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If you have an event or announcement you would like to see in the next Common Ground newsletter please contact one of our editors.



**LABOR AND EMPLOYMENT
RELATIONS ASSOCIATION**

LERA AND UB TEAM UP FOR DISCRIMINATION FORUM

On November 16, 2005, the University of Buffalo Law School co-sponsored and hosted a LERA meeting at the Center for Tomorrow on the University of Buffalo North Campus in Amherst. LERA and the Law School assembled a panel of three distinguished speakers to discuss emerging issues in employment discrimination law. The speakers included Elizabeth Cadle, Director of the U.S. Equal Employment Opportunity Commission's Buffalo office, University of Buffalo Law School Professor Dianne Avery, and Douglas Bantle, Chair of the Upstate Region for the National Academy of Arbitrators. LERA members were joined by a number of interested law students creating a more enjoyable atmosphere. Also in attendance was Spencer H. Lewis, Jr., District Director of the E.E.O.C. Elizabeth Cadle, in a very informative presentation, spoke on the E.E.O.C.'s current goals. She outlined the E.E.O.C.'s five point plan, which includes; proactive prevention; proficient resolution; strategic enforcement and litigation; promotion and expansion of mediation; and using the E.E.O.C. as a model workplace. Cadle stressed the E.E.O.C.'s current emphasis on education through public outreach to workers in an

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OPPOSING VIEWS PRESENTED ON GLOBALIZED OUTSOURCING

On September 29, members of Cornell University's ILR Alumni Chapter joined LERA members at the Hearthstone Manor for a dinner meeting that focused on "Globalization of Work: Implications for Management Strategy and Public Policy." Guest speakers Rosemary Batt, PhD., Cornell University ILR Professor, and Jack Davis, CEO of I Squared R Element Co., Inc. and founder of Save American Jobs, presented their views on the impact of globalization upon American manufacturing and trade policies.

Dr. Batt discussed her findings from research she conducted on the call center industry. She surveyed US companies that operate in-house call centers, US companies that outsource their call center operations, and Indian offshore subcontractors performing call center functions. She looked at factors such as years of education of the staff of the call centers, the extent of training, the number of weeks it takes employees to become qualified to work in the call centers, the amount of discretion employees may exercise, the salaries the call center employees receive.

In analyzing the data collected, Dr. Batt considered the effectiveness of each model for the company's purpose of competing on the quality of their service and the satisfaction

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GLOBALIZATION

of their customer base. She observed that although maintaining a call center in-house is the most expensive model, it is attractive because the call center employees are generally more professional, stable and experienced. In contrast, it is “not a sustainable model” for companies to outsource their call center work because those employees are lower educated and exercise less discretion, making those employees least effective. She found that it is appealing for companies to use Indian offshore subcontractors because while the employees exercise very little discretion, they have a higher skill level than employees of domestic subcontractors. In addition, while the pay level is low by American standards, it is a good wage by Indian standards and a source of motivation for that workforce.

Dr. Batt concluded that while currently the majority of call center jobs remain in the US, the picture could change in the future. Companies who are concerned about maintaining their customer base to remain competitive keep the call center work in-house. However, American jobs may be threatened as US companies develop trust in Indian managers and give them more discretion to handle complex matters.

Mr. Davis hit on a number of points related to outsourcing and globalization. He began by describing his experience as a manager of a manufacturing company. He found that maintaining a bonus system based on company profits resolves many management problems and helps his company stay competitive. He developed a system where a third of the company’s profit is divided among the employees, there is a completely funded profit-sharing retirement program, employees are entitled to three weeks of vacation after 13 years of service, and the company contributes \$400 per month to health insurance. He concluded that this system fosters a higher employee retention rate and an environment where employees supervise each other with the goal of achieving higher profits to obtain a higher benefit through the bonus system.

The heart of Mr. Davis’s presentation dealt with free trade. “Free traitors,” as he calls proponents of free trade, support a policy that destroys the American middle class. The irreplaceable manufacturers that have been essential to the growth of the middle class are closing their plants and transferring to other countries, thereby reducing US wealth and opportunities for the middle class. Mr. Davis criticized free trade as making it impractical for companies to stay in the US. Foreign manufacturers not subject to the fees and taxes that increase the cost of labor in the US have a huge advantage over domestic companies.

