Oregon Civil Rights Newsletter

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AN INTERVIEW WITH BRAD AVAKIAN, OREGON'S LABOR COMMISSIONER

by Greg Woods, Kivel & Howard, and Corbett Gordon, Tonkon Torp

Brad Avakian's time as the labor commissioner of the Bureau of Labor and Industries (BOLI) will be ending. Commissioner Avakian has served as Oregon's labor commissioner since November 2008 and has announced that his tenth year on the job will be his last. He spoke with members of this newsletter's editorial board to provide an update on BOLI's ability to handle cases, the breadth of claims the agency hears, the status of sought-after changes (see this newsletter's prior interview of Commissioner Avakian in May 2010), and the agency's experience with Oregon's new scheduling law and prior ban-the-box legislation. He also discussed the opportunity to lead BOLI, champion civil rights efforts, help prevent housing discrimination, and create apprenticeship programs. Commissioner Avakian's remarks and responses to questions have been paraphrased and edited for clarity.

An Update on BOLI

What trends, if any, have emerged in the type and frequency of complaints?

The volume of complaints overall has been steady. There has been a continuing increase in those civil rights complaints that sound in multiple areas of discrimination, while the total number of wage-and-hour complaints has declined. That may be due in part to the fact that the economy has improved since 2010. Another factor is that people are reluctant to come forward, not wanting to rock the boat, to risk losing the paycheck that their family depends on. Another factor across the agency is that we have changed our triaging system, and that has resulted in many more immediate dismissals.

With the improved triaging system, we are saving Oregon businesses millions of dollars a year in legal costs because they don't have to defend themselves on meritless cases. The people who do our intake make an initial assessment whether or not there is evidence to support the allegations. If not, the case receives a "C" case designation, which is reviewed by a manager. If the manager agrees, the case is dismissed by the agency without seeking the employer's response.

Recent legislation has included the ban-the-box initiative and new scheduling laws; has BOLI started to receive complaints regarding those new laws?

Ban the box is still a relatively new law. It is too early to know what kind of effect that will have on hiring. We enforce the ban-the-box requirements and are keeping an

eye on it. In addition to enforcing ban the box, we have made other efforts to help those who are coming out of prison. We have certified apprenticeship programs in the state prison system pre-release, and we work closely with a number of organizations that help transition people out of the prison system and into apprenticeship programs.

With respect to the new scheduling law, we expect that complaints will come. It typically takes a while following the passage of new laws before we see complaints. It also takes time on our end for our compliance officers to reach out to employers and let them know what the new rules are.

I've made a concerted effort to expand our technical-assistance-for-employers program. The intention is for employers to call and get help navigating their way through both state and federal law. We received 40,000 phone calls from Oregon businesses last year. Additionally, we present almost 200 seminars around the state each year. That means we're training close to 5,000 business managers on these laws. When employers know the law and they have a partner in BOLI to help navigate the way, it helps establish a better work environment for Oregon's workforce. We've put a lot of effort into expanding our outreach to Oregon's businesses.

Seven years ago, you sought substantial changes to the agency's ability to increase dollar awards, impose attorney's fees, and make the agency a viable alternative to court. What has happened?

Just as I told you seven years ago, I believe that our final orders ought to be commensurate with state and federal jury verdicts. I am committed to aggressive enforcement of civil rights laws. Whether employees choose to file with us or with the courts, the harm is the same, the law is the same, and those who have suffered should expect the same type of fair justice that they would receive from a jury of their peers. Over the last seven years, that has resulted in final orders that are comparable to state and federal jury verdicts.

We have a system that is fair, that works quickly, and people are able to have lawyers assist them. Several sessions ago, we floated the notion of allowing prevailing claimants and prevailing respondents to seek attorney's fees. It was not something that lawyers on either the plaintiff or defense side had enthusiasm for. Based on that response, we didn't see the need to pursue fee provisions.

As an alternative to court, we have tried to educate the public. In regard to housing discrimination, for example, we went to Humboldt Gardens and provided training on civil rights laws affecting both employment and housing. We also aggressively pursue cases where people were discriminated against in housing. This has raised awareness, as the results have shown.

