LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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THE PRIVATE CAUSE OF ACTION AND THE FIGHT AGAINST HUMAN TRAFFICKING

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Nacht, Roumel, Salvatore, Blanchard & Walker, P.C.

Human trafficking, a collective term that includes various forms of trafficking in persons for involuntary servitude, forced labor and commercial sex exploitation,[1] has been the subject of significant federal and state legislation since the passage of the federal Trafficking Victims Protection Act of 2000.[2] One significant stride in the fight against trafficking was the creation in 2003 of a federal cause of action that empowered survivors to seek civil liability against traffickers and those who knowingly benefitted from participation in a trafficking venture.[3] Since that time, more than 30 states have enacted laws establishing a state-based cause of action for human trafficking survivors.[4] On October 16, 2014, Michigan joined those ranks. As part of a powerful package of more than 20 anti-trafficking bills, Michigan enacted the Human Trafficking Victims Compensation Act.[5] The Act, which takes effect on January 14, 2015, empowers survivors to seek damages from offenders in civil court for a broad range of physical, emotional, psychological, and economic harm.[6] Michigan's private cause of action is a welcome measure. As discussed below, civil litigation can empower survivors, hold traffickers accountable, compensate victims, and provide an avenue of redress.

18 U.S.C. § 1595 and the Michigan Human Trafficking Victims Compensation Act

18 U.S.C. §1595 is a formidable but under-utilized statute that codifies the federal private cause of action. It provides a 10-year statute of limitations, permitting, among other things, survivors time to stabilize and recover before engaging in civil litigation. The cause of action is broad and extends liability to those engaged in forced labor, involuntary servitude, labor trafficking, and sex trafficking. The statute also holds liable those who knowingly benefit, financially or by receiving anything of value, from participation in a venture which that person knew or should have known was engaged in trafficking. Survivors, therefore, are able to go after not only their traffickers but also facilitators, conspirators, and others who benefitted from the victims' exploitation. Survivors can also recover awards to compensate them for a broad range of economic and noneconomic harms, as well as obtain punitive damages and recover attorney fees. Notably, under some circumstances, survivors can sue for trafficking activity that occurred outside the United States.[7]

Under Michigan's Human Trafficking Victims Compensation Act, survivors have three years after the last violation to seek compensation for a broad range of harm, including:

- physical pain and suffering;
- mental anguish;
- fright and shock;
- denial of social pleasure and enjoyments;
- embarrassment, humiliation and mortification;
- disability;
- disfigurement;
- aggravation of a preexisting ailment or condition;
- reasonable expenses of necessary medical or psychological care, treatment and services;
- loss of earnings or earning capacity;
- damage to property; and
- any other necessary and reasonable expense incurred as a result of the violation.[8]

The Act expressly authorizes damages regardless of whether the victim suffered physical injury, whether the damages were foreseeable or whether the offender was charged with or convicted of a crime.[9]

The availability of a private cause of action – whether federal or state-based – can provide great benefits to survivors and be a means through which to hold offenders accountable. Trafficking claims can also be pleaded in conjunction with various federal and state causes of action for attendant misconduct, including RICO violations, wage and hour claims, discrimination and harassment, workplace safety and health violations, and a range of common law contract and tort claims including breach of contract, intentional infliction of emotional distress, and assault and battery.[10] In combination, these claims provide survivors with multiple avenues to obtain relief. They can also be a powerful incentive for defendants to settle.

Private Causes of Action and Survivor Empowerment

The private cause of action is important because it provides an avenue through which survivors can seek to be made whole. In representing a range of human trafficking survivors (including labor and sex trafficking victims, men and women, citizens/legal residents, and undocumented workers), one thing is clear — while there is no single face of a trafficking victim, there is a strong desire for stability and wholeness. That is not to say that survivors are not hesitant or even fearful to engage in civil litigation. That is also not to say that civil litigation is right for every survivor. It is to say, however, that in my experience representing survivors, the injury to their dignity as persons triggers a need to be made whole again. For some, that may be with regard to physical health. For others it may concern their emotional, psychological, or spiritual health. For others, it may be economic. I hazard to say for most if not all survivors it's a combination of those elements and perhaps others as well.

Civil litigation can empower the survivor. This is important because the nature of trafficking is that the survivor's power and control over the most fundamental freedoms — the right of control

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STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly journal published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section, or the State Bar. We encourage Section members and others interested in labor and employment law to submit articles, letters, and other material for possible publication.

Stuart M. Israel, ***Editor***
John G. Adam, ***Associate Editor***

THE PRIVATE CAUSE OF ACTION AND THE FIGHT AGAINST HUMAN TRAFFICKING

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over one's own body and will – is usurped. Regaining that power, including by having the choice whether to confront their offender in civil court, can have a significant effect on the survivor's sense of control. This can benefit the survivor's mental and emotional recovery.

Civil litigation also provides survivors a means through which to seek justice. While there are strong federal and state criminal laws on record prohibiting trafficking, and various law enforcement agencies have announced commitments to prosecuting trafficking, the reality is that criminal investigation and prosecution are not guaranteed. Further, the mandatory restitution law is not always enforced.[11] Civil litigation, therefore, provides survivors another means through which to hold an offender accountable and seek compensation.

Civil litigation may help a trafficking survivor financially stabilize. Trafficking survivors frequently lack income, housing, insurance and basic necessities. Financial recovery through civil litigation may provide a survivor with enough money to obtain independent financial grounding so that they can build — or rebuild — their lives. Notably, financially stabilizing survivors is a critical goal as survivors who lack sufficient resources to take care of themselves or their families remain especially vulnerable to further labor exploitation.

With this said, civil litigation is not for everyone and the decision when and whether to engage in civil litigation should be carefully considered. Survivors may have more immediate needs to address, including medical or mental health care, housing, and immigration matters. Civil litigation, in which survivors frequently recount what happened to them, can be traumatic and may interfere with a survivor's ability to recover. Also, concerns of shame or fear may predominate for a survivor. Such considerations and others must be carefully weighed before entering into litigation.

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Raising Awareness

Despite the availability of a private cause of action, relatively few civil trafficking cases have been filed.[12] While the number is steadily (albeit slowly) rising, there remain barriers to ensuring that trafficking survivors at least have the opportunity to make the informed choice whether to engage in civil litigation. The first is that victim advocates, social service providers, immigration and criminal attorneys, and others who may have contact with the survivor simply do not know that the cause of action exists. A second barrier is a general lack of knowledge with regard to how to identify a trafficking victim. Attorneys who may come in contact with a victim on criminal, wage and hour, discrimination, contract or tort issues, are not necessarily familiar with the signs of trafficking and thus may not identify the person as a trafficking survivor. A third barrier is what I perceive to be an insufficient involvement of civil litigators in collaborative anti-trafficking networks. It is important that those who work with trafficking survivors are aware of civil litigators who can help trafficking victims assess their full

range of potential civil claims and make informed decisions about whether to litigate.

Ultimately, the greatest freedom that we can help survivors recover is choice. That is what the private cause of action provides. The choice whether to confront an offender in court, the choice of laws under which to seek redress, the choice of settlement or trial, the choice whether to litigate or not — it's all a choice. We deprive survivors of that choice when we fail to make them aware that civil litigation is not just an option — but it is a powerful one.

— END NOTES —

1 Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, also includes trafficking for the removal of organs within the ambit of "trafficking in persons."

2 P.L. No. 165-386, codified at 22 U.S.C. §7101, *et seq.*

3 Trafficking Victims Protection Reauthorization Act of 2003, P.L. No. 108-193, codified at 18 U.S.C. §1595.

4 According the Polaris Project, as of the Fall 2014, 35 states and the District of Columbia have a private cause of action. Human Trafficking Issue Brief, Civil Remedy, Polaris Project (Fall 2014).

5 2014 PA 339, codified at MCL 752.983

6 *Id.*

7 18 U.S.C. §1596.

8 2014 PA 339.

9 *Id.*

10 This is a nonexhaustive list of claims that may be pleaded in conjunction with trafficking claims.

11 18 U.S.C. §1593. Katelyn Polantz, "Human Trafficking Cases Rarely Result in Restitution, Study Says," *Legal Times (*October 6, 2014)

12 Martina Vandenberg of the Human Trafficking Pro Bono Legal Center estimates that in the past 11 years 123 federal civil cases have been filed under §1595. Webinar, Human Trafficking: Forced Labor 7 Federal Enforcement (June 27, 2014) ■

LOOKING FOR *Lawnotes* Contributors!

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WHY DO PRACTITIONERS CONTINUE TO SEEK COURT APPROVAL OF FLSA SETTLEMENTS?

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You are a defense attorney who has just reached a fair and equitable settlement agreement in a Fair Labor Standards lawsuit. Most likely your next step is to prepare a motion to approve the settlement agreement. Maybe you are doing this because that is the way you learned it. Maybe you did a quick internet search on this and found that most practitioners file motions to approve FLSA settlements. But, have you ever really dug deeper? Is there really some FLSA-exceptionalism that requires court approval of settlements where, say, Title VII claims do not? What about Fed. R. Civ. P. 41(a) that expressly allows parties to voluntarily dismiss cases upon stipulation? After all, there are risks inherent to opening a settlement to judicial whim, such as:

- The risk the court may not enter the agreement;
- The costs incurred in filing a motion, appearing for a fairness hearing, and filing any necessary briefing;
- The risk that the court may not enforce a pervasive release or confidentiality provision. See, e.g. *Moreno v. Regions Bank* 729 F.Supp.2d 1346 (M.D. Fla, 2010);
- The risk a court may strike a confidentiality provision in an FLSA settlement. See, *e.g*. Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1242 (M.D. Fla. 2010); *Carpenter v. Colonial Management Group, LP*, 2012 WL 2992490 (D. Md. July 19, 2012); *Curasi v. HUB Enterprises, Inc*., 2012 WL 728491 (E.D.N.Y. Mar. 5, 2012).

In fact, neither the Fair Labor Standards Act nor any of its implementing regulations require court approval of an FLSA settlement. Further, there is no mandatory Sixth Circuit authority that requires judicial approval of FLSA settlements. So, why do practitioners continue to seek judicial approval of FLSA settlements?

A brief history lesson is in order. First, in 1945, the U.S. Supreme Court, in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), held that the substantive protections of FLSA claims could not be waived pre-suit and thus refused to enforce an agreement that released an employee's claim for liquidated damages under the FLSA in exchange for the payment of overtime wages that were indisputably due to him. *Brooklyn Savings*, however, left open possible settlements for a "bona fide dispute" regarding the amount due in an FLSA action. In 1946, the Supreme Court in *D.A. Schulte v. Gangi,* 328 U.S. 108 (1946) noted, in dicta, that a stipulated judgment under court scrutiny would allow for an enforceable settlement of an FLSA claim.

Then, in 1982, the Eleventh Circuit, in *Lynn's Food Servs., Inc.*, 679 F.2d 1350 (11th Cir., 1982), held that FLSA cases require either DOL approval or court approval to be valid. *Lynn's Food* has been influential and to-date, most defense attorneys will counsel clients to seek DOL or judicial approval of a settlement to ensure that it can be enforced.

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WHY DO PRACTITIONERS CONTINUE TO SEEK COURT APPROVAL OF FLSA SETTLEMENTS?

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However, *Lynn's Food* has not been formally adopted in the Sixth Circuit. In fact, Lynn's Food and its ilk have recently been called into question. See, *e.g. Picerni v. Bilingual Seit & Preschool Inc*., 925 F. Supp. 2d 368, 368-69 (E.D.N.Y. 2013), and *Martin v. Spring Break '83 Productions*, LLC, No. 11-30671 (5th Cir. July 24, 2012).

In *Picerni*, the court sua sponte reversed its prior refusal to approve a settlement and found that there is nothing in the FLSA that trumps Fed. R. Civ. P. 41 in allowing the parties to voluntarily dismiss a case. The *Picerni* court distinguished *Lynn's Food*, where the Department of Labor, after investigation, concluded that the employer had committed repeated, systematic FLSA violations. In *Lynn's Food*, DOL and the employer engaged in settlement discussions to no avail. The employer then made an offer to its employees of $1,000 in total, to be divided among them on a *pro rata* basis, in exchange for a broadly worded FLSA release that purported to bind not only each employee but the DOL as well. Many of the employees spoke no English, were unaware of the DOL findings, and there was no lawyer involved. This settlement was pre-litigation but during the pendency of the DOL investigation. The employer then filed a declaratory action to have the settlement approved by a court. The *Picerni* Court noted that, "I believe *Lynn's Food* should be confined to its rather egregious facts. Not only did the employer settle on the cheap with unsophisticated employees, but it circumvented the DOL's investigation in doing so, and then had the audacity to seek a judicial imprimatur validating its aggressive strategy." *Picerni*, 925 F.Supp.2d at 374. The *Picerni* Court reasoned further that "while the FLSA expressly authorizes an individual or collective action for wage violations, it does not condition their dismissal upon court approval. The absence of such a requirement is a strong indication that Congress did not intend it, as it has expressly conditioned dismissals under other statutes upon court approval." *See e.g*., 8 U.S.C. § 1329.

In *Martin v. Spring Break '83*, No. 11-30671 (5th Cir., 2012) four lighting and rigging technicians working on the set of "Spring Break '83" claimed they were not paid for all hours worked. A pre-suit settlement agreement was worked out with the employees' union and the employer and the plaintiffs received settlement checks. The plaintiffs later determined they were dissatisfied with their union representation and filed suit. The plaintiffs' suit was dismissed after the district court enforced the settlement. The Fifth Circuit upheld the dismissal finding that the settlement was for a *bona fide* dispute and therefore enforceable.

