LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 15, No. 2 Summer 2005

GARG: ABOLISHMENT OF THE CONTINUING VIOLATIONS DOCTRINE UNDER MICHIGAN LAW

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Recently, the Michigan Supreme Court issued a sweeping opinion that will assuredly have a significant and immediate impact upon the handling of employment litigation claims under Michigan law. In *Garg v. Macomb County Community Mental Health Services*, 472 Mich. 263 (2005), the Court abrogated the continuing violations doctrine under Michigan law. The Court's opinion also touched upon a host of other key employment litigation issues, including the admissibility of acts falling outside the period of limitations as a means of supporting a timely claim, reliance upon stray remarks, and acceptable forms of opposing conduct prohibited by the Elliott-Larsen Civil Rights Act (ELCRA). Although only time will determine the true impact of the *Garg* decision, there can be no dispute that its holdings will shape fundamental employment litigation decisions ranging from choice of law and forum to routine discovery and evidentiary issues.

THE *GARG* DECISION

Plaintiff Sharda Garg, a female of Asian Indian descent, began her employment with Defendant Macomb County Community Mental Health Services in 1978, serving as a staff psychologist. During her employment, Plaintiff was denied promotional opportunities on numerous occasions and, beginning in 1987, filed several unsuccessful grievances claiming the denials were based upon her national origin. On July 21, 1995, Plaintiff brought suit against Defendant under the ELCRA, alleging national origin discrimination and retaliation for her grievances as well as other acts taken in opposition to sexual harassment. Plaintiff claimed that the retaliation occurred from 1987 through the date of the 1998 trial and took the form of denied promotional opportunities, degrading and humiliating treatment, and racially derogatory remarks.

Defendant moved for summary disposition, claiming that certain of Plaintiff's claims were barred by the three-year statute of limitations applicable to her claims under M.C.L. §§ 600.5805(1) and (10). The trial court denied the motion, relying upon the continuing violations doctrine adopted by the Michigan Supreme Court in *Sumner v. Goodyear Tire & Rubber Co.*, 427 Mich. 505 (1986). In *Sumner*, the Court relied upon federal precedent in adopting the continuing violations doctrine, which allows a plaintiff to recover for acts outside the limitations period. In order for the doctrine to be applicable, a plaintiff must first demonstrate that a violation took place within the limitations period and, if so, that his or her employer had engaged in a "policy of discrimination" or "a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern[.]".

Application of the continuing violations doctrine permitted the Plaintiff in *Garg* to introduce evidence of adverse employment actions that predated her lawsuit by more than the three-year statute of limitations. The jury ultimately returned a verdict in favor of Plaintiff, concluding that she had been subjected to unlawful retaliation and awarding her $250,000.00.[1] The Michigan Court of Appeals, in an unpublished opinion, affirmed the jury's verdict and determined that the trial court properly applied the continuing violations doctrine to Plaintiff's claims.

The Michigan Supreme Court, in a 4-3 opinion, reversed the Court of Appeals and remanded the case for entry of judgment in favor of Defendant. The majority opinion forcefully rejected the continuing violations doctrine first adopted in *Sumner*, determining that it found no support in the text of the applicable statute of limitations, M.C.L. §§ 600.5805(1) and (10). The majority found that the statute "does not say that a claim outside this three-year period can be revived if it is somehow 'sufficiently-related' to injuries occurring within the limitations period" and "[n]othing in these provisions permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations.'" The majority further criticized *Sumner's* "unduly heavy reliance" upon federal precedent, stating that "while federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law."

The abolition of the continuing violations doctrine rendered untimely all retaliatory actions alleged by the Plaintiff in *Garg* to have occurred outside the three-year limitations period. However, the majority went further and also rejected the proposition that these acts falling outside the period of limitations, while not independently actionable, could be admissible "as background evidence in support of a timely claim." The majority determined that such a position "would essentially resurrect the 'continuing violations' doctrine of *Sumner* through the back door." Doing so, reasoned the majority, would "allow the plaintiff to resuscitate stale claims … and require a defendant to defend against such claims in the face of the passage of time, fading memories, and the loss of witnesses and evidence."

