SYMPOSIUM PROCEEDINGS

WORKFARE: CURRENT CHALLENGES IN ORGANIZING AND LITIGATION

INTRODUCTION

"Workfare: Current Challenges in Organizing and Litigation" is the first in a series of "state of the field" presentations sponsored by the *Review of Law and Social Change.* The idea for this series came from a discussion held by the New York Legal Aid Society Homeless Rights Project ("HRP") in 1998. Facing an increasingly hostile state and federal judiciary where long-used approaches to fighting for the rights of the poor were failing, HRP gathered together a range of people involved in the field to hold a brainstorming session about what new avenues could be taken to combat homelessness and get past the walls they were up against. Using this forum as a model, *Social Change* brought together litigators, politicians, policy advocates, activists and academics in November, 1998 to speak about the social, legal and economic injustices of current workfare programs. Speakers discussed their roles in challenging the workfare system, including litigation, legislative advocacy, worker organizing and know-your-rights trainings. What follows is an edited transcript of the proceedings and a resource bibliography that gathers noteworthy law journal and newspaper articles on the topic.[1]

PRESENTATION

MARC COHAN[2]: I am going to focus on a couple of cases that we're working on in New York and make analogies to comparable issues we're working on in other parts of the country. Then, Richard Blum, who's with the Legal Aid Society of New York City, is going to touch on some other cases that are part of New York workfare litigation strategies.

The Welfare Law Center is working on a variety of issues. You can think of the issues as basically being divided up into two groups. First, the

1. Footnotes have been inserted into the transcript in order to assist readers in finding cases, legislation and other information and specific matters discussed or mentioned by the participants.

2. Marc Cohan is the Director of Litigation at the Welfare Law Center, which advocates on behalf of low-income people to ensure that adequate income support is available to meet basic needs. The Center's program is concentrated in two areas: Project Fair Play, which involves direct participation and support for litigation nationwide, and the Client Engagement Project, which includes the Low Income Networking and Communications Project and the Workfare Research and Advocacy Project.

determination of whether or not the current New York City administration's program of putting all public assistance recipients into workfare is a correct approach. The second group of cases center around what happens when the recipients are put into workfare and how they are treated after they've been assigned. Mr. Blum is going to focus on the assignment of people to workfare: whether it is appropriate and how they are really treated in the assessment process. I am going to focus on what happens after they are assigned, by discussing a couple of issues that arise.

First off, one of the results of the Personal Responsibility Act of 1996,[3] commonly known as Welfare Reform, is that it increased the obligation of the states to move people from welfare programs into work activities.[4] Among the things that it did was to narrow considerably the options of states to assign people to different kinds of activities and have those activities count to meet participation rate requirements set forth by the Federal Government.[5] However, that being said, it did not dictate, as the current New York City administration would have people believe, that workfare is the only activity to which people can be assigned.[6] Once people, are assigned to a work activity, however, they may acquire the rights and status of an employee for certain purposes and for certain protections.[7] And that's what some of our litigation has centered on.

I want to discuss two cases in New York. First, is a case called *Capers v. Giuliani*.[8] In the *Capers* litigation, public assistance recipients assigned to do workfare were being required to clean New York City streets without adequate health and safety protections. Conditions under which they were working were truly horrendous; they were being deprived of drinking water, access to toilets, were being required to lift up dead animal carcasses with their bare hands, required to work with traffic rushing by, and otherwise being subjected to conditions that would be horrendous if your worst enemy were doing them, as opposed to being merely people who were forced to do it because they are poor. We were able to secure a preliminary injunction staying the City from requiring workfare workers to do

3. Title IV-A of the Social Security Act as amended by § 103(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193. Title IV-A is codified at 42 U.S.C. §§ 601 et. seq.

4. Social Security Act, § 407(a)(1) and § 407(a)(2), as amended by § 103(a) of Pub. L. No. 104-193.

5. Social Security Act, § 407 (d), as amended by § 103(a) of Pub. L. No. 104-193.

6. Workfare, also known as "work experience", is one of twelve approved activities to which a recipient may be assigned. *Id.* In New York State, workfare is an activity to which a recipient may be assigned only "if sufficient private sector employment is not available." N.Y. Soc. Serv. L. § 336(1)(a).

7. *See* Mannix, Cohan, Freedman, Lamb & Williams, *Welfare Litigation Developments Since the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 31 CLEARINGHOUSE REV. 435 (Jan.-Feb. 1998).

8. *See* Capers v. Giuliani, 677 N.Y.S.2d 353, 253 A.D.2d 630 (N.Y. App. Div. 1st Dept., 1998) (reversing the lower court's issuance of preliminary injunctive relief for the plaintiffs).

these activities until the city guaranteed that they were provided with appropriate health and safety protections, the same health and safety protections that regular workers enjoy.[9]

The lawsuit was significant both in terms of the result achieved, and also in terms of who the plaintiffs were. In addition to the individual named plaintiffs, whom you would normally sue on behalf of, the lawsuit was also brought on behalf of two welfare rights organizations. One group, which was represented by the Welfare Law Center, was ACORN, a national organizing entity focusing, among other issues, on welfare rights organizing. The other group, represented by the National Employment Law Project, was a group called Community Voices Heard, which is a local organizing entity that focuses primarily, but not exclusively, on mothers with children.

The lawsuit was successful in that the court entered an order requiring that adequate health and safety protections be provided. While the lawsuit was pending, because of publicity generated by the lawsuit as well as pressure brought to bear through city council hearings, newspaper coverage, and the activities of the organizers and others who are horrified by the terrible working conditions that workfare-workers were required to labor under, the state legislature enacted legislation that was a double-edged sword.[10] It extended the protections of regular municipal workers, public employees, to workfare workers.[11] And that's a double-edged sword, because on the one hand that is good in that one wants workfare workers to be treated as much like regular workers as possible and to enjoy the same protections. It was bad in that in some respects it serves as a limitation of rights because the Appellate Division, First Department, then held that by extending the protections of regular workers to workfare workers, you also extend the handicap that regular workers have.[12] That is, workfare workers must exhaust all remedies through the administrative agency before they can go into court and secure protections. As those of you folks in labor law discover, while the government gives workers rights on one hand, they limit those rights on the other. Typically, the limitation is that workers have to go before the administrative agencies that are often understaffed, slow, and cumbersome, to effectuate the rights that they are granted by

9. *Id.*

10. N.Y. Soc. Serv. Law § 330(5) (McKinney 1999) provides that "Notwithstanding any other provision of this chapter of the labor law, recipients of public assistance. . .who are required to participate in. . .work experience activities. . .shall be included within the meaning of the term 'public employee' for the purposes of. . .section twenty-seven-a of the labor law."

11. *Id.* The protections provided for "public employees" as referenced in N.Y. Soc. Serv. Law § 330(5) may be found at N.Y. Labor Law, § 27-a.

12. Capers v. Giuliani, 677 N.Y.S. 2d 353.

statute. Workers' compensation is a perfect example of that, where workers who are injured on the job often cannot sue the employer directly, but must go before an administrative agency to secure a statutory benefit.

Capers was also significant for other locations throughout the country which are wrestling with health and safety protections. For example, workfare workers in the state of California, in San Francisco, are being required to clean public buses and cable cars, and are subjected to horrible working conditions, including being forced to use harsh chemicals without face masks and gloves.[13] Those workers, following up on the work that was done in New York City, and other organizing efforts of local groups, were able to secure adequate health and safety protections. Those protections were also achieved through appropriate pressures and through the threat of litigation.

Another issue that arises is how people are compensated for the work that they do. Typically, workfare workers work side by side with regular workers. In a lawsuit that was brought jointly by the Legal Aid Society, the National Employment Law Project ("NELP"), and the Welfare Law Center, we challenged the fact that workfare workers were required to work at less than the prevailing wage for the work they were doing, where that work was comparable to work being performed by regular city workers.[14] For example, one of the named plaintiffs was required to do electrical repairs side by side with regular city workers. He was doing it for the welfare benefits while the regular city worker was making $23.00 an hour. The plaintiff ideally wanted the city job, as did all the other plaintiffs working on any jobs, for that matter. They didn't want to be on workfare, but if they are going to be on workfare, they want to be fairly compensated for the work that they are being required to perform. We went to court and the judge agreed with us.[15] The state legislature, terrified about the result I suppose, passed legislation making it clear that the prevailing wage will not apply.[16] We are obviously dismayed by that result, although we were heartened by the initial ruling from the court which recognized, and in very strong language, the equity issue involved here. The other heartening thing about this case was that organized labor came in very strongly and submitted amicus briefs because they recognized that a threat to one worker's wages is a threat to all workers' wages. And these issues are playing out throughout the country. For example, in Ohio, the Workfare Law Center

13. *See e.g.* <http://www.sfo.com/~coh/toxicfacts.html> (discussing onsite workplace hazards of workfare participants as documented by the San Francisco grassroots organization P.O.W.E.R.).