Commissioner Avakian's Civil Rights Legacy

What achievements highlight your tenure as the labor commissioner?

We've been able to prosecute cases that needed to be prosecuted and in the end give a lot of people a new start at a better life. Our prosecution in the *Stars Cabaret* case protected girls from sex trafficking. They were employing girls who were fifteen and even thirteen years old. Thousands of hours went into investigating that case and it resulted in protection of the most vulnerable among us. We prosecuted the P Club for its treatment of transgender patrons, earned a $2.4 million settlement with Daimler for those discriminated against based on race, and made efforts against white supremacists.

With regard to the MAX train incident this year, we met with the US District Attorney and the Multnomah County Attorney to participate in a coordinated effort of investigation and enforcement. We are good partners. If they find evidence that the perpetrator was connected to a white supremacist group, then we're going to take that seriously. If something falls within our jurisdiction to prosecute, we will pursue enforcement of the law.

Is there a specific moment that you're proud of?

Linda Campbell is a retired Lt. Col. in the US Air Force and Oregon Air National Guard. She was married to a woman named Nancy Lynchild. In talking to Ms. Campbell, I learned that her wife had been diagnosed with terminal cancer. Ms. Campbell had expected to be buried at Willamette National Cemetery near her father, who also had a military background, but she also wanted her final rest to be with her wife. Federal regulations precluded burial of same-sex couples in the national cemetery, a right extended to heterosexual couples.

We contacted the White House on Ms. Campbell's behalf and asked for a waiver to permit Ms. Lynchild to be buried at Willamette National Cemetery. They said no. This began a nine-month negotiation, which resulted in

our threat to bring suit before the White House relented. Ms. Lynchild passed away before the final resolution, but she is now buried in the cemetery near Ms. Campbell's father. This was the first waiver for a same-sex burial within a national cemetery.

What's Next?

Why are you not seeking another term?

My wife and I talked about whether we want to take on another statewide campaign. We determined that there are a lot of things other than elected office that one can do to make our community better and to find fulfillment. I've been labor commissioner for almost ten years. I would have been term-limited out if this were some other statewide office, and I'm ready for a change. I'm eager to see what comes next for me, and I'm eager to see who ends up taking the helm next here and what they will bring to the job.

What would you put on a to-do list for your successor?

The beauty of elected office is that my successor will bring their own set of skills and their own goals. That person will have an ability to shape something in a way that is best at that time. We'll have a smooth transition, and I'm excited to see who comes next. I see an opportunity for and, during my time left in office, will continue to work on equal pay, more apprenticeship programs, and an emphasis on helping people with disabilities.

We want to finish the work on equal pay. In 2014, the Civil Rights Council produced a "Pay Inequality in Oregon" report that is the best roadmap I've seen on how to eliminate pay disparities. The legislature has passed roughly half of the recommendations, but things such as subsidized daycare, which would allow working parents to continue working, are incredibly important.

We also want to expand opportunities for women and people of color in apprenticeship job training. In regard to apprenticeship, approximately 8,600 people are being trained for great living-wage jobs. BOLI certifies all apprenticeship programs in Oregon. Whether you are in an industry sector, union or non-union, if you want to create an apprenticeship program, you do so through BOLI. Each year we create the policies that set the standards for admission to these apprenticeship programs and that ensure the quality of education that apprentices are going to get. We play a large role in the health and effectiveness of every apprenticeship program.

In addition, we are trying to broaden apprenticeships opportunities to industry sectors beyond construction. We have made efforts to restore shop classes to middle and high schools to focus on twenty-first-century programs, including biomedical engineering, sports medicine, computer-aided design, and clean-energy technologies. BOLI has partnered with the Oregon Department of Education and the legislature to revitalize grant funding so that more than 340 Oregon schools will add these kinds of twenty-first-century classes to their curriculum.