Based on *Picerni* and *Martin*, there are at least a few cases showing a trend to treat FLSA settlements like any other. However, are these sufficient to change the practice of seeking judicial approval of FLSA settlements? Probably not.

Perhaps what is needed are specific requests for a judicial ruling that FLSA approval is not needed. The next time you file a motion to approve an FLSA settlement, throw in some of the case law above and ask the court to (a) approve the settlement and (b) in the alternative, rule that the Court does not have to do so. Maybe after creating some precedent in the district courts, we can all stop filing motions to approve our perfectly good settlements. ■

DEFERRAL AND THE ROLE OF THE ARBITRATOR

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You may think that deferral is a dry topic…so let's spice it up by adding a flair of Hollywood. The following is an example of the life span of a deferred charge:

When Harry Met Sally…

1. The Charging Party (Harry) files a charge with the NLRB alleging Section 8(a)(1) and (3) allegation(s).
2. The Board Agent (Sally) assigned to the charge obtains affidavit testimony from Harry and his witnesses (if any).
3. Sally obtains evidence from the Charged Party Employer (Katz's Deli).
4. Sally submits the case to her supervisor and Regional Director for a decision, and recommends that the charge be deferred, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971).
5. Sally presents the following requirements, for which deferral is appropriate:
   a. The underlying dispute arises within the confines of a long and productive collective-bargaining relationship;
   b. the employer and union have a collective bargaining agreement currently in effect that provides for final and binding arbitration;
   c. no claim is made of employer animosity to the employees' exercise of protected rights;
   d. the parties' contract provides for arbitration in a very broad range of disputes;
   e. the arbitration clause clearly encompasses the dispute at issue;
   f. the employer has asserted its willingness to arbitrate the dispute;
   g. the dispute is well suited to resolution by arbitration; *Id*. at 841-842.
   h. the alleged unfair labor practice lies at the center of the dispute; *United Technologies Corp*., 268 NLRB 557 (1984)
   i. the charge has arguable merit; *NLRB Casehandling Manual Part One:* Unfair labor practice Proceedings Sec. 10118.1 (2011)
   j. the collective bargaining agreement contains a clause prohibiting union discrimination;
   k. the employer has agreed, in writing, to waive all procedural defenses, including timeliness, to the filing and/or processing of grievances parallel to the charge allegations;
   l. the employer and union have provided written assurances that they will make every effort to have the grievance(s) arbitrated/resolved within one year of the date of deferral. *GC Memorandum 12-01*
6. The Regional Director decides to defer the charge to the grievance-arbitration procedure of the parties, and issues a deferral letter, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp*., 268 NLRB 557 (1984).
7. Sally sends a deferral status check letter to the parties (Harry, Katz's Deli, and the Union) every 60 days;

8. The parties arbitrate Harry's grievance, and the arbitrator sends Sally a copy of his decision.
9. Sally reviews the decision and looks for the following factors:
   a. The proceedings are fair and regular;
   b. all parties agree to be bound by the decision;
   x. the award is clearly not repugnant to the Act;
   d. the contractual issue before the arbitrator is factually parallel to the unfair labor practice issue; and
   e. the arbitrator was presented generally with the facts relevant to resolve the unfair labor practice. *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), *Olin Corp*., 268 NLRB 573 (1984).

A Storybook Ending…

10. Sally recommends to the Regional Director that the Region defer to the findings of the arbitrator, based on his careful and proper consideration of all of the evidence, and the full analysis of the Section 8(a)(1) and (3) allegations.
11. Harry seeks to withdraw his charge.
12. The Regional Director approves the withdrawal of the charge.

And they lived happily ever after…The End.

But hold on, is there a proposed alternate ending to one of the best romantic comedies of all time?

In 2009, former NLRB General Counsel Ronald Meisburg proposed that a new approach to cases involving arbitral deferral may be warranted and asked the Board's regional offices to submit post-arbitral deferral cases for analysis in developing that new approach. *OM Memorandum*, 10-13 (November 3, 2009)**.**

In 2011, upon completion of that analysis, former General Counsel Lafe Solomon urged the Board to modify its approach and apply a new framework in cases requiring post-arbitral review, giving greater weight to safeguarding employees' statutory rights *GC Memorandum* 11-05 (January 20, 2011).

Stating that the current policy is overly deferential to arbitral awards and can result in the acceptance of awards that differ significantly from the decision that the Board would reach, Solomon proposed: In Section 8(a)(1) and (3) cases, i.e., those involving allegations that the employer discriminated against or otherwise interfered with, restrained, or coerced employees in the exercise of their rights under Section 7, deferral would not be appropriate *unless it is shown that the arbitrator adequately considered and applied the statutory rights at issue*. The burden of proof would be reversed, and the party seeking deferral would be required to prove that deferral is appropriate. In other words, the party advocating deferral must demonstrate that (1) The contract had the statutory right incorporated in it, or the parties presented the statutory issue to the arbitrator; and (2) The arbitrator correctly enunciated and applied the applicable statutory principles in deciding the issue. Only then, and absent a finding that the award is clearly repugnant to the Act, would post-arbitral deferral be appropriate. *GC Memorandum* 11-05 (January 20, 2011).

On February 7, 2014, the Board invited the filing of briefs by parties and amici in *Babcock & Wilcox Construction Co.*, 28-CA-022625, pending before the Board on exceptions to Administrative Law Judge Jay R. Pollack's decision, JD (SF)-15-12, to consider, *inter alia*, whether the Board should adhere to, modify, or abandon the current standards for post-arbitral deferral in Sec. 8(a)(1) and (3) cases.

The Board invited comment on the GC's proposed changes to the *Olin/Spielberg* standard, with respect to issues presented in *Babcock & Wilcox Construction Company.* In that case, the Union filed an NLRB charge arguing that the discriminatee (Beneli) was discharged because of her duties as union steward. A review subcommittee found no violation of the Union's agreement with the Employer. ALJ Pollack in April 2012 said the Board should defer to the subcommittee's decision and that the complaint should be dismissed:

> Here, the subcommittee found that Beneli was discharged for the use of profanity and insubordination upon receipt of her discipline. Although not stated in its decision, the subcommittee rejected the assertion that Beneli was discharged because of her duties as steward… While I would reach a different conclusion, I do not find this factual decision by the subcommittee to be repugnant to the Act. Accordingly, I recommend that the Board defer to the arbitration and grievance procedure. *Id.*

The GC contends that the subcommittee's decision was repugnant to the Act because the employer had taken whatever steps necessary to rid itself of an "activist steward." The GC contends that the *Olin/Spielberg* standard should be changed so that it doesn't abandon its obligation to protect individual rights whenever employees and unions agree to a grievance arbitration process.

The Employer argued that deferral to the subcommittee was appropriate because the GC hadn't met his burden of showing that the award was palpably wrong and because the Board previously declined to adopt the new deferral framework proposed by the GC.

Pursuant to the existing standard, the Board defers to an arbitration award when the arbitration proceedings are deemed fair, when all the parties agree to be bound and when the arbitral decision isn't considered repugnant to the intentions of the NLRA. The *Olin/Spielberg* standard also requires that the arbitral forum consider the unfair labor practice issue, which the Board regards as adequately considered if the contractual issue is factually parallel to the unfair labor practice issue, and that the arbitrator be presented generally with the facts relevant to resolving the unfair labor practice issue.

What does the future hold? Will Hollywood spit out a sequel?

It will be interesting to see what the Board does in this case. On the one hand, the Board should avoid any standard that undermines the usefulness and finality of labor arbitration by making grievance-arbitration procedures simply another step in the NLRB process. On the other hand, the Board clearly has an interest in arbitration awards and grievance settlements which implicate statutory rights under the Act. ■

The Latest on Deferral from the NLRB

While *Lawnotes* was going to press, the NLRB decided *Babcox & Wilcox Constr. Co.*, 361 NLRB No. 132 (December 15, 2014) altering the deferral standard in a split decision.

MICHIGAN SUPREME COURT UPDATE

Richard A. Hooker
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***Whitman v City of Burton and Smiley*, Case No. 149370 (11-19-14), *Vac'g & Rem'g*, 305 Mich App 16 (2014) or "Twists and Turns Worthy of Harlan Coben"**

Plaintiff in this case won a jury verdict under Michigan's Whistleblowers Protection Act on his claim that Defendants' decision to not renew his contract as the City's Police Chief was retaliation for his having complained, three years prior, that the City's failure to pay him for his accumulated, but unused paid time off was a violation of a City ordinance. The Court of Appeals reversed, finding his complaint was motivated by self-interest and not by any desire to "inform the public" regarding a violation of law. *293 Mich App 220 (2011)*. The Supreme Court then granted leave to appeal and reversed the Court of Appeals, expressly ruling a plaintiff's motivation for engaging in activity protected by the WPA is not made a prerequisite in that statute and is, therefore, immaterial. *493 Mich 303 (2013)*. The matter was remanded to the Court of Appeals for decision with this principle as guidance.

On remand, the Court of Appeals, undeterred, again found for Defendants, this time resting its judgment on several interesting and creative grounds:

- Plaintiff was not involved in WPA protected activity at all. He merely disagreed with the decision of all the other City department heads to waive their entitlement to payout of their accumulated, but unused paid time off, so his objection was more along the lines of a contractual dispute than a reported violation of law;

- Because the waiver decision was prompted by the City's financial distress, Plaintiff's objections, rather than promoting a public interest, were actually contrary to the public interest; and

- The causal connection between the Plaintiff's objections and the Defendants' decision to not renew his contract 3+ years later was not established because: (a) the Mayor's decision was based on a matter of "trust" and not a matter of conduct; (b) the alleged protected activity was too remote in time from the decision to not renew and there were intervening breaks in the "causal chain;" and (c) Plaintiff's misconduct while in office were the real cause of the decision to not renew.

Judge Saad wrote the majority opinion and was joined by Judge O'Connell, who concurred but suggested the Supreme Court should accept leave to appeal and consider whether the department heads' waiver decision was actually a contract and, therefore, that Plaintiff's breach of that contract precluded his WPA claim. Finally, Judge Beckering dissented, ruling that Plaintiff's protection under the WPA was "the rule of the case" by virtue of the Supreme Court's opinion, and that there had been sufficient evidence in the Record below to support the jury's finding on causation.

Application for Leave to Appeal was duly filed, as anticipated. However, in the interim, the Supreme Court had decided *Wurtz v Beecher Metropolitan District*, 495 Mich 242 (2014), in which it held that non-renewal of a contract employee's contract following its expiration was not an adverse employment action under the WPA. So the Supreme Court has now vacated the most recent Court of Appeals judgment and remanded the matter to the Court of Appeals for consideration in light of *Wurtz*...

…all of which may lead to "much ado about nothing."

***Younkin v Zimmer*, ___ Mich ___, No. 149355 (Slip Op 11/18/14), *rev'g & remd'g*, 304 Mich App 719 (2014).**

Plaintiff claimed a work-related injury while employed in Flint and sought workers compensation benefits. In the meantime, Defendant Zimmer, the Executive Director of the Michigan Administrative Hearings System (MAHS), had ordered a reorganization of MAHS that included the closure of the Flint office. As a result, Plaintiff's administrative hearing was noticed for the State Secondary Complex in Dimondale, some 70 miles from Flint.

Plaintiff sued both Zimmer and then-Licensing and Regulatory Affairs Department Director Steve Hilfinger, seeking a writ of mandamus compelling the State to maintain a Genesee County hearing facility. The Genesee County Circuit Court issued the writ, and a Court of Appeals majority affirmed, ruling the Circuit Court had not abused its discretion.

The Supreme Court, in lieu of granting leave to appeal or oral argument, unanimously reversed the Court of Appeals and found an abuse of discretion by the Circuit Court in granting the writ. Although MCL 418.851 provides that a workers' compensation hearing must be held "at the locality where the injury occurred," the Court found reasonable the Defendants' interpretation of "locality" as meaning no more than a "district" or other "definite region." Thus, the scheduling of a hearing in Dimondale on Plaintiff's claim had not been unlawful.

[Practitioner's Note: this ruling is virtually certain to impact the State's other efforts at administrative consolidation in such areas as Unemployment Insurance, MIOSHA, and Wage/Hour Hearings. It may also portend an even greater expansion of telephonic hearings in some of these areas.] ■

LABOR AND EMPLOYMENT LAW TRENDS

Stephanie Stenberg
Institute of Continuing Legal Education

Every year, the Institute of Continuing Legal Education's Labor and Employment Law Advisory Board meets to discuss the latest legal developments. Advisory Board members review ICLE's proposed courses, books, and technology projects to see if they match practitioners' needs.

Here is a brief rundown of some of the practice trends LEL Advisory Board members have observed:

- **Wage and hour and I-9 violations**. There has been an increase in individual wage and hour cases, especially for small business employers. Employers continue to struggle with classification issues (for interns and for independent contractors, for example), which can result in wage and hour violations. There have been more I-9 violations recently, too.
- **Pregnant workers**. Many people see a rise in issues involving pregnant workers. Pregnancy accommodation is a big issue in practice right now. Some employers have been asking workers to count pregnancy-related doctor appointments against their FMLA leave. In addition to dealing with the new EEOC pregnancy guidelines, employers still struggle with FMLA leave for pregnant workers.
- **Early claim resolution**. Early claim resolution is becoming more and more prevalent. It is becoming more common to resolve claims presuit through demand letters and negotiations. There is more early mediation before any discovery takes place.
- **Overlap of employment law and business torts**. More employment law cases involve business owners, which means employment lawyers need a solid background in business law to handle issues like minority shareholder oppression claims. There continues to be a high volume of disputes involving trade secrets and noncompetition and nonsolicitation agreements.
- **Whistleblower retaliation cases**. Several Board members noted a higher volume of whistleblower retaliation cases, which has been trending for the past few years.
- **Remote workers**. As technology makes telecommuting easier, employers are dealing with legal issues surrounding hiring remote workers from other states and countries.
- **Agency practice**. Employees don't waive agency process like they did in the past. Even though employees are represented by counsel, they are not going straight to court.