14. Brukhman v. Giuliani, 662 N.Y.S.2d 914, 174 Misc. 2d 26 (N.Y. Sup. Ct., N.Y. Cy., 1997), *rev'd*, 678 N.Y.S.2d 45, 253 A.D.2d 653 (N.Y. App. Div. 1st Dept. 1998), *leave to appeal denied*, 691 N.Y.S.2d 378, 93 N.Y.2d 908 (N.Y. 1999).

15. *Id.*

16. N.Y. Soc. Serv. Law § 336-c(2)(b) (McKinney 1999).

has been able to secure wage and hour equity on behalf of workfare workers.[17]

We have also filed, with NELP, a case involving the calculation of hours where there are minimum wage violations. This case is interesting to the extent that workfare is work at all: even if one cannot secure prevailing wage protections, one ought not to require these people to work at less than the minimum wage. In fact, welfare recipients are being required, in some instances, to work at less than the minimum wage. That is truly illegal. So far, in one case we filed, the City of New York has settled.[18]

There are other cases that have been filed, but we don't have the time to go into them in detail. Some of the issues you ought to be thinking about are issues of treatment after the person has been assigned to the job, like those we've been litigating or doing administrative hearings around, including sexual harassment and discrimination, such as the case we are working on with the National Organization for Women Legal Defense & Education Fund (NOW LDEF).[19] Now, I think Ricky Blum is going to turn to questions about what happens before the person is assigned to a job.

RICKY BLUM[20]: First, a few opening comments and reflections on Marc Cohan's comments. I think a couple of things are very striking in the experiences which Marc has just described. First, just because you win in the legislature doesn't mean you win, and particularly doesn't mean you win in court. If you look at *Capers*[21] and *Brukhman*,[22] what's interesting is that while we were aware in *Brukhman* that we had "lost" in the legislature, we still believed that there was a constitutional claim. That was recognized and the statute was repealed.

However, in *Capers*, we thought we had won in the legislature and what was curious is that the court found a way for our victory to be converted into a defeat.[23] Second, the experience in *Capers* also points to some of the tensions that we have been dealing with between, as Marc Cohan said, labor law and welfare law. Particularly regarding the question of remedies, because I think it's too often the case that people focus on substantive rights without recognizing the nitty-gritty, the actual ways that you have to vindicate your rights. And, what welfare practitioners have

17. *Workfare S. . . Puts Woman in Time Bond*, TOLEDO BLADE, Jan. 1, 1998 at 11; *Workfare Recipients Required to Work Less*, FREMONT NEWS MESSENGER, Jan. 1, 1998.

18. Cardos v. Turner, et al., 98 Civ. 4215 (S.D.N.Y. 1998).

19. *See* Sherry Leiwant's comments *infra*.

20. Richard Blum is a staff attorney with the Legal Aid Society, Civil Division. He graduated from New York University School of Law in 1989, where he was a member of the Urban Law Clinic. He joined Legal Aid in 1990 in its Civil Appeals Division and is currently in the Bronx neighborhood office. Mr. Blum has been counsel on numerous workfare-related claims, including recent class action lawsuits and individual cases.

21. *Capers*, 677 N.Y.S. 2d 353.

22. Brukhman v. Giuliani, 662 N.Y.S.2d 914.

23. *Capers*, 677 N.Y.S. 2d 353.

long known—and, of course, labor lawyers as well—is that is what really counts and what is so difficult. Particularly, for welfare recipients, who are almost always without representation and who face an increasingly hostile administrative system, the "fair hearing" system has become more and more of a misnomer, particularly with respect to the work programs.

And, of course, there are a lot of reasons why welfare recipients working on these jobs are even less equipped than regular workers, or people who are recognized as employees, to vindicate their rights through the labor law administrative system when they don't have a union representing them. That's one of the issues that Marc Cohan and his office [Welfare Law Center] and the National Employment Law Project, also have addressed. For instance, what do you do if you are in a six-month assignment and by the time the inspecting agency comes around in response to your complaint, you are no longer there? There's no union to represent you, they won't recognize anyone else to represent you and so forth and so on. So there are a lot of reasons why remedies that are inadequate for regular employees are even worse for welfare recipients, and why the regular traditional welfare remedies are not very good, and why we always have to remember remedies when we're talking about rights. Because rights don't mean a thing without the appropriate remedies available to people.

There are two cases that I am working on right now which I would like to discuss. One concerns the issues that Marc Cohan described: the question of how people are assigned and then what happens once they are assigned. The other one concerns the assignment process up-front. The first is a case called *Mitchell*,[24] which concerns the treatment of people who are found to have medical limitations—mental or physical or both types of impairments—that limit in some fashion the kind of work they can do and how the city is supposed to accommodate them to ensure that assignments don't exceed their limitations. Of course, the City does no such thing. First of all, the City uses a medical operation, called HS Systems, which I sometimes think couldn't recognize a hangnail, and which has particularly glaring gaps, including its gross incompetence with respect to any kind of mental disability. There is also, by the way, no system of accommodating people in the process of evaluation, so if you can't make it in or you have some problems actually going through the medical review or getting into or calling for an appointment, there is no method of having that accommodated whatsoever.

24. Santana v. Hammons, 673 N.Y.S.2d 882, 177 Misc.2d 223 (N.Y. Sup. Ct., N.Y. Cy., 1998), *later proceeding sub nom. See also* Mitchell v. Barrios-Paoli, 687 N.Y.S.2d 319, 253 A.D.2d 281 (N.Y. App. Div. 1 Dept, 1999) (reversing the plaintiffs' class certification, upholding the preliminary injunction only to the extent that it suspends the named plaintiffs' WEP obligations while the action is pending and directs the city to provide E-II WEP participants with adequate and timely notice of their rights, and converting plaintiffs' remaining grievances into individual Article 78 proceedings).

But leave that aside, and assume that you could get through and accept that their determination of your limitation is accurate. Once they reach a determination of limitations, you would think that the next thing that would happen is that they will rule out a bunch of job assignments and make sure that the assignment that you get is consistent with the limitations. Of course they don't bother to do that. What they basically say is, "We will just send you off to one of these agencies like Parks, Sanitation or Citywide Administrative Services—which means doing mostly maintenance work. We'll send you off mostly to do maintenance work and figure when you get there, *they* will sort it out." That's kind of the attitude: when you get there, they will sort it out.

Now the interesting point about remedies: Let's look at the state legislature's response to the death of a woman on a workfare assignment. Marsha Motipersad, a fifty year-old woman who lived in Brooklyn, New York, died from a heart attack on June 17th, 1997 while on her workfare assignment at the City Parks Department. In 1994, Ms. Motipersad was forced to leave her job of seventeen years as a secretry with the Children's Aid Society because of her heart disease.[25] That incident was covered in *The New York Times*,[26] and we got it to everybody in the legislature. In response to that death, the legislature said we have to have a grace period, where the city is supposed to make a preliminary medical determination. If within 10 days, you request a hearing because you disagree with the determination, they can't do anything to you. They can't assign you. They can't sanction you for not cooperating until they sort out the issue of just what limitations you may have. Makes sense: you shouldn't have to test the job with your body. You shouldn't have to go and die on a job to prove that it was an inappropriate assignment. But, the City doesn't think this applies to people who have some limitations. They think it only applies to people who may be totally exempt.[27] So, if you are saying maybe I am totally exempt or maybe I just can't do these certain things, that's not good enough. Of course, the problem is the City doesn't tell you what job you are going to have to do up front; all they will tell you is whether they are going to send you to do maintenance. They defend this tactic by saying: "But we really don't mean maintenance when we say maintenance. We mean whatever work they have on the job at the time in the maintenance sector and they will accommodate you. And we have remedies for employees, so that's okay too." The bottom line is: people are sent to situations where there is no effective remedy. If they don't show up because they've been told they

25. Joe Sexton, *Woman's Death Prompts Concerns Over Workfare*, N.Y. TIMES, June 24, 1997 at B3.

26. Joe Sexton, *Woman's Death Prompts Concerns Over Workfare*, N.Y. TIMES, June 24, 1997 at B3; Joe Sexton, *Claim Filed on Job Death at Workfare*, N.Y. TIMES, August 28, 1997, at B2.

27. The relevant statutory provision regarding the effect of physical limitations on work assignments is found at 12 NYCRR § 1300.2 (b) (1999) and 12 NYCRR § 1300.2 (d) (1999).

are going to do something they *know* they can't do, they are sanctioned. If they ask for a fair hearing, they are told it's premature and they have to go to the job. If they go to the job, it is almost certainly inappropriate, because there is no system for matching. They have left it up to people who have *no* instruction or training on this whatsoever. Then, you either have to do the job and get sick on the job, or risk a sanction by challenging it in an unfair hearing.[28] If you do the job and get sick on the job, and wind up not able to do the job anymore because you are in the hospital or home sick, they then sanction you for that. So, any which way you look at it, you are trapped. We won a nice order below and we are awaiting a decision of the Appellate Division where we argued to preserve the case.[29]

We also have a claim against the state in *Mitchell* because of the way the fair hearings are run. You would think the administrative law judge would take a look at the assignment and defining limitations and see if they match. If they don't, that's the end, right? You are not sanctioned, right? You would think that's what they would do. Instead they make you go get medical documentation that has magical words in it. They don't tell you about that in advance. If you don't have the medical documentation that has magical words in it, that's it—you lose. So the burden is shifted to the WEP worker to prove the inappropriateness of the assignment, instead of having the agency be required up front to show that they did it right in the first instance and that the person did not comply. Anyway, that's the *Mitchell* litigation.

