of holding an election within 42 days after a petition is filed. The General Counsel's memorandum does not officially change this 42-day time target, but the streamlined procedures would make it possible for an election to be scheduled within 18 days after the petition is filed, or even faster in some circumstances.

I believe requiring higher ed employees to vote in a union election eighteen days after a petition has been filed is completely inconsistent with what a university is all about. Universities are places where people make informed decisions after carefully studying the relevant factors and arguments involved in a thoughtful way. Whatever the purpose may be of scheduling an election eighteen days after a petition, the effect will be

[14] GC 12-04

that employees will be less informed when they make their decision. It deprives universities of their rights to articulate their position, it deprives employees of their rights to be fully informed and deprives employees who might be opposed to the unionization effort to research the issue and discuss the same with their colleagues.

b. Bargaining unit composition.

In August of 2011, the Board issued a decision in the case *Specialty Healthcare*.[15] In that case, the Board articulated a new standard for determining the appropriateness of bargaining units of employees. Specifically, the Board stated that groups of employees who were "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" will be found appropriate, assuming they share a community of interest as determined using the traditional criteria. Under the new standard, such a group can only be placed in a larger unit with which it shares a community of interest if the party seeking such placement can demonstrate that the employees in the smaller group share "an overwhelming community of interest" with the rest.[16]

This is one of the most significant NLRB decisions in years. It represents a fundamental shift in what has been settled law for decades and I believe could have a significant adverse impact on colleges and universities. It could raise costs of administration, decrease efficiency, reduce effectiveness and result in an unfair and inconsistent treatment of employees.

c. Property rights

In *The Research Foundation of the State University of New York at Buffalo*,[17] the Board held that an employer, who did not own its office building, violated the Act by having a union organizer arrested for entering the employer's offices without permission. According to the Board, although non-employee organizers are not entitled to engage in organizing activity on the private property of others, an employer has no right to exclude union representatives engaged in such activity from areas in which it lacks a property interest. Because the private employer did not actually own the property (the State of New York did), it could not exclude the union organizer from its offices.

Nothing is more important than protecting the safety of students, faculty and staff. It is the issue that keeps university executives up at night. A university should be able to set its own requirements regarding the extent to which it will make its campus accessible to people from outside its community, or inside for that matter. Clearly it may not discriminate against visitors based on union affiliation, but consistently applied access rules are a fundamental university prerogative and solemn responsibility.

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[15] Specialty Healthcare, 357 NLRB No. 83 (2011).
[16] *Id.*
[17] 355 NLRB No. 170 (2010)