Without the benefit of the retaliatory acts occurring outside the three-year limitations period, the majority concluded that Plaintiff could not establish a causal connection between her initial protected activity in 1987 and any retaliatory acts occurring within the limitations period, which would have taken place between five and eleven years after the protected activity.

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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***

GARG: ABOLISHMENT OF THE CONTINUING VIOLATIONS DOCTRINE UNDER MICHIGAN LAW

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THE IMPACT OF THE *GARG* DECISION

Although it will be some time before the true breadth of the Michigan Supreme Court's decision in *Garg* is established, its potential impact in the realm of employment litigation in Michigan is extensive.

Choice of Law and Forum

A plaintiff faced with a claim that may be time-barred under Michigan law may be left with no recourse but to assert the claim under federal law, and by extension, acquiesce to federal question jurisdiction. Under existing federal employment law[2], the continuing violations doctrine is still potentially applicable to claims that do not involve discrete acts and, moreover, acts occurring outside the limitations period may still be relied upon as background evidence supporting timely claims. Thus, counsel for plaintiffs will be faced with a strategic quandary of proceeding under more favorable federal law before an increasingly conservative federal bench. Additionally, a plaintiff forced to proceed under federal law will be subject to the statutory caps on damages.[3]

Moreover, the assertion of claims under federal law will necessitate compliance with federal jurisdictional requirements, the most significant of which is the duty to exhaust available administrative remedies. Plaintiffs asserting claims under Title VII, the Age Discrimination in Employment Act, or the Americans with Disabilities, for example, would be required to file a timely Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC). Proceeding through this administrative process could provide both parties early insight into the nature of the respective allegations and defenses as well as the evidentiary support therefor, and also serve as an opportunity to resolve a dispute in advance of litigation and the expenditure of significant costs.

Evidentiary and Discovery Disputes

Perhaps the greatest initial impact of the Michigan Supreme Court's decision in *Garg* will involve evidentiary and discovery disputes. Relying upon *Garg*, a party may seek to limit, as inadmissible and irrelevant, discovery requests for information, documentation, and other materials that predate the three-year period prior to the filing of the complaint. While the acceptance of such a position will likely have a disproportionate impact upon plaintiffs, it may also be utilized to prevent defendants from seeking or relying upon material outside the applicable limitations period. Were Michigan courts to accept this bright-line temporal limitation on discovery, the practical impact would be a decrease in the costs of litigation expended during the discovery process.

Application of the *Garg* Decision to Hostile Work Environment Claims

The plaintiff in *Garg* did not assert a hostile work environment claim under Michigan law. However, the principles espoused by the Michigan Supreme Court in abolishing the continuing viola-

tions doctrine would appear to be equally applicable to hostile work environment claims relying upon acts occurring outside of the three-year limitations period. Specifically, the *Garg* Court relied heavily upon the express text of the statutory limitations period and the purpose of the statute of limitations, *i.e.*, the need for certainty and preventing a party from being forced to defend against claims in the face of the passage of time, fading memories, and the loss of witnesses and evidence.

CONCLUSION

While the true impact of the Michigan Supreme Court's decision in *Garg* will develop over time, there can be no dispute that the decision will have immediate consequences upon the practice of employment litigation in Michigan, ranging from the fundamental decision of choice of law and venue to more practical issues involving everyday discovery disputes.

— END NOTES —

[1]The jury rejected Plaintiff's national origin discrimination claim.

[2]See *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002).

[3]See generally 42 U.S.C. §§ 1981a(b)(3), (4). ■

U.S. SUPREME COURT RESOLVES CONFLICT OVER TAXATION OF ATTORNEY'S FEES

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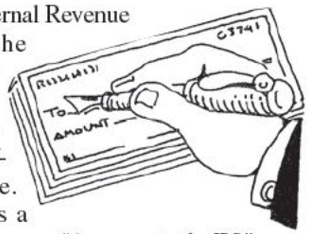
This article discusses the tax issues associated with withholding taxes on and reporting amounts paid in settlement of alleged legal claims in light of the U.S. Supreme Court's January decision in *Commissioner v. Banks* (125 S. Ct. 826 (2005).