We obviously are considering a variety of other lawsuits over the City's total inability or unwillingness to accommodate people's disabilities starting from the first call in through the entire evaluation process itself, and of course the quality of the evaluation process as well. I have a lot of clients with mental limitations, in particular, for whom the system is incredibly abusive. It actually exacerbates the medical condition. Just the evaluation process does that. And one of the kicks is that if you don't have medical documentation, if you just come in and say you are sick, they won't refer you to a doctor for an examination. But if you do come in with extensive medical documentation, then they require you to go to their doctors to see if they can't undermine the medical documentation. So that's just one of the number of ways in which they impose extra burdens on people with disabilities instead of accommodating them. Again, this goes to the question of whether people should be assigned at all to these sorts of activities, and at the same time, if they are assigned, what the conditions on the job should be. It sort of bridges Marc Cohan's two issues.

28. For possible sanctions for failing to comply with work assignments, *see* 12 NYCRR § 1300.12 (d) (1999).

29. Mitchell v. Barrios-Paoli, 687 N.Y.S.2d 319.

The second case, *Davila*,[30] with which Marc Cohan and I are both involved (along with others at Legal Aid and the law firm of Davis, Polk, & Wardwell) is a case concerning access to education and training for single parents who have children living with them. The lawsuit is called *Davila*, and it has actually been one of our most successful litigations, particularly successful even though it is in state court which has proven to be a very difficult forum to litigate in.This is the case that reminds everybody that under federal law and state law, not a single person is required to do workfare. No one in this whole state, or for that matter, under the federal law in the entire country, is *required* to do workfare. People gasp, faint, breakout in sweats when I say that because it is so inconsistent with reality. In fact, usually when I describe the law in any area having to do with the work programs, people become apoplectic and get ready to have me carried away, because they think I am out of my mind, because the law has nothing to do with reality, with what's happening on the ground. Because there is such *rampant illegality*. In *Davila* we say, look, under the law, the City is supposed to assess a person (my god what a radical concept!). They're supposed to actually take a look at the person as an individual—not as a generic miscreant—but as an individual. They should ask: "What background do you have? What education do you have? What skills do you have? What skills do you need? What education do you need? What family circumstances are you operating with? What child care needs do you have? Anything else going on?"[31] The worker looking at this should be consulting with the client. The statute actually says "in consultation with the participant".

The worker is supposed to then develop, based on that assessment, a plan, (what an onerous administrative requirement!) that makes sense in light of that assessment and reflects the participant's preferences—get that, the statute actually says "reflects the preferences"—to the extent possible.

30. Davila v. Hammons, Index No. 407163/96 (Sup. Ct., N.Y. Cty. Dec. 19, 1996). Justice Jane S. Solomon issued a temporary restraining order preventing the City of New York from requiring college students receiving welfare to participate in workfare programs if such work unduly interferes with their studies. The order also provides that social service officials conduct an individual assessment for each welfare participant to determine whether job training or college attendance would be a more suitable work activity than assignment to workfare. Information on this filing may be found at <http://www.welfarelaw.org/webbul/96dec.htm> and <http://www.welfarelaw.org/docket/docket10.htm>.

31. *See, e.g.*, N.Y. Soc. Serv. Law §335 1 (Consol. 1996) ("Each social services official shall ensure that each recipient of public assistance who is a member of a household with dependent children. . .receives an assessment of employability based on the educational level, including literacy and English language proficiency, basic skills proficiency, child care and other supportive services needs; and skills, prior work experience, training and vocational interests. This assessment shall include a review of family circumstances including a review of any special needs of a child.").

Imagine that. The statute actually envisions a program which the participant *wants* to be in.[32] In consulting with the person, the City can ask: "What makes the most sense? What activities from this menu of activities including a variety of education training programs, *make sense* to get you a job?" A J-O-B. The one word you will never hear from these people unless they are misusing it to call workfare a job—which it isn't. Any job that I ever had has pay, wages, a salary, money, okay? They are not interested in a J-O-B, in getting people a J-O-B. They are interested in getting them into workfare. So they've decided in their best discretion and experience, that the best thing for everybody—regardless of their experiences, regardless of their circumstances—is to do workfare or job search. Job search means sitting in a room of telephones and making phone calls all day, so you can't do anything else.

We said that's illegal, and we invoked the provisions of the state law I've just described. So far we have two court orders and we are anticipating a third. Each has said, yes, this is the law and it was the law before the state amendments that brought the state law into conformity with the federal law. It is still the case under the state law that they have to undertake this kind of rational, individualized assessment process to figure out what makes the most sense for people, and not just pre-determine or pre-ordain that one size fits all: everyone goes to WEP. This year, the most significant victory so far was that we actually stopped them from imposing a twenty-hour per week WEP requirement on all college students, which effectively would have thrown thousands of college students out of college because they do not have another twenty hours in their week to donate to the workfare program. The Court agreed,[33] again under the same principles that I have already articulated, and the Appellate Division has said that that order remains in effect pending appeal.[34] Unfortunately, when you get an order against the government in state court, once the government expresses their intent to appeal, the burden is on you to get the Appellate

32. N.Y. Soc. Serv. Law §335 2(a) (Consol. 1996) ("[T]he social services official, in consultation with the participant, shall develop an employability plan in writing which shall set forth the services that will be provided by the social services official, including but not limited to child care and other services and the activities in which the participant will take part, including child care and other services and shall set forth an employment goal for the participant. To the extent possible, the employability plan shall reflect the preferences of the participant in a manner that is consistent with the results of the participant's assessment and the need of the social services district to meet federal and state work activity participation requirements and if such preferences cannot be accommodated, the reasons shall be specified in the employability plan. The employability plan shall also take into account the participant's supportive services needs, available program resources, local employment opportunities, and where the social services official is considering an educational activity assignment for such participant, the participant's liability for student loans, grants and scholarship awards.")

33. Davila v. Hammons, Index No. 407163/96 (Sup. Ct., N.Y. Cty. Dec. 19, 1996).

34. *Id.*

Division to agree to keep that order in effect pending the appeal. Otherwise, the order is automatically stayed.

Just a final word as a segue into some of the other stuff. I notice in your invitation letter some discussion of how we pick priorities. I just want to say that we see a huge number of people, and it wouldn't have taken Sherlock Holmes over the last few years to figure out that the WEP program is one of the principal devices that the city has been using to knock people off of welfare, to exploit them while they are on welfare, and to deprive them of meaningful opportunities to get off of welfare for good. That's not rocket science, that's very obvious. They are not very subtle about it, from the experience of our clients. From the cases that we've described come very vivid experiences that people have day to day to day. They have experiences doing these absolutely, incredibly dangerous things on their workfare assignments and they come to us livid about getting paid a wage far below what they deserve. They say, "Look, I want a job, give me the job. Let me do it. I'm doing it now. *But pay me for it.*"

People come to us in very dire straits, for example, deprived of medical care because they are sanctioned because of their disabilities. And of course, we have thousands and thousands of students who communicate with us through a variety of means: different organizing groups and different institutions who are up in arms over the treatment of students at all levels, not just college students, under the system. So I think this really goes right down to the questions of the organizing and so forth, but it hasn't taken much insight for lawyers to get a clue about the experience of our clients out there, of what they are going through day to day in the system.

SHERRY LEIWANT[35]: My name is Sherry and I am from NOW Legal Defense and Education Fund. We are basically a women's' rights group, but we also have worked around issues of economic justice for about a decade. What we are now focusing on is the intersection between women's issues and poverty issues around the country. We are a national organization. The issues we've been focusing on have been violence, child care, reproductive rights and employment discrimination. The ultimate goal we have

35. Sherry Leiwant is a senior staff attorney at the National Organization for Women Legal Defense and Education Fund (NOW LDEF), working on issues related to women's poverty, sexual harassment and reproductive rights. Prior to joining NOW LDEF in 1996, Ms. Leiwant worked for 11 years as a senior staff attorney at the Center on Social Welfare Policy and Law, a national support center which provided litigation and technical assistance on public benefits issues and engaged in administrative and legislative advocacy on a national level on welfare issues. Prior to joining the Center, she was an assistant regional attorney at the Department of Health and Human Services as well as a Special Assistant United States Attorney in the Southern District of New York. Ms. Leiwant serves on the board of Bank Street College of Education. She is a 1975 graduate of Columbia Law School and a 1972 graduate of Princeton University. Ms. Leiwant has three children ages 6, 12, and 18.

in terms of organizing is to try to get the women's movement—that is traditional women's groups—involved in some of these issues for poor women and get them to understand the connection between women's issues and women's poverty. Welfare impacts women in particular and impacts them around issues that are more generally of interest to women's groups.