Many of these issues will be addressed at the Labor & Employment Law Institute on April 9-10, 2015. If there are areas or trends in labor and employment law that you would like to see addressed in future ICLE programs, materials, and resources, please let me know at stenberg@icle.org. ■

THE STRATIFIED LAW BUSINESS

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The law business in many ways is a microcosm of American life.

On the positive side, the law business presents opportunity for upward mobility, and permits lawyers, as the saying goes, to do well while doing good.

A bright, diligent, industrious C-student from humble circumstances and a law school barely noticed by *U.S. News & World Report* can become the respected champion of the discriminated-against or the medically-malpracticed-upon, for example, and be handsomely rewarded. This can be done by "hanging up a shingle" and—as the TV commercials say—"fighting" for clients.

The commercials mean, I assume, fighting *on behalf of* clients, not just fighting to sign clients before other lawyers do. In any event, connoisseurs of TV commercials know that having a "fighter" as a lawyer is highly desirable.

On the negative side, the law business is stratified. Not as stratified as, say, pre-revolutionary France or the Jim Crow south, but still stratified. And it can be snobbishly cruel to those without the right pedigrees.

One is not safe even within the rarefied confines of BigLaw. This is well-chronicled by the tabloid-type attention given by legal media and blogs to the internecine and external machinations of big and powerful firms in D.C., on Wall Street and La Salle Street, and on Easy Street elsewhere across the country and, for some, around the world. To paraphrase Orwell, all lawyers are equal, but some lawyers are more equal than others.

This is not new of course. The stratification of the law business, and some disreputable historical causes and unfortunate consequences of stratification, are chronicled by Jerold S. Auerbach in *Unequal Justice—Lawyers and Social Change in Modern America* (1976).

But you don't need a book to prove that within the profession's upper echelons one must know where one fits. This is succinctly made clear in by-lines of recent co-authored articles in *Litigation*, the journal of the American Bar Association Section of Litigation. One by-line reads: "_____ is senior counsel and _____ is an associate at _____ in Washington, D.C." Another reads: "_____ is a partner and _____ is an associate with _____ in New York City." *Litigation*, apparently, does not think it sufficient if readers are informed only that co-authors practice together. BigLaw seems as rank-conscious as the military. In both milieus, RHIP.

The late Leo Rosten showed how knowing where one fits works in practice. He wrote in *The Joys of Yiddish* (1968) at 102:

> The phone rang in the law offices. A voice answered, "Zucker, Zucker, Zucker, and Zucker."
> "Hello, may I please speak to Mr. Zucker?"
> "I'm sorry, but Mr. Zucker is in court."
> "Well then, can I speak to Mr. *Zucker*?"
> "Sorry, Mr. Zucker is in Washington."
> "Well, how about connecting me with Mr. *Zucker*?"
> "Mr. Zucker won't be in until two."
> Sigh. "O.K., then I'll speak to Mr. Zucker."
> "Speaking."

Alexis de Tocqueville observed in *Democracy in America* (1835; Henry Reeve translation, Penn. State Univ.) vol. 1 at 305: "Lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste and they may be looked upon as the natural bond and connecting link between the two great classes of society." Is this still true? Discuss and decide. ■

INDEPENDENT CONTRACTORS, THE NLRB, AND ENTREPRENEURIAL OPPORTUNITY: A SHEEP IN WOLF'S CLOTHING?

C. John Holmquist, Jr.
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Since the fog of *Noel Canning* has lifted, the Obama Board has returned to addressing issues impacting the coverage of the National Labor Relations Act. In a literally long-awaited decision, the Board held, 3-1, that contract drivers at FedEx Home Delivery's Hartford terminal are employees and not independent contractors. *FedEx Home Delivery*[1] Since FedEx had refused to bargain with the union and was challenging the underlying election certification, it was ordered to recognize and to bargain with the union in accordance with the May 2010 certification of election.

The September decision marked the apparent end of a long and delayed journey. In January of 2010, FedEx requested the Region to dismiss the petition based on the decision of the D.C. Circuit in *FedEx Home Delivery v. NLRB*[2] which was decided in April of 2009. The company argued that the decision addressed an identical fact situation and was binding in the instant case.

The Region took the position that because the case was pending with the Board, it could not act. The company then filed a motion to dismiss with the Board. On May 27, 2010, the Board issued its decision and certification of representative without addressing the company's motion to dismiss which led to the company's refusal to bargain with the union

The Board ultimately found, on October 29, 2010, that the company had unlawfully refused to bargain in violation of §8(a)(5) of the Act. It did not address FedEx's motion. Not surprisingly, the company filed a petition for review with the D.C. Circuit. The Board subsequently vacated its October decision in January of 2011 and as a result, requested the D. C. Circuit dismiss the petition for review, which was done. The case remained on the Board's docket until resurrected in the September decision.

It was probably not a good sign when the Board finally, albeit belatedly, agreed to review its denial of review in light of the D.C. Circuit's decision from 2009. The decision that resulted was indeed bad news for the company and for other employers. The panel majority "clarified" the approach to be taken in determining the status of individuals as it pertained to the issue of entrepreneurial opportunity. What evolved is now a standard that focuses exclusively on the individuals in the bargaining unit and looks to whether services are rendered as part of an *independent business*.

The panel majority stated that the court's decision raised "important and timely questions" about its approach to independent contractor cases.[3] The panel majority did not define what it meant by "timely" or otherwise explain this delay in addressing these important issues.

The panel majority reaffirmed that its review is guided by the non-exhaustive list of common law factors set forth in Restatement of Agency § 220 dealing with ten listed factors.[4] Its focus was on what it identified as the D.C. Circuit's holding, which it refused to adopt, that entrepreneurial opportunity is the "animating principle" of the review and the court's position that entrepreneurial opportunity is the decisive factor.[5]

The panel majority stressed that it was not saying that it may not nor should not give weight to evidence of entrepreneurial opportunity that the putative independent contractor exercises. It was simply restating and refining the approach to be used and making clear that the entrepreneurial opportunity must be the actual and not theoretical opportunity for gain or loss. The panel majority went further and stated that as part of its refinement, it placed the entrepreneurial opportunity as part of a broader factor—whether the evidence tends to show that the "putative" independent contractor is in fact rendering services as part of an *independent business*.[6]

The panel majority also upheld the exclusion of evidence that FedEx sought to introduce of the system-wide opportunities for drivers. The evidence must pertain to the employees that the union seeks to represent. The panel majority then engaged in a multipage review of the operations of the company at its terminal and found that eight of the ten common law factors supported a finding of employee status and that the other two were inconclusive.[7]

The dissent stated that what the panel majority had actually done was to adopt a dissent by Member Liebman in *St. Joseph News-Press*.[8] The shift in the panel majority's analysis is to one of "economic realities" which diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the "right to control" factors relevant to perceived economic dependency. The dissent then traced the development leading to the amendments in the Taft Hartley Act and the gap between employee and independent contractor status that can only be bridged by Congressional action and not by the path taken by the panel majority. [9]

The dissent also disputed the panel majority's assertion that the D. C. Circuit treated entrepreneurial opportunity as dispositive. The D.C. Circuit stated that while there is a quantitative aspect to the application of the common law factors, there is also a qualitative assessment in each case to determine which factors are determinative and why. The court stated that where some factors cut one way and some the other, an important "animating" principle is whether the position presents the opportunities and risks that are inherent in entrepreneurism.[10]

The dissent agreed that the test for entrepreneurial opportunity needed to be clarified with the focus placed on actual as opposed to theoretical exercise. The panel majority cannot, however, declare that the actual taking of entrepreneurial opportunity amounts to nothing because not enough people took advantage of it. The dissent also disagreed with the exclusion of the system wide evidence and would remand the case for the acceptance of such evidence. The record did not contain sufficient evidence of the market value of the opportunity to adequately consider in light of the facts of the case.

The dissent concluded by noting that the new test is an impermissible diminution of the significance of entrepreneurial opportunity and an unwarranted response to a judicial decision that is supported by court and Board precedent. The factor is now relegated to such a minor significance as to contravene the established principle that the weight to be given to the relevant factors depends upon the facts of each case. Little weight will now be assigned to entrepreneurial opportunity.[11]

FedEx filed a motion for reconsideration of the Board's September 2014 decision as well as a petition for review with the D.C. Circuit. The company stated that it had tried for literally years to advise the Board of changes in operations which supported its po-

sition on entrepreneurial opportunity. It also objected to the creation and application of what it called a new "independent business" test and its retroactive application.[12] The court of appeals case has been stayed due to the request for reconsideration.

So now the parties head back to the D.C. Circuit, unless the Board withdraws the decision and returns it to languish on its docket. Although the initial court decision was split 2-1, all the judges recognized that the evidence of system wide entrepreneurial opportunity should have been allowed to be introduced by FedEx in the original representation hearing. It would not be a surprise to see a similar outcome to the exclusion of system wide evidence in this case.

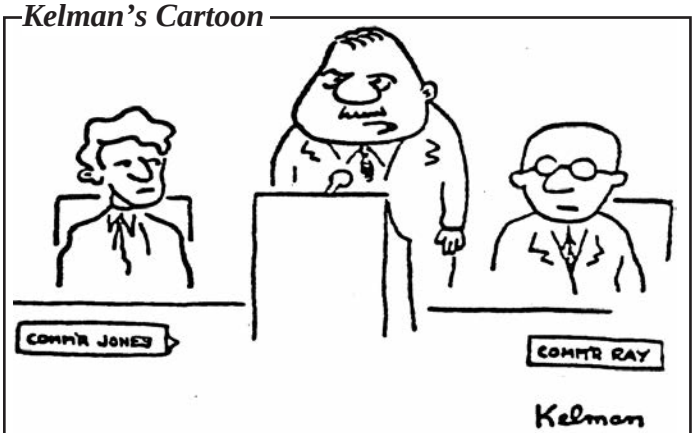
The parties will also have the opportunity to learn if the panel majority has correctly interpreted the court's original decision. Finally, the General Counsel may have the opportunity to explain why the Board waited for over four years to address "important and timely questions" in a representation case. It would not be surprising to see the court grant the petition for review and vacate the Board's decision, even if for the limited purpose of allowing the system wide evidence.

The dilemma caused by the excessive delay rests in the reality that the operations today bear little similarity to the operations in 2007 when the original direction of election occurred. Even assuming that the new standard is proper, how are the purposes of the Act furthered by retroactively applying it in a case that is seven years old? One can picture the D.C. Circuit borrowing Lee Corso's favorite line from ESPN's *College Football Gameday* and saying, "Not so fast, my friend."

— END NOTES —

1 361 NLRB No. 55 (2014).
2 563 F.3d 492, 504(D.C. Cir. 2009).
3 361 NLRB No. 55 at p. 1.
4 Id. at p.2.
5 Id. at pp.3, 10.
6 Id. at p. 10.
7 Id. at pp. 12-18.
8 345 NLRB 474 (2005).
9 361 NLRB No. 55 at p. 27
10 563 F.3d. at p. 497.
11 361 NLRB at pp. 32-33.
12 FedEx motion, pp. 4-6, 9, and 12 (10/14/14). ■

Kelman's Cartoon



"I declare this meeting open to the public under the Sunshine Law. My financial disclosure is available through the Freedom of Information Law. I disqualify myself as chairperson according to the Ethics in Government Law. This Commission will be defunct in twenty minutes by operation of the Sunset Law. Good night and good luck."

EFFECTIVE USE OF MEDIATION

Lee Hornberger
Arbitration and Mediation Office of Lee Hornberger

An attorney advocate can use mediation to effectively represent his or her client. This article includes suggestions on how the advocate can most effectively use mediation for the best interests of the client. Strategies and techniques for acclimating and preparing the client for mediation, written submissions, opening statements, settlement agreements and creative endings for mediations are suggested.

Mediation is an effective tool for resolving disputes. It provides a confidential and informal process that is consistent with the parties' interests and needs to resolve a dispute. Mediation provides confidentiality, collaboration, mediator neutrality and impartiality. As opposed to arbitration or court litigation where an arbitrator or a judge makes the decision, in mediation, the parties craft their own resolution. Mediation can resolve existing disagreements while preserving or even strengthening the relationships between the parties.

PREPARING THE CLIENT FOR MEDIATION

It is crucial that the advocate prepare and acclimate the client for mediation from the very beginning because the mediation might be one of the most important stages of the litigation, regardless of whether or not settlement is reached. The advocate should educate the client to litigation realities. This includes advising the client regarding the time, expense, and unpredictability of litigation. The client should understand that newspaper articles reporting California jury verdicts might not be applicable in Michigan, and that bad things do happen to good people.

In addition to acclimating the client to the realities of the civil justice system, the advocate should cooperate with the mediator in scheduling. If there is a scheduling problem, the advocate should let the mediator know in advance. Mediators have busy schedules too and often need to make travel or other logistic arrangements. Communication is the key to building a good working relationship.

MEDIATION LOGISTICS

The logistics concerning the mediation can help insure a healthy environment for productive discussions. The advocates should cooperate early on with the mediator in arranging the time and location of the mediation. Some believe that the mediation should take place at a completely neutral site such as bar association facilities or the mediator's office. However, it has been this writer's experience that most mediations can be effectively conducted at one of the advocate's offices, if the facilities are adequate. Adequate facilities include an opportunity for shuttle mediation and private separate sessions.