Background

Under Section 61(a) of the Internal Revenue Code of 1986, as amended (the "Code"), "gross income" for federal tax purposes includes all income from whatever source derived, unless the income is specifically excluded under the Code. Accordingly, amounts received as a result of a legal action are generally includible in the plaintiff's gross income unless a specific Code provision excludes those amounts.



"A message to the IRS."

Amounts paid in settlement of an employment-related claim that are classified as back pay, front pay, or lost wages must be treated as employee compensation. These amounts are subject to payroll and income tax withholding and are reported on Form W-2 for the year in which paid.

Amounts paid in settlement of a claim that are classified as damages must be treated as miscellaneous income to the plaintiff. If the damages are for or related to a physical injury or illness, the damages are specifically excluded from the plaintiff's gross income under Code Section 104(a)(2). Damages for or related to a nonphysical injury or illness (including emotional distress that is not the direct result of a physical injury or illness) are includible in the plaintiff's gross income and must be reported on Form 1099-MISC for the year in which paid.

Sixth Circuit Decision in *Banks*

In 2003, the U.S. Court of Appeals for the Sixth Circuit issued its decision in *Banks v. Commissioner,* 345 F.3d 373 (6th Cir. 2003). The plaintiff in *Banks* filed a civil suit against his former employer alleging employment discrimination under Title VIII of the Civil Rights Act of 1964. After trial began, Banks and his former employer settled for $464,000. Under Banks's contingency fee agreement with his attorney, $150,000 of the settlement proceeds was paid to the attorney.

Banks did not report any of the $464,000 settlement payment on his individual income tax return for the year in which the payment was made. The Internal Revenue Service (the "Service") issued Banks a deficiency notice for the entire $464,000 payment, which was upheld by the U.S. Tax Court.

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The Sixth Circuit reversed the Tax Court's conclusion that the $150,000 paid to Banks's attorney under the contingency fee agreement was includible in Banks's gross income. The Sixth Circuit determined that the contingency fee agreement was not an anticipatory assignment of income by Banks, but rather was more like a partial assignment of income-producing property by Banks to the attorney. Accordingly, the amount earned by the attorney under the contingency fee arrangement was not gross income to Banks.

Relying on the Sixth Circuit's decision in *Banks,* some entities under the jurisdiction of the Sixth Circuit stopped reporting attorney fees paid out of settlements as gross income to the plaintiff when the attorney fees were paid under a contingency fee arrangement.

Because *Banks* and similar decisions from the U.S. Courts of Appeals for the Fifth, Ninth, and Eleventh Circuits conflicted with decisions from the U.S. Courts of Appeals for the Second, Third, Fourth, Seventh, Tenth, and Federal Circuits, the U.S. Supreme Court granted certiorari to *Banks* and a companion case from the Ninth Circuit to resolve the conflict.

Supreme Court Decision on *Banks*

The Supreme Court reversed the Sixth Circuit decision in *Banks,* holding that when a litigant's recovery under a settlement agreement is income to the litigant, the portion of recovery paid to an attorney under a contingency fee agreement is includible in the litigant's gross income. The Supreme Court specifically did not address the question of whether the attorney fees awarded under a statutory provision authorizing a fee award are includible in the plaintiff's gross income.

Retroactive Application of *Banks*

Under the Supreme Court's decision in *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86 (1993), the *Banks* decision must be applied retroactively. The *Harper* holding states that any Supreme court decision applying a rule of federal law (in the *Banks* decision, the Code) to the parties before the Court must be given full retroactive effect as to all events, including events preceding the Court's decision.

The Service has not yet indicated whether it will be pursuing retroactive application of *Banks* to taxpayers under the jurisdiction of the Sixth Circuit and other Circuits whose decisions were reversed by *Banks.* We have not yet been able to find anyone at the Service who is willing to address this question.

Corrections Required

If an entity paid attorney fees under the terms of a settlement and did not report those attorney fees as income to the plaintiff on either Form W-2 or Form 1099-MISC, the entity has an obligation under the Code to report those amounts to the Service. However, the entity's reporting obligation is limited to tax years that are still open under the applicable Code statute of limitations.