I will focus on the work we have been doing in New York. And I'd like to echo what Ricky Blum said, particularly as it relates to the areas of child care, violence, and sexual harassment. There are rights in these areas. There are federal rights. There are state rights created by state law. But the system in the City right now is a totally lawless one, and one that is not geared toward letting women know what those rights are, or letting them know what they can do to help themselves get off of workfare and actually get a job. Child care is a particularly horrendous example, I think. With this population, you are talking about basically single women with children. The law in the state does guarantee child care for women who are in work programs or who have a job and are on welfare.[36] In addition, both federal law and state law guarantee that women should not be sanctioned—that is lose their benefits—if they can't cooperate with workfare assignments because they don't have child care for their children.

Number one, women are not told that. There is no information whatsoever that there is no sanction possibility if the reason for their failure to cooperate is a lack of child care. Number two, women are very rarely told that the City can help them or that there are subsidies available to help them get child care. They're basically told it is their responsibility to go out and get child care if they have a child, but what they have to do is to show up for their workfare assignment. We've been running a clinic at our office. We are trying to find clients who are in the situation where they did not receive the proper notice with respect to these child care options or with respect to subsidies. We did some outreach to let people know that we are interested in these child care issues, and what we found is, although that's definitely a serious problem, there are so many serious problems around the way child care subsidies are administered in New York for women on welfare that it is truly *shocking*. As one example—also as kind of confirmation that what the city is interested in is having people participate in workfare rather than get jobs—women who report for their workfare assignments are given a packet of places they can go to to get a real job. For the most aggressive and confident women who get those packets, they will go out and get jobs. We have a number of clients who are in that situation. The problem is that once they get a job, they lose their child care vouchers. That is an incredible thing for someone who has actually gone and tried to get a job. These aren't great jobs, they are jobs which pay slightly above the minimum wage, such as home health aid, but they are very happy to have them instead of having to report to workfare. And for the women we

36. N.Y. SOC. SERV. LAW § 335(2)(a) (McKinney 1999).

have seen, they had vouchers and they got child care to enable them to go to a workfare assignment, but as soon as they are out of workfare, the Office of Economic Security (OES) says they are no longer under their jurisdiction. You don't get your vouchers, you have to go to the agency for child development and get on their waiting list, which at this point is about a year. So you've got women who have gone out and gotten jobs but they have pre-school age children who need child care, so they are not going be able to *keep* those jobs.

Now, we have been representing these women and trying to get aid continued to support them. The fair hearing system is such that the OES fair hearing officer tells them, "There is nothing I can do, my hands are tied." One client went into a fair hearing and the ALJ[37] said, "Off the record, maybe you should go to the press, but there is nothing I can do for you." What we are really talking about is an extremely lawless system. It is disheartening for the advocates, but it's certainly *devastating* for women who are trying to do what they think they are supposed to do, and who really are concerned about the care of their small children. One of the big problems with litigation around these issues is that they are very much issues of common practice and it's very hard. If you point to the procedures, the procedures are fine. Therefore, creating a lawsuit means really getting enough people to demonstrate to a judge that this in fact is happening, even though there is nothing written as to what's happening. That entails trying to get a judge to focus on the fact that there are guarantees in the law and it is really up to the City— not up to the welfare recipient—to make sure that those guarantees are honored.

The other area that we have been working on around the country and here in New York is on issues around violence against women. NOW LDEF co-sponsored and helped to draft the Family Violence Option which is in the federal law.[38] Most states now have adopted it. It states that if you are a victim of violence—of domestic violence—then you are entitled to supportive services, some kinds of screening, and to a waiver as determined by the state. New York has adopted that and New York has adopted decent regulations around that. But the problem with this, as with the child care issue, is that most workers don't know about it. Most case workers don't know about it and most clients don't know about it. If you talk to the case workers in the office they will say that they are not the ones who are supposed to be doing the screening. If you talk to the domestic violence liaisons—which is a group that's been set up through the state law to evaluate claims of domestic violence—they will say, "Well, yes, we can screen but it is not for us to give the waivers. That's really for the case

37. The speaker is referring an administrative law judge, the appointed officer of the State Department of Social Services that presides over recipient-requested hearings about benefits-related issues.

38. 42 U.S.C. § 602(a)(7) (West 1999).

worker to give the waiver." So there is complete confusion as to who should be administering this in a way that will benefit victims of violence. We have been working in coalition with organizations who work with battered women including groups like Sanctuary for Families and Victim's Services who have a little more cachet—or a little more political power or authority—than people who are just representing welfare recipients. And we are trying very hard to improve through administrative advocacy the way in which the waiver system works for violence victims. But, here again, the administration has really no interest in making it work. At least that is how it seems to us.

The last area that I want to touch on is sexual harassment, which Marc Cohan alluded to. It's a problem around the country. The federal government has shown some interest in making sure that it doesn't happen in the workfare program.[39] The EEOC[40] here in New York has said that they will make it a priority to make sure that complaints around sexual harassment are investigated and pursued. We are hopeful that that could have some effect. But the problem here again is that the City is very lax in letting women know that sexual harassment is not something that they have to put up with in workfare assignments. The level of notice and the level of communication with workfare workers is extremely poor. We are, also in conjunction with the Welfare Law Center, representing a couple of clients who have had that experience and are trying to use the law in ways that can perhaps change the city policy.

STEPHEN DIBRIENZA[41]: When people ask what I do for a living these days, I answer "bang my head against the wall". I chair the Committee on General Welfare—as I mentioned—and we have jurisdiction to look at all areas of government services and social services that are under attack at every level, whether it is out of Washington, Albany or City Hall. Let me tell you that there is no middle ground here, folks. These are bad people that run the City of the New York. These are not just people I disagree with. These are bad people. Who is bad?

39. *See* DEPARTMENT OF LABOR, HOW WORKPLACE LAWS APPLY TO WELFARE RECIPIENTS (1997) (may be found at <http://www.dol.gov/dol/asp/public/w2w/welfare.htm#How>); Enforcement Guidance, No. 915.002, Dec. 3, 1997, 2 EQ. EMPL. COMPL. MAN. (CBC) §605, (Jan. 29, 1998).

40. The speaker is referring to the Equal Employment Opportunity Commission.

41. Councilman Stephen DiBrienza was first elected to the City Council of the City of New York in 1985. He currently represents the 39th District. In January 1994, he was elected Chair of the General Welfare Committee of the City Council, which oversees the Human Resources Administration, the Department of Homeless Services, the Administration for Children's Services, the Department of Employment, and the Human Rights Commission. He also serves on the Economic Development Committee, the Higher Education Committee, and the State and Federal Legislation Committee. Previously, Mr. DiBrienza chaired the Contracts Committee and has served as a member of the Land Use Committee. He received a B.A. from Pace University and a J.D. from Fordham University School of Law. Mr. DiBrienza is married and has two children.

Ed Koch was more in your face than anyone as a mayor. But you faced the matter and you argued with him, and you always went his way. I was there for one of his terms. You could do battle with conscientious people, and you could prove your point. You wouldn't always win—in fact more times than not you'd lose—but eventually you'd prove the case and he had to— begrudgingly, you know—give you the win. Now, the next time they came back and hit you twice as hard, and kicked you in the head. But the point is, eventually you won. Fundamentally, he believed in government. Now, he believed in government that was his way. But the fact of the matter is that he fundamentally believed in it.

The difference with Mayor Giuliani's administration is that they fundamentally do not believe in government. They fundamentally do not believe that government has any role to play in people's lives. Now, government can't do everything, and maybe that is part of government's whole trouble trying to keep up with these phony solutions. But government should make the decision about what it should do, and what it does, it should do well. But the current administration fundamentally doesn't believe in government.

So why is that relevant to this discussion tonight? Because Giuliani's administration comes at welfare reform implementation from a place that has nothing to do with trying to help those in need, trying to move them from welfare to work. They talk a lot about moving people from welfare to work but if you are going to move from welfare to work, you should go from welfare to some kind of education, training, or even reasonable work experience. But then "to work" means a *job*. Their position is: you go from welfare to permanent workfare. That's what happens. You know they've reduced the public payroll by 22,000 people, since they've taken over?[42] Okay the payroll may be bloated and we may not have needed every worker, and a lot of people are early retirements with incentive packages and the like. But 22,000?! There are 38,000 welfare recipients at any one time doing workfare. That's why the municipal system hasn't collapsed. It didn't collapse because we didn't need 22,000 people cleaning parks, highways, roadways, fixing things, because they replaced them with 38,000 people. The parks department at one time had something like 3,400 workers doing maintenance: pruners, cleaners—you name it, they had it.

Now, on any given day, they have over 5,000 WEP workers and I think something like 700 regular employees—maybe a thousand—my numbers may be off.[43] That's the reason why the Parks Department didn't just break apart (5,000 people cleaning and maintaining, etc). All I know is the

42. *See* THE CITY OF NEW YORK, PRELIMINARY FISCAL 1997 MAYOR'S MANAGEMENT REPORT, SUMMARY VOLUME, pg. 19 (stating that "[t]he full-time, city-funded headcount was reduced to 201,923 at the end of November 1996, representing a reduction of 20,913 since the end of Calendar 1993").

