Lawyering for Labor in an Anti-Union Era: A Conversation with Beth Margolis

By Conrad Herold and Gregory DeFreitas

If the nineteenth century saw pro-union workers and their organizations routinely attacked with spies and thugs, today the vehicles of choice are more often high-paid union-busting law firms and consultants. While there is no shortage of anti-union lawyers in this country, attorneys on the other side can seem an endangered species, even in New York, the most unionized state in the country. Moreover, since the start of the financial crisis and the 2010 Republican electoral victories, more and more corporations and their political allies have stepped up their attacks on unions. Seldom has it been more difficult for unions to avoid accepting harsh contract concessions or to win new organizing drives.

Beth M. Margolis is a "union-side" labor lawyer. She has just completed two decades as a partner at Gladstein, Reif & Meginniss LLP, consistently ranked among the country's top labor law firms. Since its opening in 1976, the Manhattan-based firm has only represented workers and their organizations, reflecting its deep commitment to the labor movement. The firm's website states that it is organized around the principle that "workers and their organizations deserve top-quality legal representation just as much as corporations and large institutions that can pay top dollar for their lawyers." Several major unions in the New York-New Jersey-Connecticut area are represented by Gladstein, Reif & Meginniss including: the Transportation Workers Union Local 100, the Communications Workers of America, the Service Employees International Union Local 1199, as well as several local chapters of the American Association of University Professors (AAUP), including the chapter representing the faculty of Hofstra University.

Educated at Barnard College and at New York University School of Law, Beth Margolis clerked for the Honorable Dickinson R. Debevoise in federal district court in Newark, New Jersey. She also taught at NYU Law School. Before joining Gladstein, Reif & Meginniss in 1991, she was an associate at Rabinowitz, Boudin & Standard, a New York firm well-known for representing often-controversial individuals, religious groups and foreign governments in civil rights and civil liberties cases.

Given the preeminence of law firms that serve corporate interests, we wanted to ask Ms. Margolis how and why she chose to work for a firm like Gladstein, Reif & Meginniss, and what advice she might offer to anyone interested in a career in union-side labor law. We also wanted to ask about the state of worker's rights and labor law in America today from the viewpoint of someone who is daily seeing the actual tactics and effects of today's corporate attack on unions. Does the Employee Freedom of Choice Act (EFCA), fiercely opposed by the business lobby, have the potential to shift the power balance in labor organizing? What new issues and strategies are drawing the attention of the labor movement today? In a recent arbitration, Margolissuccessfully raised the question of the need to renegotiate the interest-rate swaps of public entities, which are needlessly draining them of funds that could otherwise go toward serving the public and providing fair wages to public sector workers. Gladstein, Reif & Meginniss also sometimes chooses the difficult task of representing individual unorganized workers, sometimes successfully, given the great difficulties of doing so.

In early August, Conrad Herold and Greg DeFreitas met with Beth Margolis at her firm's offices in Manhattan's Greenwich Village neighborhood.

Q: How did you become a union-side labor lawyer?

BM: I went to law school because I wanted to do something to better the world. I think during law school I came to feel that, although there are a lot of important rights that need to be enforced under the law, to me the most important are our economic rights. I think that everything follows from that. The ability to have a job, to earn a decent wage, to have the benefits that every human being should have, I think really determines obviously people's standard of living and makes for a better democracy. So that's what I decided to do.

I call myself a union-side labor lawyer because we only represent unions and employees in this office. We have never represented an employer for any purpose. I guess the one exception to that would be that we do represent unions in their position as employers of their staff. But we are not interested in representing employers because we want to use our skills to better the lives of working people, not employers. They have plenty of lawyers.

Q: I know that you call Victor Rabinowitz your mentor. Tell us a little bit about who he was and why it is you call him a mentor.

BM: Well actually, when I finished law school I clerked for a federal judge for a year. I was then looking for a union-side labor job and it's actually very hard because there are very few union-side labor firms. And the jobs don't open up very often. The advice that I got from my labor professor at NYU was, "So go to a management firm." I could have easily done that, but obviously didn't want to.

I had to expand my search somewhat and I ended up working at Rabinowitz, Boudin & Standard, a civil rights and constitutional law firm that was started by Victor Rabinowitz and Leonard Boudin. They were both very brilliant constitutional lawyers who did a lot of amazing work, including representing people during the McCarthy hearings, and litigating a number of precedential cases at the United States Supreme Court. They had initially, when they first started, done a significant amount of labor law. But as the firm developed, they became more involved in representing communist countries like Cuba, which they still represent.

Q: The firm still exists?

BM: Yes, it still exists. Leonard and Victor have both died, and their heir apparent now runs the firm. As constitutional lawyers, they ended up doing a lot of work in the years that I was there for the Church of Scientology because they had a reputation as being not afraid to fight the government. There was a period of time, I guess, probably in the 70s and 80s, where various senators were sort of initiating investigations into the Church of Scientology, probably because their children had joined or something and they didn't like it. They went after the church on a number of different fronts, including their tax-exempt status, and the church hired Rabinowitz Boudin.