The statute of limitations for filing corrected Forms W-2 and corrected Forms 1099-MISC closes on the April 15th following the end of the third calendar year after the calendar year for which the forms would be reporting income. For example, the statute of limitations for filing corrected Forms W-2 and corrected Forms 1099-MISC for amounts paid in 2001 closes on April 15, 2005.

However, the above statute of limitations only applies if a Form W-2 or Form 1099-MISC was actually filed for the plaintiff for the year in which the attorney fees were paid, but with an incorrect amount. If no Form W-2 or Form 1099-MISC was filed for the plaintiff for the payment year, the statute of limitations does not begin to run until a form is actually filed, and then remains open until the April 15th following the end of the third calendar year after the calendar year in which the form was filed.

Form W-2 or Form 1099-MISC?

In order to file corrected or original Forms W-2 or Forms 1099-MISC for previously unreported attorney fees, it first must be determined if the attorney fees were paid out of the wage replacement portion of the settlement or out of the damages portion of the settlement. In order to make this determination, the plaintiff's original claim and the terms of the settlement agreement must be reviewed.

Claims Brought Under a Fee-Shifting Statute

The initial step is to identify the federal or state law under which the claim was made. If the claim was made under a federal or state statute that specifically permits the plaintiff to bring an action to recover attorney fees (a "fee-shifting statute"), the attorney fees are reportable as damages on Form 1099-MISC and are not subject to payroll or income tax withholding (unless the backup withholding rule applies).

The Service established this position in Technical Advice Memorandum 200244004 based on precedent established in Revenue Ruling 80-364 (1980-2 C.B. 294). In the TAM, the Service noted that the former employee brought a claim under the Age Discrimination in Employment Act, which allows for recovery of attorney fees, and that the attorney fee recovery would be taxable to the former employee as damages reported on Form 1099-MISC, rather than wages reported on Form W-2, if the former employee had prevailed in litigation. The Service concluded that the treatment of the attorney fee recovery by the former employee should be the same even though the former employee recovered the fee in a settlement instead of litigation.

Equally important is the fact that, elsewhere in the same TAM, the Service determined that the allocation of the remainder of this former employee's settlement payment between wages and taxable damages was improper. However, even though the Service reallocated the remainder of the former employee's settlement payment, the Service did not include the attorney fee recovery when reallocating. Therefore, under this TAM, attorney fees paid in settlement of a claim brought under a fee-shifting statute should always be reported as taxable damages on Form 1099-MISC and not as wages reported on Form W-2.

To the extent an entity failed to report attorney fees paid in settlement of a claim under a fee-shifting statute, those attorney fees should be reported on a corrected or original Form 1099-MISC for the year in which the fees were actually paid. As long as the entity has the plaintiff's social security number, no withholding was required on the attorney fees paid.

Claim Not Brought Under a Fee-Shifting Statute

If the plaintiff's original claim was not brought under a fee-shifting statute, the proper reporting of the attorney fees will generally be determined under the allocation made in the settlement agreement. However, it is important to note that the Service takes the position that it is not required to respect any allocation made in a settlement agreement that does not reasonably reflect the economic realities of the settlement.

In TAM 200244004, the Service stated that it looks at the relief originally requested in the plaintiff's claim when determining if an allocation between wages and damages made in a settlement agreement is reasonable. For example, if the plaintiff's original claim requested only back pay, but the settlement agreement allocates a significant portion of the settlement payment to noneconomic damages and attorney fees, the Service will likely reallocate part or all of the noneconomic damages to wages.

If, in light of the plaintiff's original claim and the allocation made in the settlement agreement, part or all of the previously unreported attorney fees should have been treated as wages, those attorney fees must be reported on a corrected or original Form W-2 for the year in which originally paid. In addition, appropriate payroll and income taxes must be deposited and a Form 941-c filed to report the corrective withholding. If the payor has no additional amounts to be paid to the plaintiff from which the necessary payroll and income taxes can be withheld, the payor will need to pay those amounts and report those amounts as additional income to the plaintiff.