43. According to the 1999 Mayor's Management Report, the number of full-time employees in the Parks Department for Fiscal Year 1999 (ending June 30, 1999) was 1,077.

workfare program is designed as a dead end. You heard about some of the legal battles. But I am telling you I've been there, I fought with them long enough to know they are not interested in making things work. The federal law changed the game. The state law had to conform and not in the most onerous ways. City policy goes beyond all of the written legal requirements. It's designed to drive the numbers down at all costs. You know, Rick Blum talked about the disabled and how there aren't individual assessments to figure out what people are able to or not able to do. When we raise that issue—because I raised all these issues in my committee's hearings—they said things to the effect of, "You don't understand, you are trying to limit people with disabilities." I am serious. This is the kind of twisted perverted logic they use, you know. When you say that the medical screening doesn't work, they say, "Well, if they bring us the documentation we will have it checked by experts." Then they hired this company that you heard about with a half-dozen doctors who violated the rules from here to like five other states, or who don't have a license.[44] That's what goes on. That kind of thing goes on.

The child care issue is important, too. The irony is that when you finally get a job you lose what child care you have. The law says the state is supposed to offer child care that meets two standards: licensed-regulated care and an educational and nurturing environment. But that costs money—licensed care costs the City $77, while informal care costs the City $47. So what did the City do? The City steers people on public assistance towards informal care—"find someone to watch your kids for $47." Because, I submit, if given a real choice between informal care and licensed-regulated care people will choose the regulated and historically well-run option. With the City's efforts to steer parents away from choosing licensed care, they now report that 10 out of 12 people choose the $47 option. We are being unfair—to the children and to the families' chances of finding stable care that will allow them the opportunity to succeed with a job—by not truly allowing them a choice. Now, for those folks not involved in the welfare system, those receiving child care through unemployment services or through Child Development Services, a program designed to assist low-income working families with child care costs, the City tells us that 10 out of 12 choose licensed-regulated care—which has a 14,000 child waiting list. Clearly, if given a real choice, families will choose the licensed-regulated care.

THE CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT, Volume II, Agency and City-wide Indicators, pg. 69. (a summary of this report can be found at <http://www.ci.nyc.ny.us/html/ops/html/mmr.html>.) The number of workfare employees in the parks has jumped to more than 6,000 since 1990. Steven Greenhouse, *Union to Sue Giuliani Administration Over Use of Welfare Recipients in Jobs*, N.Y. TIMES, Feb. 4, 1999 at B9.

44. The speaker is referring to HS Systems and the medical examination contractors of the New York City welfare system.

So you take this sampling of folks; these folks who are working in entry-level jobs with pay low enough to qualify for subsidized daycare. Sometime in their lives most (but obviously not all) are involved with the system, perhaps for a long time. But the bottom line, to the City, is trying to get a job—not providing reliable child care. The City leans on these people to take a few quick bucks in a low paying job to reduce costs because they know that's what everyone criticizes. When you raise the issue, the City tries to twist and say, "you are not allowing people to be all they can be." It is kind of this topsy-turvy, up-side-down view of the world. The City is all about empowerment and anyone who criticizes that view is about maintaining a cycle of dependence and assisting people, who should in the view of the City really fend for themselves. They all read the same book. Someday when I have a lot of time, I am going to write a book. They all read some book titled "Reinventing Government" and four or five others that all say the same thing. I am going to write a book called "Government by Cliché" because that is really how they run this government. Chapter One would be "We are going to do more with less." Chapter Two would talk about how to build public-private funding for issues and on and on. We are going to have to use the clichéd ideas of "self-empowerment" and "responsibility" against them to improve the situation.

Sherry Leiwant talked about domestic violence, a critically-serious issue that we all need to do everything we can to try to end. The federal government says that if you are a victim of domestic violence, you can be exempt from workfare program requirements.[45] That's in the law. Let me tell you, the Commissioner[46] of HRA—Human Resource Administration, they administer all of this—gave a speech. We sent people to listen to him, because if you taped his speech and played it, you wouldn't believe it. He says to people—we had the transcript at the speech—"That's her responsibility (for domestic violence)." He also spoke about fraudulent welfare claims and said "watch out for fraudulent claims of domestic violence, watch out." He tells people working in this system, you must watch out as we move ahead for increasing claims of domestic violence as a way around responsibility. This is the Commissioner of the agency in charge of these programs. He gives this speech where he says he believes that more and more people will claim domestic violence as a way out of their responsibilities (meaning these ridiculous, onerous workfare people). This isn't just hype. He believes this. He believes that people are going to show up and fake a broken arm and walk-in. This is the kind of stuff this guy talks about.

One of the last things I want to say is to challenge all of the City's premises. Challenge the kind of stuff you read about, the wild claims they

45. See note 38 supra.

46. The speaker is referring to Jason Turner, appointed by Mayor Giuliani to the post of Commissioner of the Human Resources Administration.

make. Giuliani's administration cannot substantiate their claim that hundreds and thousands of people are self-sufficient. They have no idea what is true. They have no ability. They refuse to check whether or not people, who because they are hassled, deprived of medical attention and sanctioned off welfare, get a job at six weeks but then can't make ends meet because they lose daycare and therefore come right back to public assistance. They refuse to substantiate the wild claims. So look behind the headlines, look behind the claims and challenge the kind of thinking out there. Now, why do I say that? Because what they do is they create the notion that anyone who challenges them is advocating the status quo and the old system that was in trouble. There are clearly problems with the system, and there are clearly ways to balance out the system. But they try to box people in to say, if you don't believe in this kind of approach that they are taking—as I don't—then you are advocating for a kind of wildly endless status quo. Everyone will be on welfare forever and ever, and never do anything about it, never caring about whether they are truly in need or not needy. Now, the ultimate irony: if you've read the paper lately, you've seen the federal government is in town, looking at the City's Food Stamp policy and their Medicare policy.[47] Thus, the city is under scrutiny even from Washington, this Congress, and this President who came up with this consensus on welfare reform and who left the Medicaid and Food Stamps program virtually intact.

But, there are alternatives to what this administration does. While I support the work of all of these fine lawyers, I see solutions in legislation. For example, we have proposed legislation to institute a grievance procedure.[48] We have to do something while the lawyers strive to make changes. Of course the mayor opposes it. Of course he threatens to veto it. It would reinstate the rights to basic health and safety protection for WEP workfare participants. And it would give them rights to grievance procedures. So if someone is made to pick up dead animals or dangerous material without gloves, they can file a grievance. It is a very technical and strong bill, and would give workfare participants something while the rest of these fights go on.

We also have a bill that's called a transitional jobs bill.[49] This legislation would establish a five year demonstration project allowing 10,000 public assistance recipients to earn a paycheck—not a welfare check—while working in public sector or non-profit positions with appropriate arrangements for education and training. The cost to the City is minimal because of the savings of these people no longer receiving a welfare check and the

47. *See, e.g.*, Abby Goodnough, *City to Speed Applications for Welfare*, N.Y. TIMES, Nov. 9, 1998 at B1.

48. 98 Int. 0000316. A listing of bills introduced in 1998 in the New York City Council may be found at <http://leah.council.nyc.ny.us/int11998.htm>.

49. 98 Int. 0000354. A listing of bills introduced in 1998 in the New York City Council may be found at <http://leah.council.nyc.ny.us/int11998.htm>.

state's TANF[50] surplus. There is a TANF surplus because the City receives its public assistance funding based on the 1992 caseloads, which are so sharply diminished.

On top of that, the federal government created a third program called Welfare to Work Funding, which gathers about a hundred million dollars for the state, most of which comes for the city to create additional creative programs. By the way, the City of New York is going to spend it all on more workfare. What should they spend it on? Programs like this: you take some money from the savings because they're not on welfare and with your overall surplus and the workfare work money you pay for 10,000 people immediately at a living wage, with benefits to get a job. It's fine for about eighteen months which is the one extension allowed. They work at regular job and public agencies and private sector agencies and non-for-profit agencies.

They could also have an educational component during the time with a potential for one extension, and at the end of that—although it's not a permanent job—they have a real job that they want. A paycheck rather than a welfare check. The theory is that at the end of 18 or 24 months (18 with a possible 6 month extension), you are much more qualified to move toward another real (more permanent) job. The point being that people gain experience—a paycheck from day one, a real job, meaningful work, and the educational component—versus pushing a broom, or cleaning the park, with virtually no hope for being hired by the public or private sector. Which do you think leads to more permanent jobs? We believe this does; they of course don't.

So these are some legislative-type solutions that we're offering. It is hard to build a consensus around them and we encourage any of you who are interested in legislative ideas or legislative work in the future to eventually reach out to us, because we can use all the help we can get.