So when I was there, that was a very large part of their practice because it was very lucrative and it supported other things that they wanted to do that were less lucrative. I was not pleased to be doing that work. Freedom of religion was not a particularly important issue to me.

But when I was there, there was a lot of upheaval at that time among the officers of 1199, which is the Health and Hospitals Union. There was an insurgent person running for election, and Rabinowitz, Boudin, Eisner and Levy and this firm all did a lot of legal work in support of the dissident faction who ultimately got elected. Once they were elected, Rabinowitz, Boudin started doing labor work for 1199.

Q: Was its leader Dennis Rivera?

BM: Yes. He's in Washington now, I believe. But I had actually worked at this firm [Gladstein, Reif] while I was in law school. It was really the place I wanted to work above and beyond anywhere else, partially because I think the lawyers here are really very talented, and partially because, I think they have a very clear vision of what they want to do and it's an uncompromising vision. So it suits me well here.

Q: You graduated from Barnard in 1978, as an ancient Greek and Latin major?

BM: Yeah. It has a direct correlation to what I do now. I'm sure you can see that correlation immediately.

Q: Did you come from a political family or did Barnard shape you? Was it political active when you were at Barnard?

BM: Yeah. I actually transferred to Barnard. I initially went to Wellesley, but I was very unhappy there. I'm sure people would disagree with me about this, but I found it to be a kind of anti-feminist environment. When I was there, they still found it necessary to use one word to let you know that you had a male visitor, and a different word to let you know that a woman was coming to visit you. That kind of thing was troubling to me.

My parents are strong Democrats and progressives. But my father was an anti-trust lawyer, so I grew up with a rather privileged background. I think everyone in my family or my parents for sure cared a lot about fairness in the employment setting, but they were not in any way like labor activists or radicals. In fact, my father, I think, was a little concerned when I went to work for Rabinowitz, Boudin and Standard, even though it's a very prominent firm in its own world.

But, it's a very leftist firm. They were so left that during the McCarthy era, when I guess the ACLU was not taking a very good position about people being called to testify in front of the House on Un-American Committee, HUAC, they formed another not-for-profit, called the Emergency Civil Liberties Committee. It was to fund and support the kinds of activities they were engaged in, representing people who were admitted communists. I'm not a red-diaper baby. Many here were red-diaper babies, some even whose parents were blacklisted during that time.

Q: So your formative period really was at that firm then?

BM: Yes, although I belonged to the National Lawyers Guild in law school.

Q: Any particular advice to students today who would want to take up union-side labor law, in terms of their training and of what they should be exposed to?

BM: You know, I think it's very good to work at the National Labor Relations Board. I did not do that, but it would have been a good thing to do. Generally speaking, anything that gives you a rigorous training in the law is a good thing to do, and it also depends on what you really want to be doing as a union-side labor lawyer.

One of the things that I like so much about this area of practice is – aside from the goals that I have and what I think it accomplishes – is that it has everything from sort of the ridiculous to the sublime. I mean, you can do arbitrations which are more on the ridiculous end of the spectrum, and very intellectual, high-level litigation in the circuit courts and even to the Supreme Court.

I love having that variation, so that I'm not always sitting thinking hard, writing briefs and researching. But I'm not always in an arbitration with sort of craziness going on. I mean, arbitrations tend to be very informal, and depending on the union that you're

representing and the setup, they have more or less elements of due process. Sometimes you have a nice real hearing with evidentiary ruling and sometimes it is just a lot of, you know, sort of horse trading. It depends on the arbitrator. It depends on the union. For instance, I represent several locals of transit bus operators and their arbitration calendar can have anywhere from 5 to 15 cases on them in a day. So you can imagine that that does not allow for a full evidentiary hearing and there is a lot of horse trading that goes on. You know, depending on the arbitrators, some arbitrators just kind of ask the lawyers, "What's this about," and then get a fix on and it then say, "Why don't you do this."

Other unions that we represent, when you have a grievance it's a grievance and you have at least a day of hearings, and oftentimes many more than one day. It's conducted much more like a typical trial.

Q: Is there a lot of back and forth before the arbitration in terms of who the arbitrator selected is? Is it an old-boys network, a select group that unions and employers will agree on as arbitrators? Is that your experience?

BM: Well, many unions have permanent arbitrators that are selected at the time of the bargaining agreement. Depending on the size of the union, they may have a panel of permanent arbitrators. Oftentimes those permanent arbitrators are in that small handful of the leading arbitrators, if you will. They have been around for quite a while and they all are white men. You know, their reputations are well deserved. I mean, they know what they're doing. They're picked because both sides trust them to do the right thing.

BETH MARGOLIS – Interviewee

Q: Given how many women are finally in the law these days, do you think that's just rank discrimination, that arbitrators are so heavily white males?

BM: I know that this group of arbitrators, the handful that everybody wants, actually are all relatively active in trying to promote young women and minority arbitrators. But you know, it takes a long time to build a reputation as an arbitrator. I can't explain to you exactly why, but I think to start as an arbitrator these days is probably harder than it was 25 or 30 years ago.

Q: The decline of unions? Is that a factor anymore?

BM: I guess that would be a factor. Maybe there are more people trying to do it, but I'm not really sure.

