Challenging and Controversial Examples of Prosecutorial Discretion During my Term (November 1999 –May 2001)

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ABA Labor and Employment Law Conference
Philadelphia, Pennsylvania
November 9, 2007

I received a recess appointment from President William Clinton in November 1999 and served until May 2001. I had been a staff attorney with the United Auto Workers in Detroit for almost 30 years was the first former union attorney to hold this office.

Fortunately for me, my predecessor, Fred Feinstein, left me with Mary Joyce Carlson as my deputy. I can never thank her enough for her assistance and guidance during those first several months. Some of you may get the opportunity for a government appointment and I would urge you to take it. However, let me warn you that while knowledge of the law is important, you will still have a lot to learn. In that regard, the senior staffs of all federal and state agencies have both my sympathy and my admiration: with every change of administration, they have to endure the varying degrees of competence dealt them by the fortunes of the political appointment process.

However, our topic today is prosecutorial discretion. It is an awesome power. I don't want to sound flippant, but I can recall laughing aloud reading a newspaper article about me in which I was described as a little known but extremely powerful bureaucrat. I had fun wearing a nametag to the NLRB the next day.

The issuance of a Complaint, standing alone, has great ramifications. However when the respondent chooses to litigate, it is a form of review. But as you know, there is no appeal however from a decision not to issue a Complaint. My toughest cases all involved decisions not to issue.

My most challenging case was sitting on my desk when I walked in.. In 1999, the United Food and Commercial workers had won an election for meat cutters at a Wal-Mart super center in Jacksonville, Texas. The meat cutting department was immediately eliminated after the election as case-ready meat was introduced in this first Wal-Mart location. There had been no mention of this change in the pre-election hearing. It was announced just after the election. The Region had conducted and investigation and found no merit. I reached down and had the case transferred to my office in early 2000.. We conducted a thorough investigation for better than a year. We issued an investigatory subpoena for company documents. Both parties were asked to meet with senior staff and me on two separate occasions. If you have been in such meetings, you know the grilling can get intense.

The evidence showed that Wal-Mart had indeed been working on converting its retail meat operations to case-ready meat for some time. By the time of our decision, case-ready meat had been introduced in some 30 stores. My theory was that the Jacksonville store received priority treatment to be the first case-ready meat store as a result of the NLRB election. Our subpoena had asked for documents related to the timing or schedule of store introduction of case-ready meat. No such documents were presented to us. The union had noted that there had been some state court decisions finding Wal-Mart had improperly withheld documents during discovery in other civil matters.

If a Complaint were to issue it would have been based on the timing and the lack of documentation on such schedule. Understand, we had several boxes of documents showing Wal- Mart's preparations to go to case-ready meat.

I also knew the attorney for Wal-Mart quite well and in one of our meetings I flat out told him that ever bone in my body told me that the sudden introduction of case ready meat was a reprisal for the union vote. I told him that I found it difficult to believe there was no documentation on the store schedule for the case-ready meat introduction. I asked him to tell me to my face that he had asked Wal-Mart for schedule documentation.. I asked him to tell me that Jacksonville did not go to the top of the list for case-ready meat because of the NLRB election. He assured me my suspicions were unfounded and claimed that Wal-Mart routinely acted quickly and did not spend months making these types of decision, drafting proposals and plans between various levels of management. He assured me that the decision to introduce case ready meat at Jacksonville first was not related to the NLRB election.

I did not see how a trial subpoena would yield a different result than our investigatory subpoena. No "smoking gun" or former employee had come forward with incriminating evidence. There was no evidence attributable to any agent of the employer alleging that the introduction of case-ready meat was in retaliation for the vote for union representation.

The UFCW argument was that Wal-Mart's anti-union history and the timing alone was sufficient to warrant complaint.

Wal-Mart had one other thing going for it. I had decided when I took the oath of office to never be totally alone on a Complaint. Put another way, while I was fully aware of the powers of a General Counsel, I decided that if the rest of the senior staff were unanimously on the other side, I would not be by myself. After more than a year of investigation, none of the senior staff thought we had enough evidence to justify a Complaint. I did not issue a Complaint in the Jacksonville case and so advised the parties in early 2001.

As you can tell, that decision has troubled me. I have discussed this case with several close friends and the response that hit me the hardest was "But Leonard, everyone lies nowadays!" Was the timing and the lack of documentation enough to warrant a Complaint? I have become somewhat more cynical in recent years. Corporate misconduct and ethics has been a serious problem.. I gave an ethics speech earlier this year at an ABA midwinter conference dealing with corporate spying on employees and did some research on corporate ethics. I concluded that corporate ethical standards in general are not very high. Hiding facts and documents along with deliberate false statements seem to be more prevalent at all levels of our society. As a nation, we seem to taking the wrong path when it comes to principles of “truthiness”.

If I had it to do over again, I might have continued the investigation for several more months or even taken some depositions. In my defense, I believe that I went beyond the normal standards used to investigate charges. The use of investigatory subpoenas and depositions is rare, but as I read section 3(d) of the NLRA, the General Counsel has very broad authority to investigate charges. Despite the breadth of 3(d), I can still recall a minor uproar when I issued a memo advising the Regions that they no longer had to clear issuance of investigatory subpoenas with Washington.

I started as a recess appointee and when Congress recessed in 2000, I was hired as an Acting General Counsel. As a practical matter, when President George W. Bush took office on January 20, 2001, I served at his pleasure. I had been advised that most Republicans viewed me as fair and competent and that with hundreds of appointments to be made, the new President’s "pleasure" would probably continue until the Fall of 2000..

However, there was another Wal-Mart case also brewing in early 2001. We had noticed a pattern of similar unfair labor practice activity during UFCW organizing drives at five or six stores in different NLRB regions. The allegations included: threatening captive audience speeches by national office executives, removal of department heads or store managers in response to employee complaints, and placement of college trainees from the national office in appropriate units scheduled for election. The student trainees spent a fair amount of time campaigning against the union and were always transferred out of election unit shortly after the vote.

I called Wal-Mart's attorneys, told them about this pattern, and gave them the Complaint numbers. I told them that if there was evidence of wrongdoing at the national level, we would consider issuing a nation-wide Complaint and seeking a remedy to be posted at all 5000 or so Wal-Mart locations. I asked them to meet with me in a month to discuss the issue and we set up a date. About a week before that date, Wal-Mart called and said they needed another month to get ready for the meeting; I think I gave them another two weeks. About a week later, in the early evening of April 18, 2001, I received a call from

the White House telling me that my time was up. I asked for two weeks to make a last ditch attempt to resolve collective bargaining agreements with both NLRB unions such that my successor could properly blame me for the labor agreements.. However I was asked to clear out in two days. I am not alleging that my tenure was cut short because of this Wal-Mart investigation. I have no evidence to make that claim. However, I due note coincidence of timing in both of these Wal-Mart cases.

By the way, the office of General Counsel was left vacant for a record 26 days until John Higgins was finally named Acting General Counsel on May 16. He lasted all of 17 days. His successor, Arthur Rosenfeld began his term in June 2001. Mr. Rosenfeld, with John Higgins as his deputy, met with Wal-Mart and concluded there was no basis for issuing a national Complaint. I guess this potential Complaint case was thus an important decision involving prosecutorial discretion that I never got to make. The case may also illustrate why it is better to have confirmed appointees at the Board.. The bipartisan use of recess appointments and the failure to fill Board vacancies in a timely manner is a disservice to the agency. It should be rarely not commonly used. No General Counsel should be concerned about a call from the White House while investigating a major charge.