However, if the previously unreported attorney fees can be properly treated as taxable damages in light of the plaintiff's original claim and the allocation in the settlement agreement, the attorney fees must be reported on a corrected or original Form 1099-MISC for the year in which originally paid.

Penalties for Failure to Correct Forms W-2 or Forms 1099-MISC

A payor that fails to file corrected or original Forms W-2 or Forms 1099-MISC to report attorney fees previously paid but not reported is exposed to the following penalties under the Code:

- Code Section 6721 — A penalty of $50 for each Form W-2 or Form 1099-MISC not filed or each Form W-2 or Form 1099-MISC filed with incorrect information (penalty increases to $100 for each return for intentional failures); and
- Code Section 6722 — A penalty of $50 for each Form W-2 or Form 1099-MISC not provided to a payee or each incorrect Form W-2 or Form 1099-MISC provided to a payee (penalty increases to $100 for each return for intentional failures.

Both of the above $50 per form penalties can be waived for reasonable cause. Failing to file Form W-2 or Form 1099-MISC to report attorney fees based on the Sixth Circuit decision in *Banks* should qualify as reasonable cause for payors under the jurisdiction of the Sixth Circuit. However, a reasonable cause waiver is not available for the above $100 per form penalties for intentional acts.

If the Service determines that a payor willfully failed to file Form W-2 or Form 1099-MISC, the payor may be charged with misdemeanor criminal fraud. If convicted, Code Section 7203 provides for fines of up to $25,000 for an individual payor and $100,000 for a corporate payor, or up to one year in prison, or both, plus recovery of the Service's costs of prosecution.

Impact of *Banks* on Plaintiffs

Any plaintiff for whom a payor must file an original or corrected Form W-2 or Form 1099-MISC to report previously unreported attorney fees will need to file an amended individual income tax return for the year in which the attorney fees were originally paid.

If the attorney fees were paid prior to October 23, 2004, the plaintiff is permitted to deduct those attorney fees on Schedule A as an itemized miscellaneous deduction.

If the attorney fees were paid after October 22, 2004, the plaintiff may be permitted to deduct the attorney fees from gross income "above the line." This change to the tax treatment of attorney fees received in connection with legal actions claiming unlawful discrimination and violations of other specific federal laws (as identified in Code Section 62(a)(19)) was enacted in the American Jobs Creation Act of 2004. By taking this "above the line" deduction, the plaintiff will effectively remove the attorney fees from the plaintiff's regular taxable income and alternative minimum taxable income.

Complying with *Banks* Prospectively

To the extent amounts paid to a plaintiff under a settlement agreement are taxable as wages or damages, any attorney fees paid out of settlement amounts must also be reported as taxable wages or damages to the plaintiff, as applicable.

If the plaintiff's claim was brought under a federal or state fee-shifting statute, the attorney fees must be reported on Form 1099-MISC as taxable damages. These attorney fees are not subject to payroll or income tax withholding and are not reported on Form W-2.

If the plaintiff's claim was not brought under a federal or state fee-shifting statute, the attorney fees must be included when allocating the settlement between wages and damages. Taking the attorney fees "off the top" and allocating the remainder of the settlement between wages and damages exposes the settlement allocation to review and revision by the Service if the total of the attorney fees and other damages is not reasonable when compared to the amount allocated to wages.

If the entire settlement payment is properly treated as wages, the entire payment is subject to applicable payroll and income tax withholding. The attorney fees must be deducted after the applicable taxes are withheld.

If the amount of the attorney fees exceeds the portion of the settlement allocated to damages, the remaining attorney fees can be deducted from the wages portion of the settlement after applicable payroll and income taxes are withheld from the wages portion.

Reporting Attorney Payments

Any amounts paid directly to a plaintiff's attorney must be reported by the payor on a Form 1099-MISC issued to the attorney. This includes settlement proceeds paid in a check payable only to the attorney or payable jointly to the attorney and the plaintiff, regardless of whether any portion of the proceeds will be retained

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by the attorney as attorney fees. This also includes amounts paid to an attorney that are not taxable to the plaintiff, such as damages for a physical injury or illness.