MEDIATION SUBMISSIONS

Written pre-mediation submissions to the mediator are usually helpful. A successful submission should contain bullet points, key facts, and key cases. Effective submissions may attach copies of the most favorable cases with the pertinent passages high-

(Continued on page 10)

EFFECTIVE USE OF MEDIATION

(Continued from page 9)

lighted. Jury verdicts in similar cases in the geographic area can also be helpful. It should also be decided whether the submissions are to be confidential or served on the other side. Service on the opposing party is generally preferred. However, if the submission is confidential, it can candidly list the strengths and potential weaknesses of the case. Furthermore, the advocates might consider whom the submission is attempting to convince. Is it the mediator, the other advocate, the other party, the client, oneself, or all of the above?

Most mediators do not generally memorize the written submissions and may ask questions at the mediation that are covered by the submissions. Sometimes the mediator wants to create discussion or thought on the topic.

For example, the Equal Employment Opportunity Commission mediation procedure does not utilize written submissions. The mediator receives only a copy of the discrimination charge. The parties should consider the exchange of information during the mediation. This might include information concerning new employment, destitute defendants, medical information, new important evidence, or new legal authority and cases.

PREPARING THE CLIENT FOR MEDIATION

The advocate should prepare the client for the mediation as if preparing the client for a deposition. The client should not be learning the mediation process for the first time at the mediation session. The advocate should meet with the client ahead of time and prepare a first proposal as well as private goals and alternatives. A determination should be made in advance as to whether the client has a drop-dead number and what are the best and worst alternatives to a negotiated settlement. Although many clients may have drop-dead numbers, the advocate should work with the client prior to mediation to develop a range of acceptable resolutions rather than a hard and fast drop-dead figure.

The advocate should carefully explain basic mediation tenants and concepts to the client. This includes explaining mediator neutrality and impartiality, confidentiality, collaborative effort, lack of a mediator decision or maybe even recommendation, respect for the process, the mediator's role to help the parties communicate with each other, the importance of being open with the mediator in private caucus, and letting the mediator get to know the client. Possibly only the advocate talks dollar figures.

The advocate should develop a credible strategy and know the case, including its strengths and weaknesses. It is the rare case that has no weaknesses. The advocate should prioritize goals and try to create possible options, and the advocate and parties should be open to considering multiple options.

Consideration should be given ahead of time to whether some type of an apology would help the mediation process. If so, consider of what magnitude, by whom, when, and what is the wording for an apology.

ATTENDEES AT THE MEDIATION SESSION

Careful consideration should be given to determining who will attend. Should a spouse or significant other be either at the mediation or immediately available? From an employer's viewpoint, should the immediate supervisor and other management people be there? Do the attendees have the authority to settle the case? Because the mediator controls the process, he or she ultimately determines the attendees' roles. Just because a person is an attendee does not necessarily mean that person is an equal participant in all phases of the mediation session. For example, a significant other might not have a speaking part in the joint session for opening statements but would be permitted to speak and vent when the parties go into separate caucus with the mediator.

MEDIATOR'S OPENING STATEMENT

The mediator's opening statement is a crucial part of the process. Some mediators give a long fifteen to twenty minute opening while others may give a brief five minute opening. While there is a virtue to conciseness, a more comprehensive mediator opening has several advantages. The mediator's opening statement gives everyone a chance to settle down, relax, and become a part of the process. The mediator's opening statement also fills in the gaps or reinforces the procedures where the advocates may have failed to do this. In addition, the mediator's opening statement helps the mediator establish control and earn all participants' trust by restating or authenticating what has probably been explained previously.

The participants should neither look nor be bored during the mediator's opening statement. The other participants will be gauging and ultimately reacting to how others act and react during the opening statements.

LEL SECTION MID-WINTER MEETING

The annual Mid-Winter meeting of the Labor and Employment Law Section will be held on Friday, January 23, 2015 at the Detroit Athletic Club.

In 2013 and 2014, the LEL Section Council surveyed the membership on multiple occasions. One question asked was whether people would prefer a Friday-only format. The members responding overwhelming supported changing the Friday evening and Saturday morning format to an all-Friday format. Members spoke and the Council listened.

The educational program will begin on Friday, January 23, at 1:00 p.m. The program will include labor and employment law updates and a panel discussion celebrating the 50th anniversary of Title VII of the Civil Rights Act of 1964. A cocktail reception, dinner, and afterglow will follow. The Distinguished Service Award will be presented to Richard Mittenthal. Following the award presentation, Clay Risen, New York Times op-ed editor, will discuss his new book *Bill of the Century: The Epic Battle for the Civil Rights Act.*

For more information contact Michael Shoudy at mshoudy@mea.org

PARTIES' OPENING STATEMENTS

Consideration should be given to the length, detail, and tone of each party's opening statement. Egos and emotions should be left at the door. The client's portion of opening statement is crucial. The client might be the most articulate and knowledgeable person at the mediation. On the other hand, maybe exactly the opposite is the case. Splitting the opening statement between the client and the advocate can be helpful because it allows some venting by the client. However, the client should stick to the essential facts if presenting in front of the other side. Allowing the clients to speak directly to each other during the opening statements can sometimes meet both parties' emotional needs and can provide catharsis. Sometimes just being heard without interruption goes a long way towards settlement.

Often a direct presentation by a party in the opening stage goes a long way towards ultimate resolution. The mediator is not the font of all knowledge. The advocates should be prepared to provide creative suggestions in order to enhance the mediation process.

ATTORNEY'S ROLE AT MEDIATION

The attorney's role in the mediation session is different from the attorney's role in other litigation phases. The attorney should come to the mediation with an open mind. The attorney should not use threatening language. The attorney should thank the other side for attending. The edge should be taken off any attorney's remarks.

Attorneys and their clients should appreciate that the process is an important factor in mediation. In mediation, slower is usually faster in the long run. Patience, curiosity, and imagination are the keys to mediation. All the participants have to be willing to listen. In addition, both parties must be willing to compromise and be reasonable. It is very rare that either side will settle for either fifty cents or a million dollars. Both parties have an interest which should be recognized in settlement. The ultimate focus is on the future, not on the past, and on thinking outside of the box.

In essence, the parties at the mediation session must listen to each other. They are not necessarily there to get the facts to match. The facts might not ever match. Furthermore, "[y]ou never really understand a person until you consider things from his point of view... ." Harper Lee, *To Kill a Mockingbird* (JB Lippincott, 1960), p 36.

The parties should ultimately consider putting right and wrong in a corner. This results in a discussion of the future rather than an analysis of the perceived rights and wrongs of the past. It is important that the participants keep the momentum going even if by small increments in their offers, counteroffers, and efforts to find common ground.

SEPARATE MEETINGS WITH THE MEDIATOR

The parties should understand, anticipate, and plan for separate meetings with the mediator and the greater degree of confidentiality that these separate meetings provide. It is in these separate meetings that additional venting can occur. In addition, the mediator can conduct reality checks. The client needs to hear from others, not just his or her own attorney, about potential problems with the case. Options can be developed during the separate meetings, and bonding between the mediator and the participants can be fostered. Again, the mediator is not the font of all knowledge. The attorneys should be prepared to provide creative suggestions in order to enhance the mediation process.

WRITTEN SETTLEMENT AGREEMENT

It is important prior to the mediation that the participants anticipate and prepare for the drafting of a written settlement agreement, or at least a comprehensive tentative outline of an agreement, as part of the last stage of a successful mediation. The parties should bring a proposed release and other "boilerplate" language to the mediation.

Since the mediator is not a party to the settlement agreement, usually the mediator would not sign the agreement. Issues may arise as to who will draft the agreement. Consideration should be given to all of these things ahead of time. Sometimes, since the agreement is more in the mediator's memory than anyone else's at that stage, it can be useful for the mediator to transcribe the agreement while reading it out loud to the parties for concurrence. In this situation, the mediator is serving as a scribe, not a drafter.

ENDING THE MEDIATION

If the mediation results in a final written settlement agreement, that would be a good place to end the mediation. But what if the mediation does not presently result in an agreement? The decision then has to be made as to how and when to end the mediation session. A mediation session should end with a clear understanding of what will happen next.

Sometimes the decision to end the proceedings is imposed upon the mediator by the parties. Other times it can be a mutual decision of all participants. It is usually best to have a final joint session to discuss whether and how to proceed further. The parties should anticipate that the mediator may request that they keep their most recent proposals on the table for a period of time.

Hopefully the mediation results in a mutually acceptable solution to the dispute. If not, the mediation can end with an understanding of what will happen next. There might be another mediation session, a partial agreement, a reconsideration period, or selection of an alternative method to decide the remaining issues.

After a mediation that does not result in a settlement agreement, it can be helpful for the mediator to follow up with the parties to further explore reaching agreement at a later date. Sometimes after further reflection parties who ended a mediation at seeming loggerheads can reach a settlement if given a face-saving means by the mediator.

CONCLUSION

This article has reviewed reflections from what this writer has experienced in civil mediations. In addition, the article has provided suggestions on how the advocate can best use mediation for the best interests of the client. The article has reviewed the basic principles for the participants of (1) keeping an open mind and being flexible, (2) taking sufficient time to let the process work, (3) giving the client an appropriate opportunity to vent and bond with the mediator, and (4) using the opportunity to directly convince the other side of the merits of the case while keeping an open mind to the other side's viewpoint. ■

"KEEP THIS TO YOURSELF: I'M SAVING IT FOR TRIAL"

Sheldon J. Stark
Mediator and Arbitrator

One essential element of the mediation process is trust in the mediator. I'm referring in particular to the kind of trust which gives parties and counsel comfort they can share sensitive information with the mediator in the expectation it will not be revealed to the other side without permission. A mediator who violates this trust is unlikely to get work again, as news of a breach would spread like wild fire.

The kind of information parties wish to keep confidential varies. Some common examples include negative, personal feelings about the other side, problems verifying key information, a list of issues causing them anxiety, their underlying needs and interests, "bottom lines" and settlement authority, of course, and more. Their motivation for sharing this information with the mediator is usually obvious, as are the reasons they prefer not to share with opposing parties and counsel.

Not always. Sometimes the reasons for concealing it from the other side are impenetrable. For example, counsel may rationalize an offer or counter-offer with information they intend to keep under wraps. "Look," they might say, "this case isn't worth $150,000 because we can show plaintiff repeatedly lied on his employment application. This is a 'he said/she said' case. Plaintiff has credibility problems and won't be believed." Without question, it's the kind of information which impacts risk assessment and valuation. Not disclosing it, however, can lead to consternation. Plaintiff's counsel will not understand a smaller than anticipated response if it is not adequately explained. Progress in reaching agreement is likely to falter if not cease altogether. "Why can't I share it?" I ask. "Because I'm saving it for trial," comes the reply.

I wonder what trial that is. On July 22, I published "The Vanishing American Trial" on my Blog page. Lawyers are not trying many cases today. Across the country and in Michigan less than 1.5% of all cases actually go to trial. I spoke to an experienced commercial litigator recently. In 20 years of practice he has tried four civil suits and four arbitrations. Cases aren't *going* to trial any more. As a result, lawyers who save their best ammunition for trial are missing an opportunity to maximize their leverage in reaching a settlement at the mediation table.

Don't get me wrong. If the party wants something kept confidential, my lips are sealed. I will not breach my promise of confidentiality under any circumstances. What I will do is ask counsel to reconsider. If they say no, I work with what I have.

Why should a litigator reconsider the decision to protect sensitive information from disclosure?

First, counsel may be reluctant to share information because he or she expects to surprise the other side. In my experience, there are few surprises—certainly not as many as these litigators believe. Therefore, I ask: "What makes you think they don't know about this already or won't learn of it fairly quickly? How do you know they're not worried that sooner or later *your* side is going to find out about this?" If the other side is made aware of the damaging evidence—and opposing counsel's knowledge of it—a productive "wood shed" moment in the other caucus room just might result.

Second, counsel may seek to gain an advantage by "springing" the undisclosed evidence on a *party* when least expected by that party's counsel. "I don't want them thinking up a good explanation in cahoots with their lawyer." I get that. There may well be a significant advantage if the parties are mediating prior to the taking of depositions. However, if the litigation is pending in federal court, they may lose the right to use the evidence if not produced in mandatory disclosures. On the other hand, if the evidence is solid and can't be changed after the fact—such as a falsified employment history on a job application—there is nothing the other side can do to change that fact. Or explain it away. Every strategic decision in litigation requires a cost-benefit analysis. It seems to me that the benefits of disclosure at the right time at the mediation table far outweigh the cost—especially when the chances of a trial are slim and none.

And really, isn't that the point? What are the chances this case *will* go to trial? Statistically, only a tiny minority of all the thousands of cases filed each year result in a trial. "What is there about this case that leads you to believe it will be an exception?" Today, *litigation* is the alternative dispute resolution process. It is a rare case indeed where trial is inevitable. 80-90% of all cases settle at the mediation table. Disclosing the information at mediation, therefore, is more likely to save time, money, emotional distress, effort, and disruption. The moment could not be more propitious. Everyone is at the table looking for resolution. Everybody hopes to better understand and manage his or her risk. Good litigators are flexible. When they learn something new, they are prepared to move. "If counsel is *not* aware of this evidence, it has not been factored into their bottom line. Will it have an impact on valuation once the information is out? Isn't it to your advantage to use the evidence as leverage now while everyone is here in settlement mode?"

