



Shannon Liss-Riordan

ALUMNI

Labor Litigator

Shannon Liss-Riordan defends the “whole social fabric of employment.”

by MARINA BOLOTNIKOVA

IN A Hartford, Connecticut, courtroom last fall, Shannon Liss-Riordan '90, J.D. '96, was trying to prove that Ocean State Job Lot, a New England retail chain, illegally withheld overtime pay from its assistant managers. Eligibility for overtime, she asserted, depends on a straightforward set of legal tests, including how much time workers spend on management relative to non-management tasks, and how much they earn relative to non-exempt employees. Her clients, 25 assistant managers, had reported performing significant amounts of manual labor—unloading merchandise from trucks, stocking shelves—with no possibility of earning overtime for working more than 40 hours a week. Why hadn't Ocean State Job Lot applied the right criteria in classifying them? she asked executive Richard Portno during the cross-examination. “You're a company that brought in \$600 million in revenue last year. You can afford to

hire a lawyer to explain these things to you.”

Wage-theft cases are routine for Liss-Riordan. In 2015, she convinced a federal appeals court that Dunkin' Donuts managers could prove that they're eligible for overtime if their duties aren't primarily managerial. The Ocean State Job Lot case ended in a second mistrial; afterward, the jurors told her that one holdout juror refused to side with the workers. Liss-Riordan settled the case on behalf of 300 assistant managers. Fast-food and retail managers “are making pretty low wages, but because they're on salary, the company can work them as many hours as they want,” she says during an interview at the Boston office of Lichten & Liss-Riordan, P.C., the plaintiffs' employment-law practice she co-founded in 2009.

Since then, she has successfully sued national corporate giants like Starbucks and Marriott, as well as local and regional companies: she's taken on “just about all the

strip clubs in Massachusetts,” for defining exotic dancers as independent contractors, rather than employees, as if they were running their own businesses. She has also sued the Harvard Club of Boston and the Harvard Faculty Club for withholding tip payments from wait staff, arguing that the tips had to be disbursed to employees under state law. (Both cases were settled.) Currently, she's representing a massage therapist at the University's Center for Wellness, who she believes is misclassified as an independent contractor.

FOR LISS-RIORDAN and law partner Harold Lichten, the bigger-picture strategy is to find “legal issues that seem very important,” he says, and then “do everything we can to find cases and develop that area of the law.” Worker misclassification has been a particular focus for Liss-Riordan—a concern shared not just by fellow labor advocates. The U.S. Department of Labor has reported that “The misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers, and the entire economy.”

During a period of severe income inequality and increased participation in a so-called sharing economy that lacks traditional job benefits or protections, her efforts to clarify and expand the rights of workers have gained her a public profile. Through her 2013 suit against the ride-sharing company Uber, the highest valued start-up in the world, she's helped shape the debate over whether the sharing economy benefits workers by giving them maximum flexibility, or leaves them vulnerable to the vagaries of the market.

One of her favorite cases involved Coverall, a national cleaning company. “There's a whole host of these cleaning companies,” she explains, “that ‘sell’ cleaning jobs to workers, who are most often immigrant workers, who...pay thousands of dollars for these cleaning jobs. The companies try to get away with it by calling them ‘franchises.’... [The workers are] really paying for the right

to scrub toilets in office buildings. It's heart-breaking." The Massachusetts Supreme Judicial Court agreed with Liss-Riordan that it was illegal to make someone pay to work. The resulting settlement yielded payments to several hundred workers, transferred the cleaning accounts to them, and, most important, forced Coverall to stop operating in Massachusetts.

Liss-Riordan's class-action suits often extract multimillion-dollar settlements from companies, producing payments for unsuspecting workers. Her firm takes one-third of the award as attorney fees. Class-action lawyers sometimes have a reputation for milking cases for financial gain—an image, she says, that's stirred up in part by corporations. "We're often mailing checks to people who had no idea that their rights were being violated," she retorts, "and their lives are turned around."

Bringing cases like these is becoming more difficult. More companies are inserting "arbitration clauses" into employment contracts, prohibiting workers from bringing grievances to court. "Companies try to keep disputes out of the public arena and in private arbitration, and by doing that they shield themselves from class-action litigation and from public view," Liss-Riordan says. ("Arbitration Everywhere, Stacking the Deck of Justice," a three-part *New York Times* investigation into the practice published in the fall of 2015, concluded that such clauses have "essentially disabled consumer challenges to practices like predatory lending, wage theft, and discrimination.") The U.S. Supreme Court has sanctioned the use of class-action bans in contracts, which infuriates Liss-Riordan: the justices are "saying they don't really want [labor] laws enforced."

