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LETTER ON THE SOCIAL JUSTICE PERSPECTIVE

BY PETER SUNG OHR*

I hope most would agree that the law is supposed to be the codification of our societal values, but therein lies the conflict. What and whose societal values are being codified through the creation, interpretation and enforcement of the law? History teaches us that often the law reflects the values of the powerful within our society. Certainly, the greater masses have also benefited from the law; however, significant efforts, costs and time have been expended often to make only paper changes. While I am not naïve to believe that many laws serve pecuniary self-interests, even when the noble purpose of the law is to protect and provide justice, frequently the people charged with creating, interpreting and enforcing the law suffer from a lack of perspective that is necessary to mete out true social justice.

I believe the lack of perspective is the weak link in an otherwise very strong chain that prevents real long-lasting solutions. Often as a society we expend great resources on shoring up the letter of the law but fail in living up to the spirit of it, in part due to the lack of perspective. I believe that lack of perspective stems from a deficiency in diversity of thought. When I refer to a lack of diversity, I do not limit it simply to race or ethnicity. I speak of the broadest definition of diversity to include economic, geographic, gender and religious backgrounds to name a few nonracial examples. Often the default system of checking-off boxes for race and ethnicity provides only a surface level

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diversity that does not equate to in-depth perspectives. Frankly, that surface level diversity often results to greater harm in the long run.

Whether I bring a genuine diversity of thought and perspective are issues I deeply consider when evaluating whether federal labor law violations have occurred in my role as the Regional Director of the National Labor Relations Board in Chicago. I am an immigrant to the United States, I learned English as a second language, I grew up with modest means, I worked part-time while attending junior college, I was the first to graduate from college in my immediate family, and I am of Asian descent. Each of these identifying marks brings a rich tapestry of additional fabrics of diversity. For example, the difficulty in learning English as a second language was a byproduct of a peripatetic immigrant's life, which in turn caused me hardship in schools by my peers and educators, which then resulted in the mistaken belief by others that my lack of communication skills meant I was a stereotypical timid Asian boy.

I sense that this additional layer of diversity also works conversely. For example, a person who was brought up in an upper socio-economic family most likely will have the wonderful opportunities that come with growing up in a family with college-educated parents and sufficient financial resources. I surmise that most of us would hope to provide these same types of opportunities for our children. The concern, as I see it, comes when this perspective becomes the dominant if not the monolithic perspective that supposedly reflects our societal values.

Even before I was appointed to my current position, I recognized that my perspective of United States federal labor law was unique. For sure, employees of the National Labor Relations Board (NLRB) hail from a variety of backgrounds. The NLRB is proud and should be proud of the diverse backgrounds of its career employees. It is not uncommon to have Agents of the NLRB be the first in their immediate family to have graduated from college. Nevertheless, when I was appointed to my current

position, I recognized that few Regional Directors in the then 76-years of the NLRB were immigrants to the United States, let alone of Asian descent.

I have often publicly said that I hope my personal background provides me with a perspective to help better understand and decide whether a violation of the law took place. To be clear, my perspective, in and of itself, will not make a nonviolation a violation or vice versa. However, my perspective will help me understand and appreciate why things happened the way they did. During Regional case agendas to determine whether a violation of federal labor law occurred, members of the agenda committee often hear me talk about how my mother would have reacted relative to the putative victim's actions.

Similar to criminal law, labor law cases are highly fact intensive, and often there is a dispute as to who is telling the truth. In attempting to determine the truth, it is my responsibility to gauge if the U.S. government has sufficient evidence to establish a violation and whether the government can convince a judge of the necessary inferences. Depending on one's perspective, what could be considered a reasonable inference changes. For example, one could argue that it is implausible that a putative victim would not attempt to defend him/herself or seek the assistance of a coworker when a supervisor threatens the putative victim with an unlawful retaliatory act. That position is especially understandable when ones upbringing and/or culture encouraged verbal sparring; when one grew up feeling empowered; or when one has confidence about the protections of the U.S. system. Moreover, when one has very little to risk in directly confronting a supervisor, it makes reasonable sense to be dismissive of the putative victim's claim.

Moreover, while one may learn to appreciate and sympathize with a victim's plight, unless one has been repeatedly exposed to such experiences in the same or equivalent circumstances, I believe it is only human nature to fall back on one's natural de-

faults that have embedded one's vision of the world long before one consciously started thinking about such matters.

Labor law applies an objective standard – not dissimilar to other areas of the law – on whether an employee was coerced, intimidated, threatened, etc. The standard stems from the “objective” reasonable person's perspective, i.e., would a reasonable person feel that his/her rights under the National Labor Relations Act were being restricted. As objective as that may appear, I believe that the objective standard is only meaningful if that takes into account the diversity of the workforce, and a keen awareness of those perspectives. Unless the person charged with enforcing the law is cognizant of those perspectives, I believe something will get regrettably “lost in the translation.”

I also try to be mindful of and hope that my background provides me with sufficient understanding of the needs of the community as they relate to labor law protections. Truly appreciating the needs of the community is often a mystery because of the very little feedback from the underserved sub-communities. Some may assume the silence means there are no significant issues that cry out for labor law protections, and depending on one's background, I suppose that is a reasonable assumption. However, my perspective tells me otherwise. Using my father as an example, I know that he would not have the time or inclination to approach a federal agency to find out about his legal rights as an employee. He was too busy trying to provide for his family to truly understand the intricacies of the U.S. system. Further, most of his limited knowledge of his rights came from members of his sub-community, who had the same non-diverse perspective as his.

My having that broader perspective, I know that the NLRB has to be proactive in getting the message out to the different sub-communities. I know that the NLRB will at first encounter hurdles and obstacles. I know the communities' reaction may appear at times indifferent. However, I understand that the

seeming indifference is actually a protective mechanism developed from that sub-communities' experiences. Thus, why as the Regional Director having an intensive and proactive outreach program is an integral part of my mission.

Again, none of this means that I would find a violation of federal labor law just because of my perspective, but rather, it will help me do my job and in return serve the community better. The greater the diversity of the people who create, interpret and enforce the law, the more hopeful I am that we as a community will be able to make real progress to achieve social justice.

Success stories quickly spread within communities, and not just in the community of employees but also within the community of employers. In the end, preventing violations from taking place will be the true mark of achieving social justice.

— *Peter Sung Ohr*

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