In the falsified employment application example, the parties started out in very different ballparks. Their ballparks may have been in two different cities! And what if plaintiff actually has and explanation? Might that not change the employers risk assessment at least slightly? Perhaps *both* sides will find themselves in the same ballpark once plaintiff's counsel learns her client was less than honest when applying for the position. When both parties are in the same ballpark, trial is not inevitable, *settlement* is. ■

SIXTH CIRCUIT UPDATE

Scott R. Eldridge
Miller, Canfield, Paddock and Stone, P.L.C.

Statements by Superintendent to Principal That "They Want Someone Younger" Creates Triable Issue of Fact in Age Bias Claim

In *Scheick v Tecumseh Public Schools, et al*, Docket No 13-1558 (Sept. 2, 2014), the plaintiff, Robert Scheick, the former Principal of Tecumseh High School, alleged that his contract was not renewed in violation of the Age Discrimination in Employment Act ("ADEA") and the Michigan Elliott-Larsen Civil Rights Act ("ELCRA"). The high school hired Scheick in 2004 when he was 51 years old, and continued in that position until 2010. In early 2010, when Scheick was 56 years old, the high school decided not to renew the contract. After the expiration of his contract, Scheick sued the school district alleging that the decision was based on his age. The U.S. District Court for the Eastern District of Michigan granted summary judgment in the high school's favor and dismissed the case. The Sixth Circuit reversed and remanded.

For the last four years of his tenure, Scheick reported directly to the school district superintendent, who was 10 years older than Scheick. Although he insisted that he made the decision to not renew the contract, the superintendent also testified that he consulted with school board members and that there was general consensus to not renew. Evidence revealed that there had been parent, student, and teacher complaints about Scheick's lack of ability as a principal. Numerous areas of deficiences were identified as part of Scheick's annual evaluation in 2010, with Scheick receiving a rating of "needs improvement" in two areas but overall a "good, competent" evaluation, according to the superintendent. On March 8, 2010, the superintendent notified Scheick of the intent not to renew his contract. In August 2010, the high school hired a 44-year-old to replace him.

Scheick alleged that the superintendent had made statements suggesting age-based animus: first, during his performance evaluation that the board wanted him to retire; and second, that "they just want someone younger." The Sixth Circuit concluded that the second statement is direct evidence of discrimination because, if true, it was not ambiguous and required no inference to conclude that age was the but-for cause of the decision not to renew the contract. Noting that the existence of direct evidence will not always create a triable issue of fact, the Court nonetheless concluded that, despite evidence of dissatisfaction with Scheick's performance and of a need to make budget cuts, the evidence taken as a whole was sufficient to permit a reasonable juror that age was the but-for cause of the decision to not renew Scheick's contract

Tenured Professor Can Maintain First Amendment Retaliation Claim Based on Her Husband's Protected Activities

The plaintiff in *Benison, et al v Central Michigan University, et al*, Docket No 13-2554 (Sept. 3, 2014), Kathleen Benison, was a tenure professor of geology at Central Michigan University. Her husband, also a plaintiff, was an undergraduate student at the university, who sponsored a vote of no confidence in the university's president and provost, which the Academic Senate (comprised of students, administrators, and faculty members) passed. Shortly after the vote, Benison took a sabbatical, as permitted by an applicable collective bargaining agreement. She agreed that, after her sabbatical, she would return to the university for at least one full year or return any compensation and benefits she received during her sabbatical. While on sabbatical, Benison requested a promotional pay supplement. Her department denied her request for a lack of "service to the Department," which she appealed internally. Before receiving a decision, Benison resigned. When Benison refused to return the compensation she received while on sabbatical, the university sued her for breach of contract in Michigan state court. Because Benison's husband's tuition had been remitted for the spring 2012 semester as part her benefits, and Benison refused to repay, the university determined that her husband had an outstanding tuition balance and placed a hold on his academic transcript.

Benison and her husband sued the university president and others in federal court alleging retaliation under the First Amendment because of the husband's sponsorship of the no-confidence resolution against the president and provost. The U.S. District Court for the Western District of Michigan granted the defendants summary judgment. The Sixth Circuit reversed, concluding that there existed a genuine issue of material fact.

Noting that no dispute existed over whether the husband's actions were constitutionally protected speech, the Court focused its analysis on whether an adverse action occurred and whether there was a causal connection between the two. To demonstrate that they suffered an adverse action in a First Amendment retaliation case, the Court explained, the plaintiffs must show that the action would chill or silence a person of ordinary firmness from future First Amendment activities. According to the Court, the decision to sue Benison in state court and to place a hold on her husband's academic transcript were adverse actions. Further, the plaintiffs presented sufficient evidence to create an issue of fact that these adverse actions were connected to the husband's protected activities. Specifically, this instance was the first time the university had ever sued a professor for breaching a sabbatical agreement. Rejecting the defendants' contention that those other professors were not similarly situated to the plaintiff, the Court concluded that a reasonable juror could conclude that a causal relationship exists between the protected activity and the state court lawsuit, which also extends to the hold on the husband's transcript.

Finally, the Court concluded that defendants could not show that they would have taken the same action to sue Benison in state court even if her husband had not engaged in protected activities. Noting that the university had an arguably meritorious claim for breach of contract against the professor, the Sixth Circuit explained that in other instances in which professors did not repay sabbatical pay, the decision makers chose not to pursue legal claims for a variety of legitimate reasons (e.g,. health reasons) that did not exist here.

Federal Coal Mine Inspector Not Working as a "Miner" Under Black Lung Benefits Act

In *Navistar v Terry Forester*, Docket No 13-3994 (September 12, 2014), the issue – a matter of first impression in the Sixth Circuit – was whether work as a federal mine inspector is qualifying coal mine employment under the federal Black Lung Benefits Act. A federal administrative law judge awarded benefits under the Black Lung Benefits Act to the respondent, Terry Forester, after concluding that his five years of coal mine employment with the petitioner, Navistar's, predecessor, combined with his 16 years as a mine inspector with the United Stated Department of Labor's Mine Safety and Health Administration (MSHA) rendered him eligible for the rebuttable presumption that, having been employed for at least 15 years in underground coal mines, and having a totally disabling respiratory or pulmonary impairment, he was totally disabled due to black lung disease. Navistar appealed, but the federal Benefits Review Board affirmed. Navistar sought review in the Sixth Circuit, which vacated the award and remanded for further proceedings.

The Sixth Circuit concluded that a federal mine inspector is not a "miner" as defined by the statute. Specifically, the Court explained, the statute defines "miner" to include a person "who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal…[including] an individual who

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SIXTH CIRCUIT UPDATE

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works or has worked in coal mine construction or transportation in or around a coal mine." Further noting that it has held previously that the definition also encompasses workers performing duties incidental to the extraction or preparation of coal so long as they are an integral or necessary part of the coal mining process, the Court concluded that Forester's daily, underground activities in the coal mines, checking for compliance with federal mine safety regulations, is not an essential part of the mining process. According to the Court, the federal inspector's role, unlike a coal mine company's in-house inspector or maintenance worker, is "purely regulatory." Consequently, the Court remanded the matter to the ALJ with instructions to determine whether Forester was entitled to black lung benefits without benefit of the 15-year rebuttable presumption.

ERISA Preempts Wisconsin Family and Medical Leave Act

In *Nationwide Mutual Ins Co v Newson*, Docket No 12-4285 (September 30, 2014), the Sixth Circuit addressed whether ERISA preempts the Wisconsin Family and Medical Leave Act, which requires that employers allow employees six weeks of unpaid leave "following the birth of an employee's natural child" and requires employers to allow employees to substitute "paid or unpaid leave of any other type provided by the employer" for the unpaid leave provided by the statute.

Nationwide maintains an ERISA-covered welfare benefits plan for participants in 49 states and allows its administrator to pay short-term disability benefits to Nationwide employees who meet the definition of short-term disabled under the plan, including for maternity leaves — six weeks of benefits after a vaginal delivery and eight weeks of benefits after cesarean section. The Wisconsin Department of Workforce Development, however, applied the Wisconsin Act to require Nationwide to provide short-term disability benefits to employees who, according ot the Sixth Circuit, undisputably are not short-term disabled under the plan. Thus, the Sixth Circuit explained, the administrator has two choices: "violate the Wisconsin Act, or violate ERISA." By way of example, according to the Court, the Wisconsin Department applied the Wisconsin Act such that a Nationwide employee could take six weeks of paid maternity leave provided by the plan, and then substitute an additional three weeks of STD benefits for the unpaid leave provided by the Wisconsin Act – even if the employee is no longer short-term disabled as defined by the plan.

Noting generally that state laws that have a connection to or reference ERISA plans are preempted by ERISA if they (1) mandate employee benefit structures, (2) interfere with nationally uniform plan administration, or (3) create alternative enforcement mechanisms for the recovery of benefits provided under an ERISA plan, the Court concluded that the Wisconsin Act "does all three of these things." First, according to the Court, the Wisconsin Act "mandates payment of STD benefits to employee who are not STD disabled, contrary to the terms of the plan" and, thus, "governs the payment of benefits." Second, the Court concluded, the Wisconsin Act interferes with the uniform administration of the plan because "it requires the administrator to pay benefits [in Wisconsin]…that the plan itself bars the administrator from paying in other states." Third, the Wisconsin Act, according to the Sixth Circuit, creates an alternate enforcement mechanism for obtaining ERISA plan benefits because it "undisputedly" authorizes employees to file administrative complaints and file lawsuits "to obtain benefits provided by Nationwide's ERISA plan." Consequently, the Sixth Circuit held that ERISA preempts the Wisconsin Act "to the extent it requires Nationwide's administrator to pay STD benefits contrary to the terms of Nationwide's plan." ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

The Supreme Court opened its October 2014 term with a new and improved website and a number of employment law cases with wide application on its docket.

Duty to Accommodate Pregnant Employees

The Justices will consider in *Young v. United Parcel Service, Inc*., U.S. No. 12-11226 whether the Pregnancy Discrimination Act (PDA) obligates employers to accommodate pregnant employees with work restrictions in the same manner that they would accommodate non-pregnant employees with those same restrictions. Young worked for UPS as an air-delivery driver; an essential function of her job was lifting up to 70 pounds. Young became pregnant, and her physician restricted her from lifting more than 20 pounds. UPS' collective bargaining agreement reserved light-duty jobs for employees injured on the job, qualified employees with disabilities, and drivers who had lost their DOT certification for certain specified reasons. Employees with work restrictions due to a healthy pregnancy were ineligible for light-duty jobs.

UPS did not allow Young to return to work until after she delivered her baby and no longer had any lifting restrictions. Young sued under a variety of theories, including for a violation of the PDA. The district court granted summary judgment to UPS. Young appealed, and the Fourth Circuit Court of Appeals affirmed.

The Court of Appeals noted that the PDA requires employers to treat pregnant employees the same as "other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k). The Court held that Young was not similar in her ability or inability to work as employees who were entitled to light duty under UPS policy, because Young was not disabled, she was not injured on-the-job, and there was no legal impediment preventing her from performing her job. The Court also rejected Young's claim that UPS' policy was direct evidence of pregnancy discrimination, finding that the policy was "pregnancy-blind" in that it drew no distinction based on pregnancy. Finally, the Court rejected Young's argument that the PDA mandates that employers treat pregnant employees as favorably as other employees with the same restrictions, even if by doing so pregnant employees are given a benefit not available to other non-pregnant employees. Young successfully sought cert.

Judicial Review of EEOC Conciliation Efforts

Whether the EEOC's pre-suit conciliation efforts are subject to judicial review is the issue before the Supreme Court in *Mach Mining LLC v. EEOC*, U.S. No. 13-1019. Mach Mining had been the subject of an EEOC charge filed by an employee alleging gender discrimination. The EEOC issued a Reasonable Cause Determination and notified Mach Mining that it intended to pursue informal conciliation. The parties engaged in limited settlement discussions; the EEOC concluded that further discussions would not resolve the matter, so notified Mach Mining, and filed suit two weeks later. As an affirmative defense to the EEOC's suit, Mach Mining asserted that the EEOC had failed to engage in good faith conciliation efforts, as required by Title VII. The EEOC filed a Motion for Summary Judgment on the limited issue of whether

the failure to engage in good faith conciliation efforts can be an affirmative defense to suit.

The district court held that the EEOC's conciliation efforts are subject to judicial review when those efforts, or lack thereof, are raised as an affirmative defense. The Seventh Circuit Court of Appeals reversed the denial of summary judgment to the EEOC. The Court of Appeals held that the language of Title VII afforded the EEOC great deference in the conciliation process and gave no instruction to the EEOC on how specifically to engage in "good faith" conciliation. Furthermore, the Court found that Title VII's mandate that conciliation discussions be confidential conflicts with any notion that the failure to conciliate in good faith could be an affirmative defense. The Court recognized that its decision that EEOC conciliation efforts are not entitled to judicial review conflicts with the opinions in several circuits that have held otherwise. Because of that split, the Supreme Court accepted Mach Mining's application for cert.

Compensability of Time Spent at Security Screen

The issue before the Court in *Integrity Staffing Solutions, Inc. v. Busk*, U.S. No. 13-433, is whether time spent by employees going through a post-shift security screen is compensable under the Fair Labor Standards Act (FLSA). The plaintiffs in this case worked for a temporary agency that supplied employees to work at an Amazon order fulfillment warehouse. At the end of each shift, employees were required to pass through a security screen, a process which could take up to 25 minutes. Employees were not paid for the time spent during the security screen. The plaintiffs sued arguing that this time should be compensable because it was "integral and indispensable" to the performance of their job. The district court disagreed with the plaintiffs and granted summary judgment in favor of the defendant. The Ninth Circuit Court of Appeals reversed the trial court decision and held that compensable time is any time spent performing activities that are "necessary to the principal work performed" and "done for the benefit of the employer." *Busk v. Integrity Staffing Solutions, Inc*., 713 F.3d 525, 530 (9th Cir. 2013) cert. granted, 134 S. Ct. 1490, 188 L. Ed. 2d 374 (2014).