ALICIA YBARRA[51]: I'm not an attorney. I work with the National Employment Law Project. I work with community organizations and labor unions across the country that are working together in coalitions to promote alternatives to workfare and demand accountability from private sector companies that are either employing workfare workers or receiving tax subsidies or wage subsidies to employ those workers. We are also demanding basic worker protections. In other states and other cities where there are also

50. The speaker is referring to Temporary Assistance to Needy Families ("TANF").

51. Alicia Ybarra is the Organizing and Campaign Liason of the Workfare and Low-Wage Workforce Project at the National Employment Law Project. She joined NELP in 1997 after serving as an Assistant Director of the Political Action Department at Local 1199 of the National Health and Human Services Employees Union. Ms. Ybarra was also the former Executive Director of Hispanic PAC USA, Inc. (New York City) and the New Mexico Citizen Action (Albuquerque). She graduated from Stanford University in 1990 with a Bachelor of Arts Degree in Political Science.

job creation campaigns like the one that Councilman DiBrienza just talked about, coalitions within cities and counties are demanding legislation requiring cities and counties receiving welfare-to-work money, spend it on alternatives that better serve the participants. For example, money spent on workfare and WEP-type programs would be better spent on job creation and training and education programs.

And so we work to provide support and technical assistance to a variety of those kinds of campaigns all over the country. I'm going to talk a little bit about that, as well as other things we do, such as litigation and policy advocacy. I also want to talk a bit about the project that I work on and then give you a quick run-through of the campaigns around the country that are going on right now.

The Workfare and Low-Wage Workforce Project promotes the idea that workfare and welfare reform affects all workers. It's important to organize all low-wage workers into the same coalition because we want to prevent low-wage workers from being pitted against welfare recipients and workfare participants. We also want to promote alternatives to workfare which give participants the same rights as other workers like eligibility to EITC and the right to organize. This is why we work on campaigns to expand access to education and training and campaigns to create public service wage-paying jobs instead of workfare.

The kind of assistance we provide to groups is strategy development at every stage of their campaign. We also coach the leaders of some community organizations right before they're going to go into a meeting with a decision-maker. We also help provide links to other efforts that are going on in their area, especially to local labor unions, who partner with community, labor, and religious organizations because these alliances seem to be the most effective everywhere. We want to coordinate litigation with policy advocacy and grassroots organizing. So NELP works closely with grassroots organizations across the country.

Some of the campaigns that we assist and provide support to are job creation campaigns. There are New York City and New York State job creation efforts and there are also similar efforts in Los Angeles (as well as a California state bill)[52] in Washington, Vermont, and in Philadelphia and Detroit. There are also "school-counts" campaigns, which attempt to get states to agree that participation in post-secondary education should count to meet the work requirement, or allow people to finish school instead of just having to go to a workfare assignment. We were able to give assistance to that kind of an effort in Baltimore and also in Kentucky.[53]

52. A.B. 1098, 1999-00 Reg. Sess. (Cal. 1999).

53. *See* Robert E. Pierre, *It's Official: School is Work,* WASH. POST, June 8, 1998 at C8; *Baltimore: School Counts,* ORGANIZING, (Center for Comm. Change, Washington, D.C.), Apr. 1998 (found at <http://www.communitychange.org/organizing/Baltim8.htm>); *Kentucky Legislature Passes Bill to Allow Post Secondary Education,*" ORGANIZING, (Center for

There are also regional efforts. There are an increasing number of small organizations that are led by and for low-income women. The Western State Summit, held by the Western States Center in Oregon in July of 1998[54] produced a new Western states regional low-income women's network alliance, which is now in the process of expanding its base. There are eleven states involved with about twenty-five organizations of low-income women participating. They're in the process of choosing which aspect of injustices in Welfare reform they want to tackle. Efforts like that—both local organizations and regional efforts—are increasing all over the country as we move closer to the time limit.

One of the places that we want to expand our outreach to and our assistance to is organizations that are working in the southern part of the United States because there the violations to basic worker rights are the most egregious. They're basic, bald-faced violations and there isn't a whole lot of labor organizing going on around that kind of specific issue down there, so we want to be able to help with that, too. This past September we were able to bring together many of the organizations that we work and talk with, to assess where the grass-roots organizing efforts are right now and talk about needs for the future and talk about obstacles and solutions to some of those problems.

One other thing I want to talk about is joint community and labor union efforts. ACORN, and another organization in Los Angeles called AGENDA are doing this. ACORN is doing joint organizing with Communication Workers of America in New Jersey[55] and also here in New York with DC-37[56] and in Los Angeles, AGENDA and the Service Employees International Union are organizing. We are participating together. The community groups join with labor unions to organize workfare directly into the union, where they would become members both of the union and the community organization. These are innovative new campaigns that we are interested in becoming involved in. The challenge in these efforts is to politicize and educate workers to know *why* it's important that their union reach out to welfare recipients and to workfare workers. One of the obstacles to this kind of organizing is that, at the work site itself, there are frequently confrontations between African-American and Hispanic workers. Many times, a racial conflict arises when there's a group of workfare participants at a work-site and they come face to face with other low-wage

Comm. Change, Washington, D.C.), Apr. 1998 (found at <http://www.communitychange.org/organizing/Ky8.htm>).

54. *See* <http://www.westernstatescenter.org> (introducing the Western States Center, a regional organization of activists, community leaders and progressive elected officials in eight Western states: Alaska, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming).

55. *See* <http://www.cwa-union.org> (introducing the Communication Workers of America workplace organizing site).

56. District Council 37 is the regional governing body of the American Federation of State, County, and Municipal Employees ("AFSCME").

workers who are actually part of the union. That's one of the obstacles for this kind of new organizing. We're interested in working with the community and labor unions to develop some kind of a political, racial education component to their organizing.

What are some other obstacles to grassroots organizing of Workfare workers? Most of the organizations that were attending NELP's September conference were membership-based organizations, who work directly with the workers. Issues of gender and specific women's issues arose because, obviously, welfare reform and workfare mainly impact women. Organizing women has its own specific obstacles to it. Childcare for organizers is an issue. People complaining that they don't take care of their kids is a problem as is the role of women in unions. Though female membership in labor unions is increasing, leadership is still mainly by men.

Another obstacle to working with labor unions is they won't respond to something unless they see that it's an immediate threat to them. Only the unions that have experienced displacement of their members by workfare participants have become involved in the campaigns I've mentioned.

Another challenge to welfare organizing is high membership turnover in welfare rights and low-income women's organizations. Welfare organizing groups spend a lot of time training a leader and then that person gets a job and needs to go take care of the rest of their life and so leaves the organization. It's also difficult to organize people who are discouraged and have already internalized a lot of the stereotypes about people on welfare.

One of the challenges is to coordinate what advocates do and what attorneys do and what other allies do with these kinds of membership-based, low-income organizations. A lot of times in meetings, the lawyers and the advocates tend to dominate, so that was also identified as a problem. Obviously, racism in terms of not only unions but also in the population at large and in between the groups is another problem. The economy was listed as an obstacle because, although the unemployment rate is very low, that's very misleading. The jobs that make up a lot of the entry-level positions that this group could get are not life-sustaining wages, they don't have any benefits, and they don't have any medical coverage, and so that's not really a solution.

There are also problems with rural organizing—people being dispersed and hard to reach in remote areas. Dealing with the media was identified as a problem, but we really didn't go into that one. And finally there is the issue of funding. Many foundations are very interested in this issue, it's kind of hot, but the smaller, more "grass-roots-y" type organizations that are focusing on very specific issues are having a difficult time getting funding.

KAREN KITHAN YAU[57]: My name is Karen Yau and, before we start, I suggest we do some stretching exercises. I want to know how many of you have worked with welfare recipients? How many of you worked with them before you went to law school? And how many of you worked with them as law students or lawyers? [Hands raised.]

As I anticipated, many of you have already had experiences—I am sure, some very intense experiences—working with welfare recipients and workfare workers. I am here to share with you, as a peer, a personal perspective on my Skadden fellowship, my time working with workfare workers in their struggle for basic employment rights and against discrimination.

Since leaving the National Employment Law Project in August, 1998, I've been taking stock, thinking through what I know, what I've learned, what I was able to accomplish and what I've failed to do. I realize that I still need to learn so much. The little I know I'm going to share with you here. It was a privilege to have had the opportunity to work with some very experienced litigators like Marc Cohan and Ricky Blum; I don't think I've ever had a chance to thank them and I'd like the opportunity to do so now.

There are three lessons I want to share with you. One, I learned what kind of rights welfare recipients and workfare workers have - the kind of rights they *really* have, not what rights they are supposed to have. Two, I learned what I shouldn't do as a public interest lawyer. Three, I learned about some of the things that welfare recipients need.

I had the chance to work on workfare issues just when they exploded when I began my fellowship in the Fall of 1996. I had the opportunity to work on cutting-edge issues. First, I participated in some litigation. The litigation grew from organizing campaigns that I was helping with community organizers. The organizers had then identified health and safety hazards as a major problem confronting workfare workers and thought working on this issue would galvanize the workers.