Q: Tell us about some of your major victories, like the Adelphi University case.

BM: That was my continuance pay. We have represented faculty unions for a long time at this office, and we represented them before the Yeshiva decision was issued by the Supreme Court. A number of the unions that we represented prior to the issuance of the Yeshiva decision have continued to be recognized by the employer. Like Hofstra, for instance, is an example of that. Adelphi is another example. Arguably, the employers could after Yeshiva say, "We don't think you're statutory employees and we're not going to deal with you as a union anymore." But that has not happened.

At Adelphi in the early '90s, the president there was a self-aggrandizing narcissist, venal person, and he followed in the footsteps of John Silber, then the president of Boston University. Silber had previously been at a university in Texas as president. He ran into trouble with his board of trustees and thereafter came up with his system of running a university: basically to stack the board and to charm the board and bestow them with luxury goods or make them feel like they were the best and the brightest so that they would really kind of be asleep at the wheel.

Diamandopoulos had met Silber when Diamandopoulos was at Brandeis. Silber was the president of Boston University and they met at the time of the student riots. As you might recall, Silber was pretty harsh in his reaction to the protests at Boston University. He called in the police. The police had dogs. I think they attacked some of the students, and Diamandopoulos and Silber struck up a friendship over that brilliant act that Silber had undertaken.

I think Diamandopoulos wrote to him and said, "Great job," and a true friendship was formed. Silber became kind of Diamandopoulos' mentor, if you will. And Diamandopoulos followed in his footsteps. He stacked the board with a lot of very rich people who liked to think of themselves as (and maybe many of them were) very brilliant intellectuals. Diamandopoulos sold them on this notion that he was going to turn Adelphi into the "Harvard of Long Island," which of course was just preposterous.

So he started undertaking all these different things that were really detrimental to the university because they were not playing to the audience, the traditional audience of the university. Simultaneously, he was running rough shod over faculty's governance rights and the faculty was getting increasingly upset about what was happening there. We brought a couple of grievances challenging some of the things that Diamandopoulos had done with respect to governance rights.

Q: Can you give an example?

BM: I believe that we brought an arbitration challenging the right of the administration to maybe veto an election. I think they had an election of chairs with some veto right. That's my recollection. It was a very long time ago. Those are precisely the kind of issues that are not good to take to arbitration. Arbitrators do not want to manage an employment setting, and they particular don't want to manage an academic employment setting. It would be very difficult to win those kinds of grievances. We didn't win it. So we were brainstorming about how else to address this.

There had always been rumors circulating about ways in which Diamandopoulos was spending rather extravagantly the university's funds for his own purposes. We decided that the thing to do was to organize what we called then, and we still call now, a corporate campaign. It was simply to come up with things that were going to hurt the university in the public eye in an effort to get them to realize that they didn't really want to have us as their adversary, and that they had to deal with us in a more respectful way, and they had to listen to the faculty's views about how the university should be run. So we started digging around following these rumors about the economic perks that he had been bestowing upon himself and that really the board had been approving.

Q: Was the faculty united behind all of these efforts? Or were there factions?

BM: Well, it started with a very small group of people who were leaders in the union. Once we got the goods on him and we started getting that out in the public domain, then yes: the faculty was very united about this. You know, we never called it a union or a labor campaign. We came up with this name: Committee to Save Adelphi. We were quite adamant that it was a much broader group than just a labor-management struggle because a labor-management struggle wasn't going to be interesting to anybody.

We located the deed to a very expensive apartment that the board had bought for Diamandopoulos in the city, even though he lived in a very expensive house in Westbury that was owned by the university. We gave it to the education reporter of The New York Times, who was Doreen Carvajal at that time. She went out to interview Diamandopoulos under the guise of wanting to speak to him about his educational vision for the university, which she did. I mean, she talked to him about this notion that he was going to turn Adelphi into the "Harvard of Long Island" and his vision for the honors college and whatever it was that he had in mind.

At the very end of the interview, she said to him that she understood that the board has purchased an apartment for him in the city, and he denied it. That was the kiss of death. That resulted in an article in the New York Times. I believe it was late September, 1995, and I think it was on the front page. The end of the article was about the apartment.

That, of course, caught people's attention and the Times liked the fact that they had the in to this. We were able to get a lot of traction with that. There was a lot of publicity. I mean, my press book from that is just huge. The Times actually ended up calling for his resignation in an op-ed piece. The school sued the faculty for defamation as a result of that complication.

Q: Adelphi sued the faculty?

BM: Sued the leaders of the Committee to Save Adelphi. It was really an outrageous act. As the publicity built, it was having no effect, basically. I mean, these were the titans of the world who were on the board. It was Leonard Riggio, George Lois, the ad guy, Hilton Kramer, Raymond Damadian, the man who invented the MRI, John Silber. I don't remember all of them. But they were of that ilk and they frankly couldn't believe that the Times was not publishing their side of the story. They just dug in their heels and the more we attacked, the more they circled the wagons.