Integrity Staffing Solutions, Inc. sought cert, arguing that the Court of Appeals applied the wrong test to determine if this time was compensable. The Department of Labor filed an amicus brief agreeing with Integrity, asserting that the "integral and indispensable" test is satisfied only when the post-shift activities are "closely or directly related to the proper performance of the employees' productive work."

Notice Requirement for Religious Accommodation

The EEOC successfully sought cert after the Tenth Circuit Court of Appeals dismissed a lawsuit it had filed on behalf of a Muslim woman seeking employment at clothing retailer, Abercrombie and Fitch ("Abercrombie"). In *EEOC v. Abercrombie & Fitch Stores, Inc*., the Commission filed suit on behalf of Samantha Elauf, a Muslim woman who had applied and interviewed for a position as a sales clerk or "model" at an Abercrombie store. "Models" are required to abide by the Abercrombie "Look" policy which generally requires employees to wear clothing and accessories consistent with its "preppy and casual" brand. Models are prohibited from wearing the color black and from wearing caps, although some exceptions can be considered for religious reasons.

When Elauf interviewed for the job she wore a hijab, but never asked the interviewer whether she would be permitted to wear a hijab if she were hired. No one at Abercrombie ever addressed the issue directly with Elauf, but knew that Elauf wore a hijab, having seen her in their store many times. Suspecting that Elauf would wear a hijab if employed, and apparently not knowing that Elauf's choice was based on her religion, Abercrombie gave Elauf a low "appearance" score on her interview that ensured she would not be offered a job.

The EEOC filed suit on Elauf's behalf. Abercrombie moved for summary judgment, arguing in part that it had no duty to consider an accommodation to Elauf's religious beliefs because Elauf had never informed them that she wore a hijab for religious reasons or that she may require an accommodation. The district court denied the motion, but the Tenth Circuit Court of Appeals reversed, finding it dispositive that Elauf did not tell Abercrombie that she wore a hijab because of her religious beliefs or that she would need an accommodation to Abercrombie's Look policy. The EEOC sought cert regarding the principle issue of whether an employer needs direct notice from an applicant regarding religious practices before the employer has any duty to consider the issue of accommodation.

Vesting of Retiree Healthcare Benefits if Contract Language is Silent

Retiree health insurance benefits are at issue in *M & G Polymers USA, LLC v. Tackett*, U.S. No. 13-1010. Here, the Supreme Court will decide whether retiree healthcare benefits are vested, absent specific language to the contrary in a collective bargaining agreement. The plaintiffs in this case are a group of retirees who retired under the terms of a collective bargaining agreement that provided they would receive, without limitation as to time or amount, full employer contribution towards the costs of retiree health care benefits. In 2006, the employer announced that retirees would be required to make contributions to the cost of benefits. The plaintiffs sued for injunctive relief. The employer filed a motion for summary judgment, which the trial court, after reconsideration of an earlier opinion, denied.

The Sixth Circuit Court of Appeals upheld the injunction issued by the district court mandating that the plaintiffs be reinstated into the health plan, free of cost. The employer sought cert, and the Supreme Court agreed to address the limited issue of whether there is a judicial presumption that if a collective bargaining agreement is silent as to the duration of retiree health care benefits, those benefits are intended to be for life. ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel at Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@legghioisrael.com.

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Long ago when I was an undergraduate philosphy major, my friends and I used to amuse ourselves by playing the Lifeboat Game. The basic outline is probably familiar. You've got several people with varying characteristics and abilities and a lifeboat that's too small to save everybody. Who do you throw overboard?

You can pose the problem with whatever characters you like. Some perennial favorites are: the evil criminal who knows navigation, the aged saintly hero, the pregnant woman, the concert violinist… you get the picture. Add several budding philosophers, some beverages, sprinkle with controlled substances, and you can keep the conversation going all night. In fact the point of the exercise when it's used in the classroom is that there is no answer to this question. The conversation will go round and round forever because there are no "focused criteria" for resolving it.

This all came back to me recently as I was trying to write a 312 award. Act 312 is the statute that gives arbitrators the power to decide which provisions will be included in certain collective bargaining agreements. It apples to uniformed personnel who haven't been able to negotiate an agreement and are not permitted to strike. Decisions on most issues require choosing either the Employer's last best offer or the Union's. There is no splitting the baby.

Decisions have to be made in these cases, there is no getting around that. The CBA for the next few years is going to have to cover healthcare. So, should the officers keep their old drug benefit or should they be moved against their will into the new plan proposed by the municipality? What about the pension contribution? The overtime procedure? Call-in procedure and minimum call-in pay? And what about wages?

The lawyers, of course, did what lawyers do. They gathered together volumes of exhibits showing that the positions advocated by their clients met the statutory criteria for internal comparables, external comparables, and ability to pay. They provided expert testimony and zealous argument. That's fine. They are advocates; their job is to advocate. But now the thing is on my desk, and the brute fact is I don't know what to do. Worse, I don't know how to proceed in figuring out what to do.

This is not just a confession of my own ignorance – although it is that too. It is an acknowledgement of the fact that this is an insoluble problem. Which is better, a two-tier wage system or a lower wage scale for everybody? There are reasons one might be preferred to the other. There are arguments to be made. But there is no answer to the question that isn't circular. A two-tier system rewards the people who have been around and paid their dues. A lower wage scale doesn't discriminate between old employees and new employees. But none of those arguments are convincing unless you are already convinced. Mostly, they just restate the problem.

We're back to the Lifeboat Game. We should save the baby. Why? Because SHE'S A BABY!

The problem with 312 awards is even broader than I have indicated so far. Remember, the public safety budget is just one piece of the larger municipal budget. Which is better, more vacation for the firefighters or more trash collection in the parks? What should we cut, activities in the senior center or hours in the library? Wages or pensions?

Money has to come from somewhere. If you spend it in one place, you have to take it away from someplace else. Everyone agrees on that. But who should make these decisions?

The answer is this is what politics is for. You build coalitions. You exchange what you value less for what you value more. You flatter and cajole. You lobby and horse trade. It is messy business, but it is essential. Ultimately, you make deals.

When the political process fails it is sometimes necessary to resort to other methods. But it is a mistake to suppose that any other process will be as sensitive to the needs of the parties. I will make this decision if the parties insist, but it is a decision that would be far better left to the people in the lifeboat. ■

MERC UPDATE

Catherine E. Tucker
White, Schneider, Young & Chiodini, P.C.

A summary of three recent Decisions issued by the Michigan Employment Relations Commission ("the Commission") follows. Decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/merc.

City of Flint (Police Department) -and- Police Officers Labor Council*, Case No. C11 K-188* (July 9, 2014).

Charging Party, the Police Officers Labor Council ("POLC"), filed an Unfair Labor Practice Charge ("ULP" or "Charge") alleging that Respondent, the City of Flint, violated its bargaining duty under §10(1)(e) of the Public Employment Relations Act ("PERA") by refusing to bargain over the impact or effect of its decision to impose health insurance cost increases on members of two bargaining units represented by Charging Party. Respondent asserted that the Charge should be dismissed because neither the decision nor the effects thereof are proper subjects of bargaining under Public Act 54 of 2011 ("PA 54"), which requires that employees bear any increased cost of maintaining health, dental, vision, prescription or other insurance benefits during the period between the expiration of a collective bargaining agreement and the negotiation of its successor. After an evidentiary hearing, Administrative Law Judge ("ALJ") David M. Peltz determined that Respondent violated its statutory bargaining obligation and recommended that Respondent cease and desist from refusing to bargain and make the employees in Charging Party's bargaining units whole for any losses suffered as a result of Respondent's refusal. Neither party filed exceptions. Accordingly, the Commission adopted ALJ Peltz's Decision and Recommended Order as its final order.

Charging Party represents two bargaining units, which consist of police captains, lieutenants and sergeants employed by City of Flint Police Department. Although the most recent collective bargaining agreement ("CBA") covering each unit expired in 2008, the parties agreed to extend both agreements for one year and continued to adhere to the terms of the expired agreements governing health insurance until the instant dispute. Both units' expired CBAs provided that employees would share the cost of health insurance coverage on an 80/20 basis and offered several health insurance plan options. Each year employees were allowed to select an option for the following plan year, which began on July 1 and ended on June 30, during a six-week open enrollment period in April and May. Shortly after the enrollment period for the plan year scheduled to begin on July 1, 2011 ended, PA 54 took effect.

By e-mail dated July 7, 2011, Respondent notified Charging Party that members of any bargaining unit without a contract on July 1, 2011 would be responsible for the increased cost of their health insurance plans as a result of the recent enactment of PA 54. On July 8, 2011, Charging Party submitted a demand to bargain regarding the impact of the health insurance cost increases but received no response from Respondent. By e-mail dated July 11, 2011, the president of one of Charging Party's units demanded that Respondent delay implementation to allow the parties to engage in discussion about the effects on the bargaining unit and to provide an opportunity for members to review the health insurance cost increases and make an informed selection. In response, Respondent denied that it had any obligation to bargain over the effects of the cost increases and implemented the increases on members of both units beginning with the pay period ending on July 9, 2011.

On April 12, 2012, Respondent, which was operating under the authority of an emergency financial manager, reached a tentative agreement with Charging Party's units and both units ratified the agreement the following day. On April 6, 2012, Respondent's Emergency Manager adopted the agreements and Respondent ceased deducting the increased health insurance premiums from its employees' payroll.

Before the parties reached successor agreements, however, Charging Party filed the instant Charge. While Charging Party acknowledged Respondent's authority to impose increased health insurance costs on its employees pursuant to PA 54, it asserted that Respondent acted in violation of its statutory duty by refusing to bargain over the impact and effects of its decision and the new law. In particular, Charging Party alleged that Respondent had a duty to bargain over whether to offer its employees the opportunity to elect a different health care plan or provider in an effort to offset the cost increases. Upon his review of the record and applicable law, ALJ Peltz agreed and concluded that Respondent violated its statutory duty to bargain by ignoring or rejecting Charging Party's "clear and unequivocal demand to bargain" over the impact of the health insurance cost increases. In reaching this conclusion, ALJ Peltz emphasized that even where an employer has no obligation to bargain over a particular decision, it still has a duty to give its employees' representative an opportunity for meaningful bargaining over the effects of that decision. See, e.g., *Ecorse Bd of Ed*, 1984 MERC Lab Op 615.

In his analysis, ALJ Peltz considered but ultimately rejected several arguments that Respondent asserted in defense of its conduct. First, Respondent argued that it had no duty to bargain because PA 54 was intended to relieve employers of their bargaining obligation with respect to the impact or effects of implementing the new law. Applying principles of statutory construction, however, ALJ Peltz reasoned that the Legislature was presumably aware that both the Commission and the courts have recognized that an employer has a duty to bargain over the impact a decision has on its employees and that the Legislature intentionally omitted any language prohibiting bargaining over the effects of health care cost increases when it enacted PA 54. Second, Respondent argued that negotiations would have been futile in the instant case because Section 125 of the Internal Revenue Code precludes an employer from providing its employees with more than one open enrollment period for a cafeteria plan during a plan year. Upon review of the relevant IRS regulations, ALJ Peltz reasoned that Respondent failed to act reasonably and in good faith by relying on those regulations to reject Charging Party's bargaining demand in light of a "significant cost change" exception to the prohibition on a mid-year election change which ALJ Peltz concluded would likely apply in the instant case. Finally, Respondent argued that negotiations would have been futile because it was facing an economic crisis and could not afford to hold a second open enrollment period. In response, ALJ Peltz cited several Commission decisions in support of the proposition that even a bona fide financial crisis does not entitle an employer to ignore its statutory bargaining ob-

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MERC UPDATE

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ligations. See, e.g., *Wayne County Board of Commissioners*, 1985 MERC Lab Op 1037.

Based on his finding that Respondent had unlawfully rejected Charging Party's bargaining demand, ALJ Peltz directed Respondent to cease and desist from refusing to bargain in good faith. In addition, ALJ Peltz issued an order intended to approximate the results of good-faith bargaining by requiring that Respondent pay members of Charging Party's bargaining units the difference between the actual health insurance cost increases it imposed on them and the increases that they would have incurred under PA 54 had they been allowed to change to the least expensive health insurance plan in which they could have enrolled during the period from July 1, 2011 to April 6, 2012, the date on which the successor CBAs took effect.

***Wayne State University -and- Barbara A. Richardson**, Case No. CU10 L-317* (August 15, 2014).

Charging Party, Barbara A. Richardson, filed a Charge against Respondent, Wayne State University, alleging that it violated §10(1)(a) and (c) of the Public Employment Relations Act ("PERA") by discriminating or retaliating against her for her union activities by issuing her a negative performance evaluation rating. In addition, she asserted that Respondent refused to accept her individual grievance in violation of §11 of PERA. After a hearing, ALJ Peltz found that Respondent did not violate the relevant provisions of PERA and recommended that the Charge be dismissed in its entirety. In response, Charging Party filed timely exceptions. Upon review of Charging Party's exceptions, the Commission affirmed the ALJ's findings and ordered that the Charge be dismissed in its entirety.