I first filed complaints with the state health and safety agency[58] and won the right for workfare workers to get health and safety inspections at their WEP sites. The health and safety agency agreed that, in the area of

57. Karen Kithan Yau is an associate at the law firm of Vladeck, Waldman, Elias & Engelhard, P.C. She practices in the area of employment law, representing employees in discrimination and wage and hour matters. Ms. Yau was a Skadden Fellow and a staff attorney at the National Employment Law Project, Inc. from 1996 to 1998 where she assisted workfare workers in New York City in asserting their employment rights. Fluent in Cantonese, Ms. Yau worked as a community organizer on the Lower East Side and in Chinatown prior to law school. Ms. Yau graduated from Northeastern University School of Law in 1996 and SUNY Stony Brook in 1989. This excerpt of her presentation at the round-table discussion includes additional remarks not made at the round-table discussion.

58. The official name of this agency is the Public Employee Safety and Health Bureau of the New York State Department of Labor.

health and safety, WEP workers must be treated just like the public employees.[59] Victory, right? Indeed, it was—until the agency said WEP workers may not designate a third party representative, who is not a WEP worker or a union representative, to assist her in the complaint and review process. The canopy of rights denied to a workfare worker includes the right to have a third party accompany the inspector during the walkaround inspection. This meant that WEP workers, who could have filed a complaint confidentially, had to walk around a WEP work site and point out the hazards to inspectors while their supervisors, some of whom understandably hostile, looked on. They could not solicit my help, or help from any community group, such as NYCOSH[60], ACORN, Community Voices Heard or WEP Workers Together.[61] Well, I said I learned something about the rights welfare recipients really have and what they have in theory.

As a junior counsel, I sued the agency to allow us [NELP] to represent the workfare workers during the inspection process.[62] All this seems remote to me now but why did we fight so hard then? First, the agency took months to act on the workers' complaints when the health and safety conditions confronting the workfare workers were most horrendous. At that time, workers were picking up dead animals, such as a dead dog covered with maggots, or hypodermic needles without proper training or even gloves.[63] Second, the workers were reporting instances of poor treatment and retaliation by supervisors, who, the state agency maintained, could be effective WEP workers' advocates during the inspections.[64] This agency decision put WEP workers in a place where they would be at the mercy of persons whose interests were adverse to theirs.[65] Third, the agency justified its interpretation based on a statute intended for workers who could unionize whereas WEP workers did not—and do not—have the right to

59. This policy was later codified in the Welfare Reform Act of 1997. Ch. 436, § 336-c (2)(a) of the Laws of 1997 (McKinney's Session Laws of 1997).

60. The speaker is referring to the New York Committee on Occupational Health and Safety.

61. ACORN, Community Voices Heard, and WEP Workers Together are membership-based organizations of workfare workers.

62. Stone v. Sweeney, No. 402891/97 (Sup. Ct. N.Y. Cty . 1997), N. Y. L. J., May 20, 1998, pg. 26.

63. *See* Affidavit of Madeline E. Stone and Affidavit of Ralph Tricoche (available in the Record on Appeal (hereafter "Record") to New York Supreme Court Appellate Division: First Department in *In Re Stone v. Sweeney*; on file with author).

64. "Sometimes, supervisors threatened us by saying that 'you had it easy today and if you give us too much problems, you will have to sweep longer stretches.' Supervisors made it clear that we 'must comply with assignments,' otherwise they will sign us out and make us come back to make up the time or transfer us out. . .We were told by the Sanitation workers so often that we 'must comply with [our] assignment,' many of us had believed that we [had to] work under any circumstances because our benefits were on the line." Stone Aff., *supra* note 56, at ¶ ¶ 18-19, Record 148-149.

65. The general concept behind third-party representation is to devise a buffer between public employees and their supervisors, giving the opportunity to employees to complain and participate in the process indirectly without undue fear of retaliation. As a former employee representative and an occupational health and safety expert explained, "In this

join or form a union.[66] The agency did not change its interpretation of WEP workers' right to third party representation even after the statute was amended by the Welfare Reform Act of 1997.[67] Fourth, the state agency also posits that a WEP worker's right was not impinged because a WEP worker could represent a group of WEP workers. By taking this position, the state agency placed the WEP workers in the inevitable bind of choosing between being representatives themselves and facing the threat of the loss of benefits for "being out there" or not participating in the complaint process.[68]

This lawsuit was important to bring because of other reasons. The state agency had said to me that it was not concerned that I wanted to be a third-party representative. In fact, I initially accompanied some inspectors during the walkaround. It appeared that the state agency was willing to work with attorneys who presumably knew how to play within the rules but not with organizers who might be more difficult. The lawsuit brought was intended to ensure that the WEP workers could work with organizers if they wanted and to encourage their participation in collective action. The lawsuit was about making real all of the rights embodied in a piece of legislation or a general policy, making good on the promise that workfare workers ought to be afforded the same rights as paid workers, at least in the one area of the law.

Then more lessons followed, such as losing. The trial court agreed with the state health and safety agency and rejected all of our arguments.[69] Among the reasons the Court stated in denying the petition was that the two WEP workers in this case who sought review of the state agency's decision did not experience any retaliation after they lodged the complaints.[70] In the Court's view, the WEP workers did not show that the existing anti-retaliation measures would give them insufficient protection.[71] In other words, the fact that they faced the threat of retaliation or loss of benefits was not actual harm. I wondered if we should have sued on behalf of other

way, [union] workers were protected from the repercussions from their immediate supervisors for complaining about safety and health violations that may reflect badly on their supervisors and leave the workers open to retaliation." Affidavit of Ellice Dara Barbarash, *supra* note 56, at ¶ 6, Record 336; Brief on Behalf of Petitioners-Appellants, at 6 (available in the Record on Appeal to New York Supreme Court Appellate Division: First Department in *In Re Stone v. Sweeney*; on file with author).

66. *See* In re District Council 37 v. City of New York, Decision No. 21-81, Docket No. RU-760-80 (1981).

67. Welfare Reform Act of 1997, Ch. 436, § 336-c (2)(a) of the Laws of 1997 (McKinney's Session Laws of 1997).

68. *See* Stone Aff., *supra* note 56, at ¶ 20, Record 149 (stating that "The WEP work representatives didn't work out because at first no one really wanted to take this leadership role and make herself even more vulnerable to reprisals").

69. Stone v. Sweeney, N.Y.L.J. May 20, 1998, at 26 (Sup. Ct. N.Y. Cty. 1997) (Shainswit, J.).

70. Id. at 12.

71. Id.

WEP workers who fit this more sympathetic fact pattern? While we worked with NYCOSH, Community Voices Heard, and WEP Workers Together to assist in gathering plaintiffs and getting "expert affidavits," I wondered how we could have collaborated more to make sure that the facts were the strongest? Then I caught myself, remembering that this effort was started to organize the WEP workers. Its initial purpose was not to bring litigation and we did not look for or look to assist only plaintiffs with the most sympathetic fact patterns. I have not resolved for myself how a litigation could be designed with the most sympathetic facts and yet move with the pace of worker organizing to truly support the organizing effort.

The *Stone* litigation was a lesson about this tension too. Sometime after I filed complaints with the state health and safety agency to assist organizers in reaching workfare workers, one of those organizers reflected that it turned out to be an unsuccessful strategy. I had believed that, to carry on the struggle for basic workers' rights, along the side of WEP workers, I needed to be zealous, flexible, and sensitive to their needs. Why? It was not successful because the state agency took so long to take action on these complaints and it refused the participation of the organizers/third parties. We had continued the litigation to compel positive changes but I did not fool myself in thinking that the organizing effort would—could—wait for the wheels of justice to turn. The organizer seemed to be pleasantly surprised that I was so willing to abandon legal tactics that did not work.

As you can see from my description of the *Stone* litigation, I have tried to collaborate with organizers. It is not an easy task to forge a truly collaborative relationship between organizers, lawyers, and poor people to ensure that poor people take part in decision-making processes that impact them the most. In a discussion about "community lawyering", law students are often warned about becoming lawyers who try to intentionally or unintentionally take over a community effort, assuming the role of the expert. This is often a danger; I have seen it time and again. But you should be aware of something just as dangerous. Often lawyers defer to organizers and poor people without first fully equipping them with the necessary information to make decisions. This is particularly true in current times when many foundations require "community participation" as a prerequisite to funding a project. In this latter scenario, the lawyer solicits the presence of poor people without genuinely and fully involving those persons from the community. Lawyers, and sometimes organizers, are not only the ones controlling the agenda; they are controlling the agenda for their own benefit. I tried to constantly evaluate whether I was doing what I preached against.

I also learned that welfare recipients have far more crucial problems than the lack of adequate labor protection in their workfare assignments. Public assistance recipients do not have jobs and face substantial barriers in

getting jobs that they can live on. That's why job creation programs like the one sponsored by Councilman DiBrienza offers a crucial alternative.

That's the mantra now: jobs, jobs, and jobs. Welfare recipients need jobs that can genuinely support them and their families, jobs that offer a livable wage, child care, and health care. They need jobs that comport with their skills and their backgrounds and their language abilities. This means that we need jobs for women, immigrant women, people who are now in their 50's, and people who committed crimes who are trying so hard to stay on the right of the law. This is a tall order.