The next great path for civil rights needs to include helping people with disabilities. This is a legislative issue and needs to address whether or not the full minimum wage should apply to the disabled. The future of how we provide workforce training for those with physical or mental disabilities is untapped. People are able to contribute in all kinds of effective ways. Whether they are blind, whether they are hearing impaired, when their bodies just won't work the way that they used to or that other people's do, we need to find ways to open up training opportunities for those individuals.

What has serving as labor commissioner meant to you?

Serving as Oregon's labor commissioner has been one of the greatest privileges of my life. It is a once-in-a-lifetime opportunity for a former civil rights lawyer to lead the civil rights division, to broaden the opportunity for apprenticeship, and to stand up for Oregonians. We've been able to advance civil rights laws in important ways. We're trying to make sure that people understand not only what their rights are, but that BOLI is a place where people can safely go to be heard.

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THEY ARE PROTECTED *CHARACTERISTICS*, NOT GROUPS

by Paul Buchanan, Buchanan Angeli Altschul & Sullivan LLP

Discrimination and harassment training has become a regular and to some extent dreaded ritual of modern American corporate life. Employment lawyers like me who represent large employers frequently are called on to train managers, front-line supervisors, and sometimes rank-and-file employees on the importance of refraining from unlawful discriminatory and harassing behaviors.

Often we begin these presentations with heavy-handed messages intended to make the audience sit up and take notice. We emphasize the possibility of personal liability for individual supervisors and we share alarming stories and statistics about verdicts obtained against those who failed to heed our message. We are, in effect, saying, "This could happen to you—and it could be ruinous."

With that as our introduction, many employment lawyers and human resource professionals, who also conduct these training sessions, begin to lecture their captive audiences regarding "protected classes" or "protected groups." The takeaway is that if you harass or discriminate against one of those people who is a member of one of those protected groups, or if you as a manager or supervisor fail to stop such harassment or discrimination against one of those people in one of those groups, your employment and even your place in society are at risk.

But the terms "protected groups" and "protected classes" are mentioned nowhere in the federal statutes that we are largely discussing, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, or any other federal anti-discrimination statute. The concept of "protected classes" appears to have arisen instead from judicial decisions going back decades that describe burdens of proof and it has been echoed by the Equal Employment Opportunity Commission and by state agencies, including the Oregon Bureau of Labor and Industries. The prima facie elements of a discrimination claim as recounted by many federal and Oregon state court decisions also include a showing that the plaintiff "belongs to a protected class." But the term is a misnomer that is not grounded in the language of the statutes that Congress passed. And it is counterproductive.

Contrary to the popular perception, which is advanced by the protected-classes terminology, what these laws actually prohibit is not discrimination against, say, African Americans, Hispanics, Muslims, or women. Rather, these laws prohibit discrimination based on certain specified *characteristics*, including race, national origin, religion, gender, and others. Even the Americans with Disabilities Act offers protection not only for the "class" of people who have disabilities; rather the statute protects anyone from discrimination—disabled or not—whom the employer "regards as" disabled.

Employment lawyers know that a Christian employee who is subjected to discrimination based on her religion by, say, an atheist manager, is protected against such discrimination based on her protected *characteristic*, that is, her religion. This protection is no different from the protection against discrimination to which a Muslim employee is entitled. Likewise, an employee of Japanese national origin is protected from national-origin discrimination by a manager of Chinese national origin. And a male subordinate is protected from gender discrimination by a female manager. It is a mark of the societal progress that the anti-discrimination laws have helped bring about that we now have an increasingly heterogeneous workplace in which claims such as these, while still by no means the majority, are much more commonplace than they once were.

By suggesting that discrimination is something that only is practiced by Caucasian, US-born, non-disabled Christian men under forty against other people who are members of "protected groups," employment lawyers and human resources professionals not only mislead their audiences about the true nature of the protections that these laws provide; they also communicate an arguably condescending message that engenders a combination of resentment and tribalism. And, as this protected-group terminology moves into the popular understanding, it feeds the narrative that these laws create "special rights" for some people and not others and thereby erodes support for laws that actually confer protection on everyone.