Post-*Banks* Examples

Example #1 — Claim Brought Under Fee-Shifting Statute

The Plaintiff brought a claim under the Age Discrimination in Employment Act, which is a federal fee-shifting statute. The plaintiff settled her claim for $600,000. Under a contingency fee agreement, the plaintiff's attorney fees of $200,000 will be paid from the settlement proceeds. Based on the relief requested in the plaintiff's original claim and other relevant factors, the settlement agreement reasonably allocated $250,000 of the remaining $400,000 to back pay and $150,000 to noneconomic damages. The payor withheld payroll and income tax on the $250,000 allocated to back pay, and the net check was payable only to the plaintiff. The payor also issued a check for $350,000 jointly to the plaintiff and the attorney.

The payor is required to issue a Form W-2 to the plaintiff reporting the $250,000 and the associated taxes withheld. The payor is also required to issue a Form 1099-MISC to the plaintiff reporting $350,000 in taxable damages, consisting of the $200,000 allocated to attorney fees and the $150,000 allocated to noneconomic damages. Finally, the payor is required to issue a Form 1099-MISC to the attorney reporting the $350,000 of settlement proceeds payable jointly to the plaintiff and the attorney, even through the fees to be retained by the attorney were only $200,000.

Example #2 — Claim Brought Under Fee-Shifting Statute

The facts are the same as in Example #1 except that the payor issued a check for $200,000 payable only to the attorney and a check for $150,000 payable only to the plaintiff, instead of the $350,000 check payable jointly to the attorney and the plaintiff.

The payor is still required to issue to the plaintiff a Form W-2 to the plaintiff reporting the $250,000 and the associated taxes withheld, and a Form 1099-MISC reporting $350,000 in taxable damages. However, the Form 1099-MISC issued by the payor to the attorney will only report $200,000, because that was the only amount paid by the payor to the attorney.

Example #3 — Claim Brought Under Fee-Shifting Statute

The facts are the same as in Example #1 except that the payor issued a check for $350,000 payable only to the plaintiff.

The payor is still required to issue to the plaintiff a Form W-2 to the plaintiff reporting the $250,000 and the associated taxes withheld, and a Form 1099-MISC reporting $350,000 in taxable damages. However, the payor will not issue a Form 1099-MISC to the attorney, because the payor did not pay any amount directly to the attorney.

Example #4 — Claim Not Brought Under Fee-Shifting Statute; No Allocation to Wages

The plaintiff brought a claim for common law breach of contract, which is not a fee-shifting statute. The plaintiff settled her claim for $600,000. Under a contingency fee agreement, the plaintiff's attorney fees of $200,000 will be paid from the settlement proceeds. Based on the relief requested in the plaintiff's original claim and other relevant factors, including the fact that the plaintiff's claim did not arise out of an employment relationship, the settlement agreement identifies all of the settlement proceeds as economic damages. The payor issued a check payable only to the plaintiff's attorney for $600,000.

The payor must issue a Form 1099-MISC to the plaintiff reporting $600,000 in taxable damages. The payor must also issue a Form 1099-MISC to the attorney reporting $600,000 paid to the attorney, even though the attorney will only retain $200,000 as attorney fees.

Example #5 — Claim Not Brought Under Fee-Shifting Statute; Allocation to Wages

The plaintiff brought a claim for breach of an employment contract, which is not under a fee-shifting statute. The plaintiff settled her claim for $200,000. Under a contingency fee agreement, the plaintiff's attorney fees of $67,000 will be paid from the settlement proceeds. Based on the relief requested in the original claim and other relevant factors, the settlement agreement reasonably allocates $150,000 of the settlement proceeds to lost wages and $50,000 to noneconomic damages. The payor withheld payroll and income tax on the $150,000. From the net after-tax lost wages, the payor issued a check to the plaintiff's attorney for $67,000 and a check to the plaintiff for the remainder of the net after-tax lost wages plus $50,000.