And so finally we filed a petition with the New York State Department of Education, which charters all schools that give diplomas in New York, under a little-known provision which enabled the Department of Education to remove members of the board of trustees for neglecting their duties. It was a provision that had only been used one time in 100 years. And lo and behold, they decided to hold a hearing. I think one of the reasons was that this had now become an issue that was getting a lot of attention. So in a way, they had to do something, and so we had a hearing that began in June and pretty much went until the middle of -November.

The university attacked us on every front. They went up to Albany repeatedly trying to get an injunction stopping the hearing. They went to the board and challenged our certification. They sued individual leaders for defamation. And here we were, I don't know how many people we had at the office at that time. Maybe six. There was one of us in every single one of those courts or administrative proceedings. I mean, the day we would go in for a hearing, they would go up to Albany seeking a preliminary injunction.

Q: And all of this was using Adelphi's funds on their side to use anti-union lawyers or whoever they were employing?

BM: Yes. This was in 1995. They spent a lot of money. They had troops of lawyers in the hearing that we were doing and also, of course, in every other proceeding. And frankly, at the end of our case, although I think it went very well, it was not that clear that the panel from the Department of Education was going to rule in our favor. But the Adelphi board did something that people sometimes do when they're very rich and arrogant and that is that they insisted on calling almost every member of the board of trustees and their case got worse and worse as they called these board members.

It just made it so clear that they had no clue about what was going on. I mean, one of the things that we were clamoring about was the fact that they were giving Diamandopoulos these evergreen contracts that renewed themselves every five years and with huge raises and deferred compensation. I think he was in the Chronicle as one of the highest paid presidents around that time. Obviously that didn't make a lot of sense given what Adelphi was and its size.

Q: Silber was usually number one.

BM: Yes, he usually was. Diamandopoulos was right after him.

Q: Were the board members paid for their service to Adelphi?

BM: I do not believe so. They were paid by going on junkets. He used to take them to the Harvard Club and order, you know, some ridiculous drinks for them that cost hundreds of dollars, some kind of cognac that was phenomenally expensive. Sometimes he would take them to Greece to give them a little tour. It was feeding their egos as being part of this endeavor. In fact, I think some of them even contributed their services. George Lois, who is one of the most famous advertising guys, did the advertisements for Adelphi, the "Harvard of Long Island" ads. They were running these full-page ads that were really quite well done.

Q: Were you allowed to question the trustees when they were brought up for the hearings?

BM: Yeah, and when they put the trustees on, that's really where we were able to make a lot of headway. I mean, a couple of them would go into these back rooms and decide on the annual raise. They would come back into the finance committee of the board and say, "We worked out a deal." And no one would ask what it was. And they all testified to that. They all said, "Well, we assumed if they did it, it was the right thing to do." It was just mind-boggling!

Q: What was the result? The entire board was removed?

BM: The entire board was removed except for one person. I think he was a professor of classics at Yale. The reason he wasn't removed is that he had only joined the board months before all of this started.

Q: Diamandopoulos was removed?

BM: He was removed once the new board was appointed. Then they removed him.

Q: Who appointed the new board?

BM: The Department of Education.

Q: Any other officers of Adelphi administration?

BM: Well, the provost was removed from his position as provost, but he is still on the faculty because he was a tenured faculty member. And remarkably, many of the leaders of the Committee to Save Adelphi are now in very high-level positions at the school. One is the provost and another became, I think, associate provost. Which is, you know, a very good thing.

Q: So this occupied you completely for a couple of years or more than that?

BM: Well, it started around the end of the summer in 1995. It went to hearing in the beginning of June of1996, and the decision came down, I believe, in February of 1997. And it did occupy the entire firm. Needless to say, it wasn't like there was a deep pocket there to pay for this. The faculty did a lot of fundraising and over a period of years they were able to pay the bill.

But you know, at the time if we had lost, we wouldn't have gotten paid. It truly took up most of the office. But that's one of the things that is great about this firm: it's a place where people will agree to do something if it's the right thing to do, regardless of whether or not it's going to result in us being paid.

Q: But does that make it difficult for a firm to survive? I mean, when you try to stick to your principles and not take employer-side cases, not take Church of Scientology cases. Does that make it a rocky life for a labor lawyer, that you're often dealing with folks who don't have a lot of money or have erratic sources of funds?

BM: It can be difficult, yeah. But you know, no one would come to this firm because they wanted to make a lot of money as an attorney. If they came here for that purpose, they would be sorely disappointed.

Q: New York has a lot of lawyers. How many firms would you say today in the city do what you do and only represent the labor side?

BM: Maybe somewhere between 5 and 10.

Q: Has that grown or shrunk over the years that you've practiced?

BM: I think it's been pretty consistent actually. You know, even though the labor movement has shrunk tremendously during the time that I have been practicing law and the number of unionized employees has shrunk, I think we're all feeling very discouraged by that, and we're glad that we're not just entering as union-side labor lawyers today. I don't think we know what the future holds. And that's depressing.

I mean, you see things like what's happening at Caterpillar. There is no equality of bargaining anymore. The National Labor Relations Act doesn't work and it's really broken, and it's not getting fixed, apparently. We all had very high hopes that EFCA [Employee Free Choice Act] would get passed once Obama was elected. That obviously didn't happen.