We all have a race, a gender, a national origin, a religion—or no religion. And, barring an early death, we all are, or will be, over forty. The real message that we should be conveying in training sessions and elsewhere is that these factors—these protected *characteristics*—should not determine any employee's future or impede any employee's success. Rather, employees—no matter who they are—should be judged on their individual merits, free from discrimination on the basis of any of these protected characteristics. That is what the law actually requires.

By shifting the emphasis in trainings and other communications away from the false terminology of protected classes, employment lawyers and human resources professionals can diminish their reliance on divisive, fear-based efforts at promoting nondiscrimination. Instead, by more accurately focusing on the prohibition on discrimination based on protected characteristics—which we all have—employment lawyers and human resources professionals can promote genuine buy-in to the antidiscrimination laws' central promise of equal employment opportunity.

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RECENT DECISIONS

by Rick Liebman and Chris Morgan, Barran Liebman, LLP

Circuit Courts of Appeals

Janus v. AFSCME, Council 31, 851 F.3d 746 (7th Cir. 2017), cert. granted, 86 U.S.L.W. 3148 (2017)

The Supreme Court has accepted review of a public employee's challenge to mandatory union dues. The law at issue requires that non-union-member employees pay only a "fair share" fee, which is proportionate to their share of the costs of collective bargaining and contract administration for those employees on whose behalf the union also negotiates. In 2016, the Supreme Court heard argument in a similar case, *Friedrichs v. California Teachers Association*. In that case, some believed that the Court was prepared to find that mandatory union dues for public employees violated their First Amendment right to free association. Prior to the decision being issued, Justice Scalia died unexpectedly. Without Justice Scalia, the opinion of the Court became a draw between the more progressive and conservative justices, and the matter was remanded. Many believe that Justice Gorsuch will tilt the Court in favor of a decision abolishing mandatory public-employee union dues.

McKinney v. G4S Gov't Solutions, Inc., Case No. 16-1498, 2017 U.S. App. LEXIS 20473 (4th Cir. 2017)

In granting summary judgment for the employer, the Fourth Circuit reinforced an employer's ability to rely on strong internal policies and complaint procedure as a defense to inappropriate employee conduct. An African-American employee claimed that his employer fostered a racially hostile work environment. Among other things, he alleged that a coworker used the N-word in his presence; a fire chief told him that the company had to hire a "colored boy"; a worker showed him a noose, while another coworker commented, "I know what to do with that. I can use that around my house" (presumably referring to his African-American neighbors); and a coworker displayed a white sheet over his head that looked like a KKK hood. Despite those claims, the employer prevailed on summary judgement based on the Farragher-Ellerth defense, as there had been no tangible employment action taken against the employee, the employer had good antidiscrimination policies in place, and the employee had failed to avail himself of the employer's complaint-reporting system.

Monroe v. Ind. Dep't of Transp., 871 F.3d 495 (7th Cir. 2017)

The Court of Appeals for the Seventh Circuit affirmed a ruling of the district court that an employer's decision to terminate an employee who has post-traumatic stress disorder (PTSD) was not pre-textual discrimination where the employee had otherwise engaged in a pattern of erratic behavior that created a hostile work environment. In rejecting the employee's claim that the company had failed to fire other similarly situated employees, the court found that other employees had not engaged in equally egregious behavior and also were not at-will employees like the plaintiff. The ruling underscores the importance of comparator analysis and the need for plaintiffs to show similarly situated individuals who were treated differently to prove causation in a lawsuit based on alleged discrimination.

Souryavong v. Lackawanna Cnty., 872 F.3d 122 (3rd Cir. 2017)

The Court of Appeals for the Third Circuit affirmed that willful violations of the Fair Labor Standards Act (FLSA) require specific knowledge of non-compliance. Under the FLSA, a finding of willfulness expands the limitations period for claims and subjects the employer to liability for liquidated damages. Here, individuals worked in two separate part-time capacities for the same employer. The employer failed to aggregate the hours from both jobs to ascertain whether the employees were eligible for overtime pay. Although the employer ultimately conceded that they should have aggregated the two and paid the employees overtime, the Court of Appeals affirmed that because the employer did not have specific knowledge of the two-job overtime problem at the time of the violations, they did not willfully violate the act and thus was not responsible for additional liquidated damages.