Mr. Davis discussed the situation Delphi is facing. The problem he sees is that US car companies are losing the market share to Japanese companies. GM’s plan to reduce costs is to replace the parts made by Delphi with parts made by Chinese companies who are not subject to taxes. Free trade will likely destroy many more American industries.

The solution Mr. Davis seeks is to cancel NAFTA, CAFTA and the WTO. The government should impose trade-balancing tariffs on all countries that sell the US more than the US buys from those countries. He argued that trade partners of the US use tariffs to protect their own industries, and that the US should do the same. Without tariffs, Mr. Davis sees the destruction of the middle class and the transformation of the US into a third-world country.

The approaches taken by Dr. Batt and Mr. Davis for thinking about these issues were very different. Whether persuaded by Dr. Batt’s survey research or Mr. Davis’s statistics, those in attendance surely found the information and theories presented to be an interesting springboard for further discussion of the impact globalization has on corporate strategies.

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DISCRIMINATION

attempt to prevent discrimination. Due to its limited resources, the E.E.O.C. strategically works to combat emerging trends of discrimination. In an attempt to free up some of those resources, the E.E.O.C. is focusing on its mediation program. Currently, charging parties agree to mediate their disputes approximately 85% of the time. In contrast, only 30% of respondent employers agree to engage in the non-mandatory and non-binding process. The E.E.O.C. hopes to expand acceptance by employers of this process thereby saving the parties significant costs and in the hopes that many of the disputes will be resolved before involving the agency in a time consuming investigation. When asked about possible future trends in discrimination, Cadle identified recent claims involving transgender discrimination as a possible forecast of the future.

Professor Avery's presentation focused on the individual case of *Jespersen v. Harrah's Operating Co.*, 409 F.3d 1061 (9th Cir. 2005). Darlene Jespersen, a Reno bartender was fired for refusing to comply with her employer's appearance policy. The policy applied to both men and women but applied different standards to each sex. Jespersen was fired for refusing to wear makeup, a requirement for women, but not men. Jespersen brought a Title VII discrimination claim against her employer alleging she was terminated for failing to meet a sexist stereotype. Jespersen's case was dismissed by the district court and the 9th Circuit Court of Appeals affirmed the ruling. The 9th Circuit applied an uneven burden test and ruled that the employer's appearance rules for males and females were equally burdensome. The Court refused to apply *Price Waterhouse v. Hopkins*, a 1989 Supreme Court decision ruling that an adverse employment action based upon an employee's failure to conform to a sexual stereotype is discrimination under Title VII. Professor Avery reviewed the history of the discrimination of women in the profession of bartending noting that in the past certain states had laws prohibiting woman from bartending. However, currently, 52% of bartenders are women, although on average they earn approximately ninety dollars a week less than their male counterparts. Professor Avery concluded by identifying a trend towards the feminization and sexualization of bartenders.

Arbitrator Douglas Bantle spoke on the role of arbitrators in cases requiring interpretation of discrimination law. Bantle stated that arbitrators get their authority to hear cases involving discrimination law from the language of contracts and collective bargaining agreements containing anti-discrimination clauses. However, Bantle asked the question of whether ethics allow arbitrators to take on such cases. While ethical codes generally require arbitrators to resign from a case where they do not have the expertise to rule on the issues, Bantle believes that most arbitrators will defy that rule. In addition, there is no consensus among arbitrators as to how they should handle issues regarding interpretation of statutes. Bantle posed some questions to which there are currently no uniform answers. Should the arbitrator rely solely on the contract to be enforced or should the arbitrator also look to applicable statutes? May the arbitrator do independent research or must the arbitrator restrict himself to the arguments presented by the parties? Bantle believes that arbitrators are generally not qualified to handle issues of employment discrimination, but that if there comes a time when they choose to do so they should undertake training. Bantle believes that with the proper training arbitrators could be well qualified to handle such cases.

The meeting concluded with an audience discussion about the issue of stereotyping and appearance requirements in the workplace. Professor Avery predicts that the U.S. Supreme Court will review Jespsen's 9th Circuit decision.

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