I learned that some of the welfare recipients cannot work outside of their homes because they have work inside the home, such as taking care of their children or parents. For some of these welfare recipients; they must continue to rely on some governmental assistance because a paying job is simply not suitable for them. Advocacy strategies must address the varied needs of welfare recipients. While it would be impractical for any one of us here to represent welfare recipients in every issue they have, we must be cognizant of all of their needs—both in the realm of employment law and welfare law—which may well be outside of our traditional fields of expertise. Strategies that derive from any single field of expertise would miss the goal.

QUESTIONS

QUESTION: What are your thoughts on new developments in the area of job centers and possible litigation?

MARC COHAN: Job centers are an attempt by Jason Turner to implement what is basically a Wisconsin model of deterrence in New York City.[72] And the goal is basically to tell people at the time that they're going to the welfare center – or what will now be the job center – that there is no more welfare, that we will assist you in acquiring a job, that we will divert you from seeking assistance, but we will not give you cash assistance. Such an approach is a violation of both existing federal and state laws regarding food stamps[73] and Medicaid,[74] existing state law as it pertains to public assistance,[75] as well as probably a deprivation of rights under both the equal protection and due process clause of the Constitution. It is an issue where there has been much communication in the press in an attempt to

72. *See, e.g., Mayor Giuliani Appoints Jason A. Turner to Lead the City's Human Resources Administration*, Press Release #014-98 (Jan. 7, 1998) (available online at <http://nycdoitt.ci.nyc.ny.us/html/om/html/98a/pr014-98.html>); Joel Dresa, *W-2 Work or Else*, MILWAUKEE J. SENTINEL, July 27, 1998, at 3.

73. 7 U.S.C. § 2011; 7 C.F.R. § 273.2 (1999).

74. 42 U.S.C. § 1396 et. seq.; 42 C.F.R. 435.911 (1999).

75. 18 N.Y.C.R.R. § 343 et. seq. (1999).

show some of the more horrific conduct.[76] It is certainly an issue that the City Council is looking at and obviously they should do more about this, although I wouldn't presume to speak for the council members. But, of course, there are many legislative changes that can take place to govern how people ought to be treated when they go into a welfare center. The problem with this administration, as we've seen in all the lawsuits that have been filed, is that the mere fact that you win in court doesn't necessarily *change* the behavior.

STEPHEN DIBRIENZA: One of the legislative pieces that's being talked about is the "right to apply" law,[77] so that we make clear in city law that you have a right to apply and to immediately receive your application for Medicaid, food stamps, welfare, cash grants; although they have under that particular set of rules some ability, to check out your eligibility and drag it out a little bit. But, quite frankly, this is another part of government by cliché. Mayor Giuliani and Jason Turner stand on either side of the new brass sign. They unveil it and it says "Lexington Job Center," "Dyckman Job Center" – so they gave it a new name. But, hopefully, they've gone a little *too* far in denying food and medical assistance.

I just want to sort of give you one irony here. Say a person comes in and wants welfare and there's some valid way, perhaps, to divert them. I don't think they do it that way—the administration's approach is not valid—but let's assume there was a way. And you help that person get a job and they never go on welfare. They get a job. Most likely, it's an entry-level job. In fact, it may well be a minimum-wage job, given their history. They might live happily, but that's certainly an unlikely scenario. Because the amount of money they make is so limited, they probably still qualify for Medicaid, at least for their children, and maybe even food stamps to assist them. So now the person has a barely entry-level job, medical attention, and food. In all likelihood they could move on and upward and onward and never have to come through the welfare system. That's *one* scenario.

The other scenario is: you act like the Administration does. You deny people Medicaid and food stamps—which is illegal. You maybe—*maybe*—get lucky and find the person a job. It's another minimum-wage job. Guess what? They can't take care of their kids, they don't have enough to eat, the job is paying $5.25 per hour. They can't make ends meet, they leave the job in three and half weeks or three and a half months, if they last that long, and they come back to the beginning of the line and apply for welfare. So the very thing that the City is doing to these folks, ironically, by denying a couple components which, as a total, may help you survive

76. *See* Rachel L. Swarns, *State Investigators Find Medicaid Delays in City*, N.Y. TIMES, Feb. 4, 1999, at B1.

77. 18 N.Y.C.R.R. § 351.8(b) (1999).

and move on, is causing the reverse. But they don't think that way. These are bad people.

QUESTION: What happens after Giuliani?

STEPHEN DIBRIENZA: Every one of you and all of your friends and associates have to take an active role in government and politics. But there is no guarantee we have better people running the government, so that's one. And I don't mean that impersonally. I'm obviously an activist. Two, politicians by their nature are short-term thinkers. They try not to do this, but it happens to all of us, but some more so than others. Mayor Giuliani will be out of here when the worst of the damage is done. It won't be done, the damage is being "done" every day—politics is notorious for that.

Put up the big building now, worry about the pollution later, whatever it is. And this is in terms of union suffering. I don't know that there's an answer to that except for the combined work of dedicated litigators and public interest groups and a few public officials, including Councilwoman Eldridge, Councilman Duane, Councilman Carrion and Councilwoman Lopez. There are a lot of good, dedicated folks in the Council—not enough—trying to resist, and a set of organizers trying to put together responses and alternatives. But is there a clear plan for what happens when we hit that wall? No. That's the ultimate sort of terror that Giuliani allows this group, to sort of skip away and not be around and not be held responsible for what I think will be increasing human misery.

Now, I don't have a plan. I don't think anyone has a plan except to try to use these three components—the courts (litigation), political action and organizing—to continually resist and chip away, slow down the juggernaut. We need to wait Giuliani out and hopefully, along the way, gain more widespread support.

I tell stories all the time in my committee about how awful workfare is in union terms with these folks that are involved in the system. But at some point no one wants to hear them anymore. If I told you twenty stories—as dedicated as you all are—at some point you're like, "Okay, enough already, I get the point." And this is a dedicated, young audience that's involved in learning. So you know what we have to do? We have to make a conscious effort to flip our presentation around and to talk about why it matters to folks not in the system. Why it matters to the first level of workers who—and you mentioned this—who are lower-wage workers who had better realize that if we don't do something here, they're in trouble, and if we don't do something there, they're in trouble. A fifty-six year old guy asked me, "Can you help me get my kid a job in the Parks Department?" White, middle-class guy, lives in my district. I say, "Well, you know what, Fred? I really can't." "Well why? Don't we have to clean the parks?" I say, "It's because they got 5,000 people doing it for nothing." And this guy had worked there twenty-seven years and retired, right? An

honorable job—middle-class guy, worked, raised a family, wants to help his kid. Not everybody's going to be a lawyer, he wants to be a Parks Department worker, it's an honorable thing. Can't hire him. He walks in thinking, "Ah, yeah, those people, let them work for their money," because he's not informed. Not necessarily a bad person, but they buy the hype. Walks out of there, scratching his head, maybe makes the connection between the fact that we're ripping off 5,000 people pushing brooms for free, and the fact that his kid – or anybody's kid – isn't getting a job in what is a historically reasonable kind of situation.

So, what does that mean? What I'm trying to say is the only way, besides these three components is to broaden the audience. Let people see the link between those in the system and those who are not. If we don't do something, we all are going to suffer.

RICKY BLUM: The status quo is not morally acceptable. You shouldn't *need* to have food pantries. There should not have to be a single food pantry in the entire country because everyone should have enough money to pay for their own food. It's a sick situation and we should be turning it around so that people with good intentions who are participating in programs like that understand politically that the reason that there is charity, and the good causes that they are contributing to, is because the political situation is entirely morally *bankrupt.*

And so I think that one goal must be to politicize our own social lives by reaching out to people we know through whatever connections we have—family, organizations, whatever, schoolmates in law school, whatever. We need to bring home the point to them that this is not an acceptable status quo and that it will get worse because what they're going to say in those few years is, "Oh, there's a fiscal crisis so now we can't afford to be so generous anymore the way we have been up 'til now." Ugh. And that's the message. They always manufacture fiscal crises and even though there could be 12 million tax cuts leading up to it, it's always the poor people who are costing too much money when the shit hits the fan. And that will happen when the next recession hits, which will happen, and the time limits may hit together with the recession and so forth and so on. And you'll hear the same old warmed-over nonsense that's been put out for hundreds of years whenever this sort of circumstance arises. So I think we do have to be ready for that. We have to prepare people for the idea that the current circumstance is already unacceptable.

ALICIA YBARRA: The job creation initiative like the one that's happening here in New York is another way of planning for the future. In that way, we can prove now through small pilot projects that the government can actually create successful programs of community service wage-paying jobs. That will help us when the time limit comes if people can stand behind those kinds of programs. And then also, just to muddle things a little bit,

it's not really clear if this time limit is really this huge iceberg that we're heading towards because caseworkers have employed a lot of evasion strategies. They know how to bank people's hours and so it's going to be very uneven at what time, what groups of, what numbers of people are actually going to hit the time limit. There is also a lot of talk right now that there will be a repeal of the time limit, but that's just speculation. There *will* be an organizing campaign to repeal the time limit. Especially if there's a combination of a recession at that time or not necessarily a huge recession but, you know, not quite the rosy picture that we have now.

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