In her Uber suit, Liss-Riordan argued that the company had misclassified its drivers as independent contractors, making them responsible for their own business expenses, like gas and car maintenance, and ineligible for protections like a minimum wage or healthcare. But first, she had to get past Uber's own arbitration clause, persuading California federal judge Edward Chen to rule in June 2015 that the clause was unenforceable. That cleared the way for Chen to certify a class of nearly 240,000 Uber drivers—the majority of the company's drivers in California. Then, Liss-Riordan decided against going to trial, instead negotiating a massive settlement of \$84 million, or \$100 million if the company ever

went public, on behalf of 325,000 Uber drivers in California and another 60,000 in Massachusetts. The central question of whether Uber drivers were rightfully employees or freelancers remained unanswered.

What Silicon Valley libertarians view as a revolution in work—workers get to be their own micro-entrepreneurs, without any of the hassle of *employment*—Liss-Riordan views as a scam to steal wages. Uber argues that it lets drivers set their own schedules, she says, but a lot of workers get to choose their hours—that doesn't mean they aren't employees. Uber also sets drivers' rates and performance standards, and relies on their labor for its income—all qualities of a managed labor force.

After the Uber deal, Liss-Riordan faced public scorn from some of the drivers covered by the settlement, and from onlooking lawyers, who called it a cash-grab that sold out the interests of workers. Liss-Riordan responded by cutting her firm's share of

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the settlement by about half, to \$10 million. Asked about the allegations, she says: "The \$100 million number was so big it just encouraged a bunch of lawyers who wanted to get a piece of the action to jump on it and try to scuttle it." She skates over the suggestion that there's a trade-off between settling and seeing the case through to trial: "Getting a fair settlement puts money in people's pockets now, without having to worry about who's going to be the next appointee to the Supreme Court." Ultimately, Liss-Riordan chose to settle because she wasn't sure she could win a trial, and she says it was a "monumental effort" just to get Uber's arbitration clause dismissed.

The settlement, however, was rejected last August by Chen, who argued it wasn't "fair, adequate, and reasonable." And then, in a separate decision, the Ninth Circuit Court of Appeals reversed Chen's earlier ruling that Uber's arbitration clause was unenforceable.

CHEN'S REJECTION marked a big loss for Liss-Riordan, tactically and financially. She

still hopes to convince the courts that arbitration clauses violate the National Labor Relations Act and says, if pressed, that she is prepared to file thousands of arbitration claims on behalf of Uber drivers. "What's going to happen now in this case is really uncertain," she says. "Whether we'll be able to hold together that class and see anything like \$100 million again is a big question mark." The dollar figure represented almost as much money as she'd negotiated in *all* of the settlements throughout her career. And the opprobrium cast by her critics struck a nerve for Liss-Riordan, who views herself as a lifelong advocate for workers.

As an undergraduate, she studied psychology and was interested in issues involving women in science; she was drawn to labor law only after college, while working on women's-rights organizing with former U.S. representative Bella Abzug, a New York Democrat who was also a labor lawyer. In 1991, when Anita Hill testified that Clar-

ence Thomas, then in confirmation hearings for the U.S. Supreme Court, had sexually harassed her, Liss-Riordan watched the women of her generation become galvanized by issues of gender in the workplace. By the time she entered Harvard Law School (HLS) a few years later, she says, she knew she wanted to use law as a tool to advance social justice.

"I spent a lot of my time in law school being one of those public-interest-activist types," she remembers. In April 1995, in her regular, punchy column in the *Harvard Law Record*, she urged HLS to devote more funds to its low-income protection plan (LIPP), a loan-forgiveness program for students working in public-interest law: "LIPP should not just make possible low-paying work for students committed to public interest; it should encourage that route for those who have not made up their minds." She also poked fun at the view held by her peers that they needed to gain experience at a corporate-law firm: that's "by no means a mandatory stage in a lawyer's career." Her own trajectory makes the point: the first

time she set foot in a corporate firm, she jokes, was as a “practicing lawyer to take a deposition”—although more than once she’s faced off against fellow alumni who were representing corporations in court.

Liss-Riordan makes clear that her critiques of Harvard (and the recent lawsuits) are not “some sign that I don’t appreciate what I gained from my education there. By bringing these cases against Harvard, I have hoped to push the institution in the right direction, and also highlight the issues and how prevalent they are. I believe that, with its wealth and prestige, and tremendous resources, Harvard should be setting an example for other institutions.”