Q: Any thoughts on why that's the case? Why do you think EFCA would make a big difference and why do you think it hasn't even come up really as a top priority in recent years?

BM: I think that employers have been able to use the National Labor Relations Act to serve their purposes, rather than what it was intended for, which is to give employees protection when they organized and bargained. And EFCA would have addressed many of the problems that have been created; the long delays during the organizing phase, the fact that employers don't really suffer any penalties if they fire the organizers.

In fact, if I was an employer's attorney and I wanted to bust the union, that's the first thing I would tell them to do. The consequences are none really. I mean, it takes years and years and years to get an employee who has been fired from a protected activity even to get a hearing and it's challenged. You have to go through the litigation process.

I remember Steve Greenhouse did a really good article about that in the Times probably three years ago. Even then if you win, in all likelihood there will be no meaningful economic sanction to an employer because an employee has an obligation to mitigate their damages during the time that they have been terminated. So if they have been able to get another job, what they've earned would be subtracted from whatever back pay they were owed. And alternatively the employer could argue that they didn't do enough to mitigate their damages and argue that as a result of that they shouldn't get back pay because they didn't look for work. So there is no downside to an employer to fire union activists.

Why it didn't get passed, I think, is the same reason why Obama hasn't been able to get most of his agenda passed: a combination of the Republicans being able to really prevent anything from getting done and his failure to really be confrontational.

Q: If Obama gets reelected, what do you think it would take to move EFCA up the agenda to get more energy behind its passage?

BM: The hope would be that if he got elected and he didn't then have to worry about another election, that he would be a much bolder president this time. Whether or not you could really get it through Congress is a whole other matter. You know, obviously a big, big part of the problem is the electorate in the United States. People don't seem to vote with their own interest in mind because they imagine that their interests are aligned with the Mitt Romneys of the world. In my view, they are very unrealistic about what their life is about and it's very depressing. I don't know how that gets fixed.

Q: When you tell people what you do for a living, what is the reaction you get in terms of somebody who works quite often for unions? What kind of opinion do strangers seem to often have about unions?

BM: I have found that people who are the most positive about it are older, political people who understand what the importance of the labor movement is. It's very sad to me that if I speak with younger people, they often have no idea whatsoever about what unions do and why anyone would want to be in a union. That is a big problem.

Q: How do you see the Occupy Wall Street movement?

BM: Well, in terms of what? They're young people who get it that we're the 99%? I think the labor unions have tried and have begun working with them. I think that's a really good thing. But I don't think the Occupy movement is focused enough. It's a very general agenda, which is just: "We're against the rich people." I think that's one of the problems. It doesn't have enough of a focus.

Q: You recently won an arbitration for two transit worker unions where new issues and approaches were raised such as the interest rate swaps that the MTA holds.

BM: That was something that was already percolating among the unions. One of the things that I think the unions are doing very effectively is to identify issues of broad concern beyond direct labor management issues. And so that was something that the research department of TWU had been instrumental in identifying.

We kind of took a risk in a way by putting it on as evidence in the interest arbitration. Frankly, it really couldn't have proved what we had to prove. What we had to prove was that the Transit Authority had sufficient money to be able to afford the raises that we were asking for. And the interest rate swap issue is really about urging the MTA to go to the banks to try and get some money back. But it's hypothetical money, it's not money in their pocket. So it could not have been used as a basis for the arbitrator to find that they actually did have sufficient funds to pay for the raises.

We put it on and my feeling was that this was another example of exactly what happened in Adelphi. I believe that had the Transit Authority ignored it, it would not have seen the light of day, precisely for the reason I just said: it really didn't go to the fundamental point that the arbitrator had to determine. But the Transit Authority had to put on their witness, the person who was in charge of these swaps. And he was extremely arrogant and glib and he said really stupid things. Like, I asked him whether he was aware of the fact that other governmental entities and not-for-profits had been able to renegotiate their swaps with the banks. He said something like, "Oh, I saw that article, but it wasn't really interesting to me and I didn't read it."

He also, of course, fell for the last question. One of the things that the Transit Authority did in that hearing is they made a big deal about how for the first time they had taken all of these steps to save millions of dollars in the way they operate. They had renegotiated their health insurance. They had rationalized their office space. They had eliminated redundant functions. They had a whole list of things that they had done as a result of the of the crash really. They were really starved for money.

So they did things that the state controller had been telling them to do for years. As a result, they saved $850 million in a year in repeated, recurring savings. So you know, they were touting how great they were because they had finally started to run a competent, streamlined agency. Of course, that allowed me to say at the end, "You know, you've been to all your vendors. You've renegotiated all your contracts with your vendors. You have renegotiated your health insurance. You're coming to the unions and asking for give-backs and doing this and doing that. The one place you won't go is to the banks to ask them to renegotiate these swaps."

He said, "Yes, we don't think that would be appropriate. They would never do it." And the arbitrator – it really got his attention

and I think he got angry about it. As a result, it made its way into the decision, which was good because it confirmed something that the unions had already been saying, which is: "Yeah, maybe you won't get the money back, but why wouldn't you even go and ask? You asked everybody else. You're asking us." It was very satisfying that the arbitrator actually said that.