US District Courts

Fisk v. Inslee, Case No. C16-5889RBL, 2017 U.S. Dist. LEXIS 170910 (W.D. Wash. 2017)

A district court in Washington granted summary judgment for the union employer, holding that public-sector employees may not opt out of union dues after signing authorization cards, unless they do so within the permitted window. A personal-care assistant who worked in a program that received payments from the state executed an authorization card joining her union. Later, she challenged her membership and argued that she should have the First Amendment right to withdraw her support from the union if it took positions against her personal beliefs. The court disagreed, reasoning that a person's freedom to enter into contracts and the importance of upholding and enforcing those contracts trumps her First Amendment right to free speech. The court held that her window of opportunity to disassociate from the union on a yearly basis was sufficient to protect her constitutional rights.

EEOC v. Volvo Grp. N. Amer., LLC, Case No. 1:17-cv-02889 (D. Md.)

The Equal Employment Opportunity Commission brought suit against Volvo North America, alleging that Volvo refused to hire an individual because of his use of prescription medication. The lawsuit alleges that the plaintiff, a recovering drug addict who has been enrolled in a supervised rehabilitation program since 2010, used suboxine (a prescription drug used to treat opioid dependence) as part of his prescribed rehabilitation plan. After being offered a position with Volvo, the plaintiff disclosed his suboxine use as part of a mandatory post-offer physical exam. Following the disclosure, Volvo withdrew the offer and informed him that his suboxine use precluded him from employment with the company because suboxine dependency is "worse than heroin." This case is currently pending in the US District Court for the Northern District of Maryland.

State Appellate Courts

Floeting v. Grp. Health Coop., Case No. 75057-7-I, 2017 Wash. App. LEXIS 2352 (2017)

The Washington Court of Appeals held that an employer may be responsible for an employee's discriminatory behavior so long as the business is a place of public accommodation. A place of public accommodation is any business that is open to the public. In this case, a patient sued a medical provider alleging that one of its female employees had sexually harassed him by making repeated sexual advances and suggestive comments. The court ruled that an employer has direct liability for a discriminatory or harassing act by an employee that occurs on the company's premises. This ruling has significant consequences for employers who were previously insulated from liability in similar cases where an employee's inappropriate behavior was not at the direction of the company.

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SUPREME COURT UPDATE

by Damien Munsinger, Klein Munsinger, and Kirsten Rush, Busse & Hunt

Dunn v. Madison, No. 17-193 (November 6, 2017)

In a per curiam decision, the Court reversed the Eleventh Circuit and held that a person who understands why they are being punished is competent to be executed even if they do not remember the crime they committed. More than thirty years ago, the petitioner killed a police officer and was sentenced to death. He petitioned the trial court to suspend his death sentence, arguing that because of several recent strokes, he was incompetent to be executed. Psychologists reported that despite the strokes, the petitioner understood the posture of the case, that he was tried and convicted of murder, and had a rational understanding of the results and effects of his death sentence. The Court held that the trial court did not commit reversible error in finding that the petitioner was competent to be executed because he understood that he would be put to death as punishment for a murder he was found to have committed.

Hamer v. Neighborhood Hous. Servs. of Chicago, No. 16-658 (November 8, 2017)

The Court held unanimously that the Seventh Circuit erred in treating Federal Rule of Appellate Procedure 4(a)(5)(c) as jurisdictional. The rule provides that the time limit to file an appeal is thirty days. The district court entered final judgment for the respondents. Before the petitioner's notice of appeal was due, her counsel withdrew. The district court granted a two-month extension to file the notice of appeal, despite the Rule allowing only thirty days. When the petitioner filed her appeal after the thirty days had passed but within the district court's extension, the Seventh Circuit dismissed the appeal as untimely. The Court explained that if a time limit is statutory, it is jurisdictional and cannot be extended. If a time limit is not statutory, like Rule 4(a)(5)(c), then it fits within the claim-processing category, which may be waived, forfeited, or subject to equitable considerations.

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