Charging Party is an employee of Respondent's College of Engineering and formerly served as union president for P & A UAW Local 1979. On October 29, 2009, Charging Party met with her supervisor and several other representatives of Respondent to discuss the propriety of her use of contractual union release time while serving as union president. At the end of the meeting, the issue remained unresolved and the Associate Dean for Respondent's College of Engineering advised Charging Party that it would be "handle[d]" at her upcoming performance evaluation meeting. Shortly after she returned to work from a five-month sick leave in May of 2010, Charging Party received a performance evaluation rating of "Less than Satisfactory." In August, she submitted a response objecting to the evaluation and alleging that the rating amounted to retaliation for her activities as union president. In particular, she asserted that Respondent used the evaluation as retribution for grievances that she had filed against its College of Engineering, to include a grievance that she filed on November 10, 2009 alleging that the removal of her supervisor's position from the bargaining unit constituted unlawful erosion.

On July 9, 2010, Charging Party attempted to file an individual grievance alleging that her supervisor was not qualified to evaluate her work performance but Respondent's labor relations department refused to accept it. On August 5, 2010, Charging Party attempted to file her grievance for the second time but Respondent again rejected it. Charging Party subsequently filed the instant Charge alleging, *inter alia*, that Respondent violated §11 by refusing to accept her grievance. ALJ Peltz dismissed this portion of her Charge, however, for failure to state a claim under PERA, citing several prior decisions in which the Commission has found that an employer has no obligation to process an individual grievance. See, e.g., *Detroit Fire Department*, 1995 MERC Lab Op 604. Charging Party filed no exceptions relating to this portion of ALJ Peltz's Decision.

Charging Party did file an exception, however, to ALJ Peltz's finding that Respondent had not restrained, interfered with or coerced her in the exercise of her rights in violation of §10(1)(a). In its discussion of this exception, the Commission reviewed the applicable tests for determining whether an employer has violated §10(1)(a) but concluded that no violation had occurred. See, e.g., *Michigan State Univ (Police Dep't)*, 26 MPER 36 (2012). In reaching this conclusion, the Commission reasoned that there was no evidence that the Associate Dean threatened Charging Party at the October 29, 2009 "meeting" or that the circumstances surrounding Charging Party's evaluation would interfere with or coerce a reasonable employee in exercising her rights under PERA. The Commission considered the fact that Charging Party continued her union activities for the duration of her position as local president as further evidence that Respondent had not violated §10(1)(a).

Charging Party also excepted to ALJ Peltz's finding that her performance evaluation rating was not the result of discrimination or issued in retaliation for her concerted activities in violation of §10(1)(c). In analyzing this exception, the Commission reviewed the elements of a *prima facie* case of unlawful discrimination under PERA but affirmed the ALJ's determination that Charging Party had not established the requisite elements. See *Detroit Symphony Orchestra*, 393 Mich 116 (1974). In particular, like ALJ Peltz, the Commission found that the Associate Dean's comment did not support a prima facie case of anti-union discrimination as it was "vague and innocuous" and made several months before she received her performance evaluation. The Commission also affirmed ALJ Peltz's finding that Charging Party's "Less than Satisfactory" rating did not constitute an adverse employment action of the kind contemplated by §10(1)(c) of PERA. Charging Party did not suffer a demotion, discipline, a reduction in pay or benefits or a material change to her job duties. Absent such adverse action, the Commission found that there was no evidence to support Charging Party's claim that she "suffered negative consequences affecting her work" as a result of the evaluation. Similarly, the Commission found that Charging Party failed to establish any evidence in support of her claim that her supervisor's alleged failure to properly evaluate her was discriminatory or retaliatory. To the contrary, the Commission found that her supervisor made no reference to Charging Party's union activities in her evaluation and properly focused on her duties and performance. See *Univ of Michigan*, 3 MPER 21066 (1990).

Based on its review of the record, the Commission concluded that Charging Party's allegations were "all baseless." As a result, the Commission affirmed ALJ Peltz's recommendation and issued an order directing that the Charge be dismissed in its entirety.

***Shelby Township -and- Command Officers Association of Michigan**, Case No. CU12 D-067* (August 18, 2014).

Charging Party, Command Officers Association of Michigan, filed a Charge against Respondent, Shelby Township, alleging that it failed to bargain over the allocation of its employees' share of health insurance costs and unlawfully rejected Charging

Party's January 6, 2012 bargaining demand. Administrative Law Judge ("ALJ") Julia C. Stern found that Respondent breached its statutory bargaining duty by requiring Charging Party's members to pay a share of the cost of a medical benefit plan which had been calculated to include retiree medical costs and by refusing to bargain over and unilaterally implementing increases to Charging Party's unit members' twenty percent (20%) premium share. As a result of these violations, ALJ Stern issued an order directing Respondent to bargain with Charging Party over the calculation and total amount of Charging Party's unit members' premium share and to recalculate their share after January 1, 2012 or to make them whole for any payroll deduction in excess of 20% of the illustrative rate for their insurance coverage during that period. Respondent filed exceptions to ALJ Stern's Decision and Recommended Order and Charging Party filed a brief in support. Upon its review of the record and the parties' briefs, the Commission affirmed the ALJ's decision in part and reversed it in part.

The parties' most recent collective bargaining agreement ("CBA"), which expired on December 31, 2010, provided the bargaining unit of supervisory police officers represented by Charging Party with health insurance under a plan issued by Blue Cross Blue Shield of Michigan ("BCBSM"). Following the expiration of that CBA, Charging Party's members continued to receive coverage under that same plan. Negotiations for a successor agreement began in the spring of 2011. In response to the enactment of Public Act 152 of 2011 ("PA 152") that September, the parties began to discuss possibilities for minimizing unit members' share of health care costs. In November of 2011, Respondent received bundled illustrative rates reflecting the costs for its active employees' and retirees' health care coverage for the upcoming benefit plan coverage year. Respondent notified Charging Party's bargaining unit members of the open enrollment period and of the fact that new elections would take effect on January 1, 2012.

At a meeting on December 6, 2011, Respondent's Township Board adopted a resolution electing the 80/20 cost sharing option under §4 of PA 152 for the upcoming plan year. Accordingly, Respondent began deducting a premium share in an amount based on the bundled rate from each of Charging Party's unit members' paychecks beginning with the payroll ending on January 9, 2012. By letter dated January 6, 2012, however, Charging Party demanded to bargain over the calculation method and total amount of contributions before Respondent began deductions. Following Charging Party's demand, the parties continued to bargain but Respondent unilaterally implemented the increased deductions.

Upon her review of the record and the parties' briefs, ALJ Stern found that Respondent violated its statutory bargaining obligation. To the extent that ALJ Stern based this finding on her conclusion that the election of a particular cost sharing option under PA 152 is a mandatory bargaining subject, however, the Commission rejected her finding. ALJ Stern issued her Decision before the Commission issued its decision in *Decatur Pub Sch*, 27 MPER 41 (2014), in which it concluded that the choice of cost sharing options is a permissive subject of bargaining. In the instant case, therefore, the Commission found that Respondent had no duty to bargain over this permissive bargaining topic and that, even if it did, Charging Party had never demanded to bargain over cost sharing options.

Although the Commission rejected ALJ Stern's conclusion that an employer's election of a particular cost sharing option constitutes a mandatory bargaining subject, it affirmed her finding that the allocation and calculation of the employee premium share is a mandatory subject. In reaching this conclusion, the Commission reasoned that because §4(2) of PA 152 expressly allows an employer to allocate the employee share of total annual plan costs among its employees and does not regulate this allocation, an employee's share of health insurance benefit costs continues to be a mandatory bargaining subject. See, e.g., *St. Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 MIch 540, 551 (1998). The Commission also agreed with the ALJ's finding that Charging Party's demand to bargain over that topic was timely, despite the fact that it was issued after the medical benefit plan coverage year began on January 1, in light of its reasonable belief that the coverage year began on February 1. The Commission rejected ALJ Stern's finding, however, that Respondent refused to bargain with Charging Party after receiving its bargaining demand. To the contrary, the Commission found that Respondent engaged in discussions on that topic and participated in mediation shortly after it received the January 6, 2012 demand.

While the Commission found no evidence that Respondent refused to bargain with Charging Party, it affirmed the ALJ's finding that Respondent violated its bargaining obligation under PERA by unilaterally implementing increases in its employees' premium share based on an illustrative rate that included retiree health care costs. In its discussion, the Commission acknowledged that an employer may implement an employee premium share within the limits established by §4 of PA 152 without violating its statutory duty to bargain even where the parties have not reached impasse or agreement. See *Decatur Pub Sch*, 27 MPER 41 (2014). In the instant case, however, Respondent required its employees' to pay more than 20% of its total annual benefit plan costs and impermissibly calculated its employees' premium share using a bundled illustrative rate which included the cost of its retirees' health care. Under the relevant provisions of PA 152, the "total annual costs of all of the medical benefit plans" that a public employee offers its employees expressly excludes the costs for retiree health benefits. See MCL 15.562(e); MCL 15.564(2). The Commission reasoned, therefore, that Respondent's unilateral implementation was not excused by an attempt to conform to the requirements of PA 152. Likewise, the Commission also rejected Respondent's argument that its decision to raise its employees' premium share above 20% was required by Public Act 54 of 2011 ("PA 54"). Pursuant to PA 54, Respondent could have lawfully required Charging Party's unit members to pay more than 20% of the unbundled illustrative rate when that rate increased on February 1, 2012. The Commission found, however, that PA 54 did not authorize Respondent to increase its employees' share based on the bundled illustrative rate which improperly included a retiree health care cost component.

On the basis of its finding that Respondent violated its bargaining obligation by unilaterally implementing an increase to its employees' share of health care costs in excess of the amount authorized by PA 152 and PA 54, the Commission issued an order directing Respondent to cease and desist from unilaterally increasing its employees' premium share based on rates that include retiree health care costs. In addition, the Commission ordered Respondent to recalculate its employees' share of health care costs as of January 1, 2012 using unbundled illustrative rates and to make members whole for any overpayment that resulted from Respondent's use of bundled rates. ■

MERC NEWS

Ashley Olszewski,
Paralegal, Bureau of Employment Relations

The Michigan Employment Relations Commission/Bureau of Employment Relations will be hosting a half–day constituent training program on March 26, 2015 and a full-day Fact Finder and Act 312 Arbitrator training program on March 27, 2015. Constituent training topics to be covered include: MERC Decision Update, Amended Act 312 and General Administrative Rules, Freedom to Work, Settlement Trends, and Grievance Mediation. The Arbitrator and Fact Finder training, which constituents may attend, will cover topics including: Fact Finding Recommendation Considerations, School Finance/Deficit Elimination Plans, and Local Government Fiscal Health/How a Financial Emergency Works. Information on registration and cost may be found on MERC's website at www.michigan.gov/merc. Both programs will be held at Schoolcraft College Vista Tech Center in Livonia.

MERC's second-ever Annual Report is now available for distribution and review on the agency's website. The Report highlights the numerous accomplishments of MERC and the Bureau, and covers the 2014 fiscal year from October 1, 2013 —September 30, 2014.

MERC/BER presented a very well-received *MERC Back to Basics* training program on August 20, 2014 in Troy. The program focused on the basics of labor relations in public sector collective bargaining in Michigan and the services available through the BER. The training was created in response to a request from a constituent advisory committee, based upon the observations that a large number of recently-appointed labor relations managers and union representatives could benefit from a greater understanding of MERC/BER programs and processes. The *MERC Back to Basics* training program was developed by BER staff and was presented by Commission Chair Dr. Edward Callaghan, Mediator Sidney McBride, and Mediation Supervisor James Spalding. Over 50 people responded to the announced training and attended the half-day session. The success of the *MERC Back to Basics* training program has prompted BER to begin offering the training opportunity across the State, with initial interest already expressed in the areas of Western and Northern Michigan.

MERC's website has been upgraded to provide two methods for conducting searches of MERC case decisions: by keyword or by year/month of issue date. This enhancement is significant and very popular as it provides constituents with a convenient, free resource to more readily obtain relevant MERC case law. ■

"BECAUSE I SAID SO, THAT'S WHY!"— THE LAW OF THE CASE DOCTRINE AND THE MANDATE RULE

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Following a recent post-remand experience in a federal district court (outside the Sixth Circuit), I have a new appreciation for the nuances and practical application of the law-of-the-case doctrine and the related mandate rule. The doctrine and the rule sometime serve as the judicial equivalent of the parental response to a child's protest of a paternal or maternal directive: "Because I said so, that's why!"

The Doctrine and the Rule

When a court of appeals remands to a federal district court, the district court generally must "proceed in accordance with the mandate and law of the case as established by the appellate court." *Schafer v. Multiband Corp.*, ___ F.Supp.3d ___ (2014), quoting *Hanover Ins. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997), quoting *Petition of U.S. Steel Corp.*, 479 F.2d 489, 493 (6th Cir. 1973). The "Supreme Court's interpretation of the doctrine is that 'When a court decides upon a rule of law that decision should continue to govern the same issues in subsequent stages in the same case.'" *Schafer*, ___ F.Supp.3d at ___, quoting *Arizona v. California*, 460 U.S. 605, 618 (1983).

"Because I said so, that's why!"

The "doctrine protects parties from having to re-litigate issues decided in prior stages and insures that inferior courts obey the law established by superior courts." *Schafer*, ___ F.Supp.3d at ___, citing *NAACP v. DPOA*, 676 F.Supp. 790, 791 (E.D. Mich. 1988).

The "related 'mandate rule'—a 'specific application of the law-of-the-case doctrine'—holds that 'a district court is bound to the scope of the remand issued by the court of appeals.'" *Kindle v. City of Jeffersontown, Ky.*, ___ Fed.Appx. ___ (6th Cir. 2014) (citation omitted).