You asked why would the banks renegotiate these swaps. Obviously people enter into deals. Sometimes they do well, sometimes they don't do well. My view is a public entity should never be entering into deals like these because they are basically just bets. That's all they are. It's just gambling and you're gambling with public funds. But the reason why the banks should really feel pressured to do something about this is that the reason that the banks are making out like bandits right now is because the banks crashed the economy! If they hadn't crashed the economy and the Fed wasn't setting the interest rates at this historically low levels, they wouldn't be making this money. They are making out twice off of taxpayers' money. It seems to me that the power is there if it could get some traction and people could get behind it.

Q: After the arbitrator's decision, he mentions this statement by the city's finance officer that they're not even going to try to renegotiate the swaps. So what is the situation now vis-à-vis the union contract and concessions?

BM: Well, it definitely will come up in this round of bargaining again. The thing that I find sad about it is that the MTA sees this as an adversarial issue. They are fighting us on this. It's a perfect example of an issue where we should be on the same page. And we could work together. Why wouldn't they want to get out of these swaps if they could? There is no rational reason.

Q: -There seems to be a whole national movement trying to focus on these things.

BM: It is beginning, yes.

Q: Do you think this is consistent with Mayor Bloomberg's position in general? He said the government caused the 2008 crash, not Wall Street. He is the mayor of Wall Street in some ways, isn't he? So in his agency resisting pressuring the banks, one could argue in some ways that's just consistent with his general position that the banks are not to blame. The banks are a major employer in New York and—

BM: And we should protect them at all costs.

Q: We should protect them, even if it means demanding more give-backs from working people.

BM: Well, that's a very good point. And I'm sure he has a significant amount of influence over the MTA board. I mean, he appoints a certain number of board members and I think he wields a lot of influence with them.

Q: In representing these public sector unions like the transit workers, you're at the center of this debate today that has grabbed national headlines. The governor of Wisconsin and other Republican governors are attacking public sector unions saying, "We can't afford the pay and benefits." They're pitting taxpayers against the public sector unions. Do you think that has traction in New York, that attack? I mean, this is the most unionized state in the country. Do you think New Yorkers would resist accepting such attacks?

BM: I do think they would. I don't see it happening in New York. But the fact of the matter is that the more it happens in any state, even if bargaining rights aren't more limited for public sector workers in New York, the weaker it makes the public sector unions in New York. Because everyone is watching what is happening around the country. Even though the citizens of the state of New York might not support legislation to further limit bargaining rights of public sector workers, I think you get a lot of support from people, unfortunately, to limit pension rights or health insurance rights. I think that's part of the vicious cycle that we're in now, which is we're kind of in this race to the bottom. It's really unfortunate. People seem to be feeling that if they don't have something, the way to solve that is to take it from the people who have it, rather than to insist on getting it for themselves. Until we can turn that around, we're just going to keep sliding down to the bottom. How do we turn it around?

Q: Have there been any particular cases that you've negotiated where, in fact, a sense of turning it around emerged? What might work?

BM: I don't know. I mean, there was recently an article in the Times asking this question: how are unions going to survive? It started by quoting someone – a labor economist, I believe – saying that the unions are inevitably going to continue shrinking until they disappear. It turned out that he was quoting someone back in the 1930s. The point that the journalist was making is, "See, someone was saying that then and then in the next two decades unions grew to all-time highs." So the point being that just when we think we're at the bottom, maybe we aren't really.

But the one thing he didn't address in that article is that, at the time that was said, the National Labor Relations Act hadn't been passed. When it was passed, it did initially enable the labor movement to grow and it did initially give protection to concerted protected activity.

I think one thing we need is to have the law changed. But I think – and I think it's a good thing and it's a necessary thing – is that unions are much more focused than they have ever been in the past in working with unorganized employees and employees that probably couldn't even get organized. I think that's really important. I mean, it's important that the NLRB just put on its web site this whole explanation about how you can protect your rights without being in a union. I think that needs to happen, and I think that that can be a very powerful force. It's desperately needed.

We also do a lot of that kind of work. We do a lot of wage and hourly litigation. Oftentimes it's for undocumented workers. That's really important; I mean, it has to be done.

Q: Could you talk a bit about that. Given that they're undocumented, is that a real challenge for a law firm like yours to represent them, in terms of getting pay stubs, especially if they're being paid off the books or if they're being treated as an "independent contractor"?

BM: They always are. They are almost always paid off the books. Fortunately the law in this area remains pretty strong, and you don't have to have documentary evidence of the hours that you worked or the wages that you were paid. Your testimony is sufficient for that. You know, we've actually won a number of cases that were based exclusively on an individual's testimony or a group of individual's testimony about their hours and their wages.

Q: But if the employer just brings in supervisors who say, "No, that's not true."

BM: It's a credibility dispute.

Q: So how do you establish the credibility of somebody who maybe it doesn't come up in the case, but they are in the country illegally, whereas an employer can say, "I'm an employer and I pay my taxes." How do you win those cases?