After law school, Liss-Riordan returned to her hometown, Houston, to clerk for

federal judge Nancy Atlas, for two years, before marrying Kevin Riordan ’90. (The couple live in Brookline, an affluent Boston suburb, with their three children.) She was on her honeymoon in Thailand when she interviewed, by phone, for a position at Pyle, Rome, Lichten & Ehrenberg, a Boston-based employee- and union-law firm. “We offered her the job on the spot,” Harold Lichten recalls—and she worked hard: “It wasn’t unusual for me to leave at six or seven at night and come back at eight or nine in the morning and she’d still be at her desk, not having left.”

Liss-Riordan distinguished herself early, with high-profile victories in employment discrimination cases, and in 2002 was named a “lawyer of the year” by *Massachusetts Lawyers*

Weekly. She and Lichten got along so well, they opened their own practice (it now employs nine other attorneys) and recently added a second office in San Francisco, the better to take on the app economy.

On that front, despite losing the Uber settlement, Liss-Riordan doesn’t sound discouraged. A \$27-million settlement from a similar lawsuit she brought against Lyft, another ride-sharing company, is nearing approval. Meanwhile, she is pursuing a federal complaint alleging that Uber’s star-rating system for drivers is racially biased. In order to be protected from discrimination under the Civil Rights Act, the drivers need to be employees (not contractors); Liss-Riordan hopes the Equal Employment Opportunity Commission will determine that’s what they are.

Corporations have always used arguments like Uber’s to depress wages, Liss-Riordan says. But the app economy frightens her. Because freelance services delivered on-demand through apps are relatively cheap, they have become indispensable to affluent urbanites. Everywhere in the San Francisco area, commuters take Uber to get to work and run errands. Both Uber and Lyft are working with the Massachusetts Bay Transit Authority to provide rides for people with disabilities; Lyft has also proposed supplementing late-night public transit. What if start-ups can convince the public to dispense with the notion of companies’ responsibilities to their workers and society? “If Uber is successful in re-writing laws,” she warns, “it’s not just going to be ride-sharing companies—it’s the whole social fabric of employment that’s at stake.” □

A Special Notice Regarding Harvard University’s 366th Commencement Exercises

Thursday, May 25, 2017

TO ACCOMMODATE the increasing number of those wishing to attend Harvard University’s Commencement Exercises, the following guidelines are proposed to facilitate admission into Harvard Yard and Tercentenary Theatre:

- Degree candidates will receive a limited number of tickets to both the Morning Exercises and the Afternoon Program. Parents and guests of degree candidates *must* have tickets to enter Harvard Yard. Seating capacity is limited in Tercentenary Theatre. For details, visit the Commencement Office website (commencement.harvard.edu).

Note: A ticket allows admission into Harvard Yard, but does not guarantee a seat. Seats are available on a first-come basis and cannot be reserved in advance. The sale of Commencement tickets is strictly prohibited. Gates will open promptly at 6:45 A.M. on Commencement Day.

- Alumni may request a limited number of tickets on a first-come basis through the Harvard Alumni Association (alumni.harvard.edu/annualmeeting or by phone at 617-496-7001).

- Additional viewing is available in the Science Center and at most undergraduate Houses and graduate and professional schools. These locations provide seating, and admission tickets are not required in most cases. The Morning Exercises and Afternoon Program may also be viewed via live broadcast on Commencement Day through the harvard.edu webpage.

Commencement Day Schedule

Morning Exercises: These begin following the academic procession into Tercentenary Theatre. After the student orators’ speeches, the President, Provost, and Deans will confer degrees. The University Band and University Choir perform throughout the Exercises.

Diploma-Granting Ceremonies and Luncheons: Degree recipients, parents, and alumni return to their Houses, schools, or reunion luncheons, or may purchase tickets for boxed lunches at the Alumni Spread in Harvard Yard.

Afternoon Program: The Annual Meeting of the Harvard Alumni Association includes the Overseer and HAA director election results, presentation of the Harvard Medals, and remarks by Harvard president Drew Gilpin Faust and the Commencement speaker.

~The Harvard Commencement Office
and The Harvard Alumni Association

Overseer and Director Candidates

THIS SPRING, alumni can vote for five new Harvard Overseers and six new elected directors of the Harvard Alumni Association (HAA).

Ballots, mailed out by April 1, must be received (at the address indicated) by noon, Eastern Standard Time, on May 16 to be counted. Election results will be announced at the HAA’s annual meeting on May 25, on the afternoon of Commencement day. All holders of Harvard degrees, except Corporation members and officers of instruction and government, are entitled to vote for Overseer