Exceptions

The law-of-the-case doctrine and the mandate rule promote efficiency, certainty, and the one-bite-of-the-apple principle. Unlike the Ten Commandments, however, they are not carved in stone. Rather, they are subject to exceptions. A district court may "reconsider a ruling," for example: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling

authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Schafer*, ___ F.Supp.3d at ___, quoting *Hanover*, 105 F.3d at 310.

The exceptions to the mandate rule are "exceptionally narrow." *Williams v. McLemore*, 247 Fed.Appx. 1, 7 (6th Cir. 2007). "Although the law of the case doctrine is applied with some flexibility with regard to reconsideration of earlier decisions by the same court or a coordinate court, it is 'rigidly applied to enforce a lower court's obedience to a higher court.'" *U.S. v. Barnwell*, 617 F.Supp.2d 538, 543 (E.D. Mich. 2008), quoting *Williams*, 247 Fed.Appx. at 7.

In my case—in my effort to persuade the district judge to disregard the court of appeals' mandate as contrary to the dictates of the U.S. Supreme Court and earlier precedent in that same court of appeals—I cited two cases that teach that a district court is entitled to disregard an appeals court's erroneous mandate and is expected to follow the law. The cases are *Moulds v. Bullard*, 452 Fed.Appx. 851 (11th Cir. 2011) ("*Moulds II*") and *U.S. v. Manfre*, 456 F.3d 871 (8th Cir. 2006).

In *Moulds II*, the appeals court *affirmed* the district judge post-remand where the judge *disregarded* the appeals court's erroneous mandate. In *Manfre*, the appeals court *reversed* the district judge post-remand where the judge *followed* the appeal court's erroneous mandate. The lesson: where the circumstances warrant, district judges should have the courage of their convictions.

Moulds

In *Moulds*, a state prisoner brought a civil rights action against prison officials. The district court granted summary judgment for the officials. The prisoner appealed. The Eleventh Circuit reversed on the prisoner's' claim that he was denied the right to call witnesses at a disciplinary hearing, and remanded for further proceedings. *Moulds v. Bullard*, 345 Fed.Appx. 387 (11th Cir. 2009) ("*Moulds I*").

On remand, the prison officials filed a second summary judgment motion. They argued that *Moulds I* "misapplied the law." The district court agreed and again granted summary judgment for the prison officials. The prisoner again appealed. He asserted the law-of-the-case doctrine and the mandate rule.

In *Moulds II*, the Eleventh Circuit affirmed the second summary judgment. The appeals court agreed that *Moulds I* overlooked that the prisoner did not show he had been deprived of liberty, a requirement of his due process claim. The Eleventh Circuit held in *Moulds II* that the district court *correctly* found on remand that *Moulds I* was "clearly erroneous." The Eleventh Circuit agreed, too, that its error in *Moulds I* did "manifest injustice." 452 Fed.Appx. at 854-855.

In particular, the Eleventh Circuit held that the district court properly granted post-appeal summary judgment to the prison officials on remand because the appeals court's "clear error" in *Moulds I* "could affect the case's outcome." The Eleventh Circuit held that "[a]t the least" its error would unjustly require the prison officials "to defend against litigation for which they legally should not be held liable." Further, the Eleventh Circuit held, "public policy concerns are relevant to a determination of manifest injustice" and that its error might do "manifest injustice" to "other potential defendants" who would be forced to protect themselves by conforming to the *erroneous* standard applied in *Moulds I*. 452 Fed.Appx. at 853, 855-856.

Manfre

The Eighth Circuit employed similar principles in *Manfre*, which addressed the application of federal sentencing standards in a criminal case. The Eighth Circuit recognized that its earlier conclusion about the earlier district court findings apparently had been "mistaken." 456 F.3d at 874.

The Eighth Circuit held that "nothing" in its earlier opinion "or its mandate prevented the district court from correcting our error and clarifying the reasons" for disagreeing with the mandate to impose a sentencing enhancement. The "law-of-the-case doctrine would not prevent the district court from revisiting the matter if our prior decision was 'clearly erroneous and work[ed] a manifest injustice.'" The Eighth Circuit reversed the enhanced sentence imposed on remand by the district court based on the mistakenly-premised mandate, and again remanded, "for further resentencing consistent with this opinion." 456 F.3d at 874 (citation omitted).

Don't Look Back

I was brought into my law-of-the-case case post-remand. My predecessor got summary judgment in the district court. The court of appeals reversed, however, and sent the case back for trial. The appeals court applied state law. The appellate decision failed to apply governing preemptive federal law, set out in two U.S. Supreme Court decisions, both applied in earlier cases by that same court of appeals. The appeals court did not distinguish or reject the governing federal law; it failed to even cite the federal law.

I thought we would save the day by pointing out the court of appeals oversight which, in the salient terminology, was "clearly erroneous and would work a manifest injustice." After all, how often is one able to invoke four decisions addressing virtually-identical circumstances, two from the Supreme Court and two more from the pertinent court of appeals? As the district judge pretty much got it right the first time, I believed he would relish avoiding manifest injustice and a protracted jury trial while poking a collegial elbow into the metaphorical ribs of the appeals court.

I believed *Moulds II* and *Manfre* would illuminate the path to justice. They showed that when a district judge corrects an appeals court's error, the judge will be respected, vindicated, and affirmed (*Moulds II*), and that when a district judge declines to correct an appeals court's error, the judge will be reversed yet again (*Manfre*). Live and learn. I filed our post-remand summary judgment motion. "Law of the case," the opposition retorted. "Jury trial," the district judge said.

Whatever might happen at trial, the district judge acknowledged, assuredly would be challenged in a second appeal by one side, or the other, or both. Eventually the appeals court could sort out all that Supreme Court precedent stuff. Save it for later, the judge said. For now, get ready for trial—soon. "But judge," I said, "why?" He responded, in essence: "Because I said so, that's why!" ■

DEATH OF AN EXPERT WITNESS

Sheldon J. Stark
Mediator and Arbitrator

I recently attended a memorial service for an old friend, Dr. Emmanuel Tanay, a longtime, highly regarded forensic psychiatrist and expert witness who died at the age of 86. Dr. Tanay had been an expert in many nationally renowned cases: Sam Shephard, Jack Ruby, and Ted Bundy, among others. He published a collection of essays about his courtroom experiences in *American Legal Injustices—Behind the Scenes with an Expert Witness.* In his first book, *Passport to Life—Autobiographical Reflections on the Holocaust*, he described how he survived as a young Jewish boy in Poland during World War II.

I first met Dr. Tanay in the late 1970s. At the time he was a clinical professor at Wayne State University School of Medicine, with a private practice in the Fisher Building. I represented a college dean being forced to retire at age 65. My client was in good health, mentally fit, and emotionally unready to step down. The Elliott-Larsen Civil Rights Act had just been signed into law and we decided to challenge his mandatory retirement by seeking a temporary restraining order and preliminary injunction. The dean was bound and determined to stop his termination in its tracks.

The requirements for injunctive relief set a high bar, including demonstration plaintiff will suffer irreparable harm if an injunction is not granted. It is no accident hat the injunction is referred to as an "extraordinary remedy." Because employment discrimination plaintiffs can typically recover back pay, front pay, emotional damages, attorney fees, and equitable relief should they prevail, meeting the "irreparable harm" burden was a major impediment to recovery.

In researching the law of age discrimination, I came across the then recently decided case of *United Air Lines, Inc. vs. McMann*, 434 US 192 (1977), which held—until overturned by Congressional amendments to the ADEA—that the "age act" did *not* prohibit mandatory retirement. However, the American Medical Association submitted an *amicus* brief in the case arguing that mandatory retirement had an immediate impact on health and life expectancy. The AMA noted that an alarming percentage of employees forced to retire died within two years of losing their employment. If I could identify an expert who would testify that my client was facing the risk of death or serious illness, we might be able to overcome the irreparable harm hurdle.

I was familiar with Dr. Tanay because I knew a number of lawyers who had successfully employed him as an expert. He was known to be smart, empathetic, and savvy as a witness. When I first met with Dr. Tanay, he was reluctant to become involved. Although he was familiar with the effects of mandatory retirement, he had no previous experience as an expert witness in employment litigation. After meeting and examining my client, however, and thinking it over, Dr. Tanay agreed to the engagement. He wrote a strong report describing the potential impact on the dean's prospects to survive until trial—then perhaps three or four years away in a clogged Wayne County docket.

Our trial judge, the great Jimmy Montante, granted a TRO and scheduled our request for a preliminary injunction for the following week. Apparently intimidated by the prospect of cross examining Dr. Tanay, defense counsel stipulated to admission of his report. Judge Montante was familiar with Dr. Tanay and understood the issue presented. He denied our request for a preliminary injunction but persuaded by Dr. Tanay's concern, set the case for immediate trial only weeks later in early April 1977. Our case became the very first case of employment discrimination tried in Michigan under ELCRA.

Following several days of testimony, it became evident that the college lacked good reason for demanding the dean's departure. Judge Montante suggested the parties discuss settlement and the case resolved. The dean returned to work a happy man. We were both grateful for the help of Dr. Tanay. ■

DO WHAT YOUR EMPLOYER ASKS; JUST DON'T EXPECT TO GET PAID: THE SUPREME COURT DECIDES *INTEGRITY STAFFING V. BUSK*

Jesse L. Young
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The U.S. Supreme Court issued its highly anticipated decision in *Integrity Staffing Solutions, Inc. v. Busk*. The issue was whether, under the federal Fair Labor Standards Act (FLSA), the time spent by warehouse workers waiting in line at the end of their shifts in order to pass through required security checkpoints was compensable. In a 9-0 decision, the Court held this time was not compensable.

Integrity Staffing required its employees to undergo a security screening before leaving the warehouse at the end of each day. During this screening, employees removed items such as wallets, keys, and belts and passed through metal detectors. While the warehouse workers were required to undergo these screenings and waited in security lines for up to 25 minutes per day—and many hours per year—Integrity Staffing did not pay its employees for this time.

The plaintiffs argued, and the Ninth Circuit held, that under the FLSA, post-shift activities ordinarily classified as non-compensable are nevertheless compensable if necessary to the principal work performed *and* done for the benefit of the employer. The Ninth Circuit concluded the screenings were compensable because they were "necessary" to the employees' primary work as warehouse workers and done for Integrity Staffing's benefit.

Reversing the Ninth Circuit, in an opinion by Justice Thomas, the Supreme Court ruled the security screenings were not compensable. In support of this conclusion, the Court explained: (1) the warehouse workers were hired to retrieve products from warehouse shelves and package them for shipment, not to undergo security screenings; and (2) the security screenings were not "integral and indispensable" to the employees' duties, as the employer could have "eliminated the screenings altogether without impairing the employees' ability to complete their work." The Court faulted the Ninth Circuit for "focusing on whether an employer *required* a particular activity" and not on "the productive work that the employee is *employed to perform*." The Court further held as overbroad "[a] test that turns on whether the activity is for the benefit of the employer."

Justice Sotomayor wrote a concurring opinion, which Justice Kagan joined, to separately explain their understanding of the standards the Court applied. Justice Sotomayor first explained that "an activity is 'indispensable' to another, principal activity only when an employee could not dispense with it without impairing his ability to perform the principal activity safely and effectively." She went on to explain that "the security screenings were not 'integral and indispensable' to the employees' other principal activities in this sense." Second, she explained that the Portal-to-Portal Act "distinguishes between activities that are essentially part of the ingress and egress process, on the one hand, and activities that constitute the actual 'work of consequence performed for an employer' on the other hand . . . [t]he security screenings at issue here fall on the 'preliminary . . . or postliminary' side of this line."

For those who followed the case, it was fairly obvious that the ultimate outcome would depend on the test the Court used to determine the issue. By rejecting the employees' argument that the test should include whether the post-shift activity is "required by the employer" or "for the benefit of the employer," the employees' fate was sealed.

For employers, the impact of the decision is clear. A test of whether an activity was "integral and indispensible" to the principal activity the employees were hired to perform provides employers with a renewed defense to claims arising from pre- and post-shift work that is required but arguably unrelated to the employees' primary job duties. It's a safe bet that employees who work in retail environments have little recourse against employers who require them to wait for and pass through security checkpoints without pay. What is less clear for employers at this point, however, is how the courts will interpret *Busk* in determining whether certain pre- and post-shift work is sufficiently related to an employee's primary job duties.

For employees, *Busk* is viewed as an assault on the already expansive gap in income equality and as lowering the working conditions in the United States. For sure, some in the plaintiff's bar are already questioning the breadth of applicability *Busk* will have in the workplace, dreaming up scenarios where employees are required come in early and prepare breakfast for their employers without pay—and since that activity is totally unrelated to the job they were hired to perform, it would not be compensable work under the FLSA.

But it's not all bad news for employees. There are silver linings in *Busk*, most notably the Supreme Court's continued casting of doubt on the appropriateness and availability of the *de minimis* doctrine as a defense in FLSA cases involving preliminary and postliminary shift work. Citing this doctrine, employers have historically (and often successfully) argued that infrequent and insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded by the courts as *de minimis* (i.e., insignificant).

Of course, *Busk* will be scrutinized and subject to interpretation by other courts to determine the limits of what time required by employers is compensable based on whether the duties are "integral and indispensable" to an employee's principal work activities. It will be interesting to observe how courts interpret and apply *Busk* to the various employment settings where pre- and post-shift work is commonplace. But for now, employees should plan to do all their employers require—and not expect to get paid for time spent in the ingress and egress process. ■

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