BM: You know, oftentimes the employees are much more credible than the employers. They just are. Not always. Sometimes, they have kept their own records. We had a case for garment workers in a sweatshop that is now 12 years old, which we actually won at trial. None of the plaintiffs spoke any English or wrote any English. They were all Chinese-speaking. They had kept notes of what they were paid. Through their testimony and their notes, we were able to convince the jury that they were telling the truth, and we won at trial.

Q: They were being paid less than the minimum wage?

BM: Yes, and no overtime. I mean, they were working six and seven days a week. They typically were being paid by the piece. I do know that the judgment for them was about a half a million dollars.

But mind you, we're not always successful. Actually, we're right now litigating a case which is excruciatingly painful, for a single domestic worker who claimed that she was not paid minimum wage over time – and in some circumstances not paid at all. She is illiterate and speaks no English. And it's truly a challenging case because she has a hard time remembering exactly what happened.

Q: How do these people find your firm, and how do you decide what cases to take? Why would you take a case like that, for example, that seems so hard despite the injustice?

BM: Well, that's a good question. Let me start by answering the first part. I mean, we work with a number of different community groups that do organizing around issues like this: Make the Road, the Fifth Avenue Committee, the Urban Justice Center, and the Chinese Staff and Workers Association. We have worked with them since the time that this firm was founded. That case that I just described to you, the garment worker case, was brought to us by the Chinese Staff and Workers Association. So that's how they come.

And I mean, we took it because we thought it was a very compelling case. And you know, you come up against the reality that for someone like that, a federal judge, I'm sure she's never dealt with someone who is illiterate. So it's incomprehensible to her what that means.

Q: Can you say something about working with Local 1199? That's a very big, fast-growing union, mostly private sector. Are they experiencing a lot of these same challenges in terms of employer attacks?

BM: Yes, we do a lot of work for them. Amy Gladstein, one of the partners, now works full time at 1199. She's actually the Director of New Organizing there. My partner, Ellen Dichner, does almost exclusively 1199 work, mostly around organization drives. And the battles are very tough. I think she would say they have gotten much worse. She has been litigating a case involving an organizing drive in a nursing home in which the nursing home is represented by Rosemary Alito, who happens to be the sister of [U.S. Supreme Court Justice] Sam Alito. And they have appealed every single victory. They are fighting this tooth and nail. Every victory that we have gotten has been appealed, and it's been going on very intensely for years and doesn't show any signs of letting up.

And then, the nursing home industry: I don't do a lot of work in that area, but what little I do is very disheartening. I think nursing homes have for a long time been not playing by the book in terms of compliance with the union contract, much less the Fair Labor Standards Act. I remember doing a nursing home case in a unionized shop in which the grievant was not even being paid minimum wage and working 60 or 70 hours a week. I just remember feeling shocked by one of the things that's gone on for years: that they try to treat as many employees as possible as if they're not in the bargaining unit, because they're part time. They set up these agreements with employment agencies. Oftentimes they own the employment agency, but they're paying them through the employment agency. So they're saying that they're not really their employees. You know, so just enforcing the contract is one of the challenges.

Q: You mentioned employee rights. With more social media and some people venting on Facebook, you see stories of employees demanding as a condition of hiring that you give them your Facebook password so that they can check that. Has your firm run into cases like that?

BM: We have people who get disciplined for putting things up on Facebook. Of course, the problem of e-mail is just huge. I find it to be very big for me in my practice. Most people who come in with an employment problem have already been engaging in a lot of e-mail communications.

"A huge number of people are shocked when I tell them, 'You don't have any employment rights! There is no obligation to give you health insurance. There is no obligation to give you any warning before you're fired. There is no obligation to be nice and not harass you for reasons other than your protected classification.' And people are uniformly shocked to learn that."

Of course, it can help you or hurt you because chances are the employer has been too. But it's a problem. I recently had a bus operator who had a perfect record, truly a perfect record for 18 years. He got fired because he wrote a long diatribe against his supervisor, which was completely inappropriate. You know, it obviously found its way into the employer's hands and he was fired. I got him back to work, but it's very dangerous.

Q: What would you say is the current state of things on that? If he just sent a diatribe with his personal e-mail outside of work hours?

BM: Which is exactly what he did.

Q: That got him in trouble?

BM: Yeah. It was somewhat threatening. In general, the law is that employers can't discipline you for off-duty conduct, but there are several exceptions to that. One of them is if, as a result of that conduct, it would either put the employer in a bad light if the public knew about it. For instance, there have been these cases where, say, a cop brandishes a gun at someone off duty. That doesn't look good for the police department if the public finds out about it. So that's one exception.

Another exception is if the person would pose a danger to his coworkers or his supervisors. The third is if the coworkers won't work with the person as a result of the off-duty conduct. The theory is that the off-duty conduct really leaches into the workplace because of the nature of the conduct. In that case, there was a question about whether or not the guy was dangerous and threatening.

Q: Would you represent people who come to you and say that the employer is just routinely checking their e-mail at work and the like? Do judges just always side with the employer?

BM: If you are using your work e-mail, then it's going through the employer's property basically. I think it's very common for employers to say that anything that goes through their server is theirs. You shouldn't have any expectation of privacy or confidentiality of that. And you know, the court would not be concerned with the question of whether or not it was confidential, as much as what it ultimately said. Is it something that is problematic or not?

Q: If it said, "Let's all join a union?"

BM: Well, that's a different question. That's considered concerted activity that is protected under the labor law. If it's protected activity, that's a different story. They can't be disciplined for it.

Q: That the employer will make no sanctions.

BM: Exactly.

Q: Say some things about discrimination cases. Do you guys get sex discrimination or race discrimination cases?

BM: Yeah

Q: I read somewhere that the last—well, basically since the recession began that there has been a dramatic spike in discrimination cases, age discrimination, sex discrimination, retaliation. In about one fourth or one third of the cases retaliation is claimed from the employer for saying, "I feel so and so is harassing me." Are you seeing that in New York, a jump in those cases?

BM: I don't know that we're experiencing that. I find that there are often a lot of claims of discrimination. It's a frequent concern of employees if they've been disciplined or treated unfairly. I personally haven't noticed that I'm getting more calls about that than I had previously gotten.

Q: When you do get those cases, how do you feel about the EEOC? Is there a backlog?

BM: Oh no. It's huge. I have a case at the EEOC actually that's now at least three years old. It might even be four years old. The EEOC has told me that they were going to issue a complaint on it. It's just lingering there. Nothing happens. They are incredibly under-funded, as are many of the federal and state agencies that are charged with enforcing the labor and discrimination laws.

Q: What would you advise someone who goes out and gets her first job and she experiences what she thinks is just classic sex discrimination at work? Should they just quit their job? Should they go to the EEOC first? Should they go to a law firm like yours first? What's the best pattern?

BM: I don't think it's realistic to tell people that they should quit their job and just go look for another job because it's so hard. Frankly, this comes up with my own children. Not so much sex discrimination, but you know, I have a 26-year-old and a 22-year-old. They're out in the workforce. They're routinely treated as independent contractors, when they are really employees. And what I tell them to do is: if they feel that they can have a discussion with their employer without jeopardizing their job, they should have that discussion. If they don't, my view is keep your job. Look for another job. Then when you're no longer working there, sue the bastards.

That's for a situation where you can continue to work because it's not creating a hostile work environment for you, unlike sex discrimination. I think that presents a much more difficult issue. I would always advise someone who is experiencing some sort of illegal discrimination in the workplace to raise it with the employer. Because there is a way in which, once you have raised it, you've almost created a layer of protection for yourself. It becomes more difficult for the employer to at least immediately take some kind of adverse employment action against you because, the closer to the time that you've complained that you are adversely effected in your employment, the stronger your claim is going to be that that was done in retaliation for voicing the complaint.

In my experience, I have found that if someone raises it with an employer, that often can slow the employer down quite a lot. And then the employer has an obligation to take some action, to investigate it and to take action against the person who is perpetrating it.

Q: How would you recommend they raise it with the employer? Would they need a written record, an e-mail or something? Like say, "I would like to see you about what I think is sexual harassment," so that it's there?

BM: I would always suggest a written record, yes. Either before you have the communication or at a minimum afterwards just confirming what was said. That's always a good idea. You know, actually in New York State, it's legal to tape record a conversation even if the other person doesn't know that they're being recorded.

Q: Is there anything else that you'd like to say that we haven't asked about? Any other areas of your practice you'd like to say a word about?

BM: I don't know. I guess the only thing that I would end with is that, as difficult a time as it is to be practicing in this area, I think it's crucially important that people continue to fight this fight. Unless we can maintain a middle class in this country – which we seem to be doing a worse and worse job of – the country is going to become more and more dysfunctional. I think we've all got to do whatever we can do to try to ensure that we provide people with an opportunity to support themselves in a decent fashion.

I read recently in the Times that half of the jobs in the United States now pay under, I believe it was under $38,000 a year. That is a shocking figure.

I think one of the things that is always—always has been a constant in my practice is that people do not understand that in a country like the United States there are no employment rights. I could say that about people in every walk of life that come into my office. You know, whether they are vice president of a bank or something or someone who is working as an orderly in a non-union health facility, they don't really. I would say the person on the low end, they might have a better understanding that there are no rights.

But a huge number of people are shocked when I tell them, "You don't have any employment rights. There is no obligation to give you health insurance. There is no obligation to give you any warning before you're fired. There is no obligation to be nice and not harass you for reasons other than your protected classification." And people are uniformly shocked to learn that.

I think unfortunately this generation will get that better. I think, maybe in our generation it was somewhat less common. I feel like in the workplace, to the extent that there were unwritten rules that existed, like your mom-and-pop shop where people actually felt like they wanted you to work there for your whole life – those are all gone. And in the absence of any actual laws, I think it's now made a real free fall in a way that probably wasn't quite as bad in our generation.

I mean, no one gave you a 1099. If you went to work, you had a W2, or at least that was my experience. Now you would be lucky if you would get a W2 in most jobs, I think. Take the restaurant industry in New York: you could walk into any restaurant and find a wage-and-hour violation, I bet. And you sue a restaurant owner and they'll tell you, "I can't pay that because then I wouldn't be competitive with every single other restaurant in this city."

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