The payor is required to issue a Form W-2 to the plaintiff reporting the $15,0000 and the associated taxes withheld. The payor is also required to issue a Form 1099-MISC to the plaintiff reporting $50,000 in taxable damages. Finally, the payor is required to issue a Form 1099-MISC to the attorney reporting the $67,000 of settlement proceeds paid directly to the attorney. ■

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Contributions may address legal developments, trends in the law, practice skills or techniques, professional issues, new books and resources, etc. They can be objective or opinionated, serious or light, humble or self-aggrandizing, long or short, original or recycled. They can be articles, outlines, opinions, letters to the editor, cartoons, copyright-free art, or in any other form suitable for publication.

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TIPS AND TOOLS TO SETTLE EMPLOYMENT DISPUTES: REMINDERS FROM THE MEDIATOR'S CHAIR

Tracy L. Allen
Mediator and Arbitrator

Despite the vanishing trial and consequences of tort reform in Michigan, there is still plenty of work for mediators especially in the employment arena. Almost daily we read about corporations adopting mandatory dispute resolution processes for workplace conflict. Courts are constantly reviewing arbitration clauses and finding them enforceable. Meanwhile, Congress keeps the revolving door spinning, especially as it relates to the Internal Revenue Code. Despite this changing landscape, there remain many tools available to both employer and employee that can make settlement negotiations fruitful and satisfying.

Within the last six months, two significant events have clarified pesky tax aspects of employment settlements. For several years, there was confusion in the law among the federal courts on the tax treatment of attorney fees. Finally, early this year, the United States Supreme Court decided *Commissioner of the IRS v. Banks,* case number 03-892, issued January 25, 2005. The Court ruled in favor of the IRS and ruled somewhat contrary to a federal statute adopted in October 2004. (Perhaps Congress knew the decision was coming when it enacted the American Jobs Creation Act of 2004 (AJCA)).

In *Banks,* the employee settled a federal employment discrimination case against a California state agency. In a second related case from Oregon, as in *Banks,* neither employee reported the attorney fees paid to them in their settlement, as income on their individual tax returns. In disputes between the IRS and the employees, the Sixth and Ninth Circuits arrived at different conclusions on the tax treatment of those monies. The Supreme Court ruled that when a litigant's recovery constitutes income, income includes the portion of the recovery paid to the attorney as a contingent fee.

The tax treatment prescribed by *Banks* has potentially devastating effects on plaintiffs because the deduction available to them for payment of legal fees is often meaningless due to the obscure and barely understandable alternative minimum tax (AMT). Suffice it to say that the imposition of the AMT essentially eliminates the attorney fee deduction for many plaintiffs. The net affect is to leave plaintiffs with less funds because they are paying income tax on fees paid to their attorneys (who than must also report the fees received as income).

Fortunately, some relief came in October 2004 with the passing of the AJCA. It addresses the recurring issue of how to treat attorney fees and costs incurred by a plaintiff engaged in litigation. Christopher Fowler in the Winter 2005 issue of *Lawnotes,* outlined the history that led to the new statutory guidelines. In essence, after years of inconsistency among federal courts, the AJCA provides that for judgments and settlements occurring after October 22, 2004, the client is afforded an "above the line" deduction for attorney fees paid, thus escaping the AMT and avoiding the dual taxation on the attorney fees. This relief and tax treatment applies to more than fifteen employment or discrimination statutes including the ADA, the ADEA and Michigan's Elliott-Larsen Civil Rights Act.

As a result of this news, plaintiff's lawyers must give careful consideration to the contents of the complaints filed and/or allegations made against employers. The substance of the claims stated may very well dictate the tax planning in settlement negotiations. Even so, however, with both developments, negotiators can now look at monetary settlement offers in an appropriate light. Where employers offer financial pieces to a settlement package, such offers can be clearly earmarked toward particular taxable and non-taxable claims of the employee as well as fee segments attributable to legal fees. The ability of a litigant to understand and actually see a calculation and breakdown of how money will flow from the defendant to the claimant is invaluable. It answers the plaintiff's concern about how to pay for the legal services and illustrates the near exact amount the plaintiff will actually put into his/her pocket. This certainly is not only reassuring to a disputant, it is frequently the catalyst to closing the negotiation and reaching a mutually acceptable solution.

From the employer's tax perspective, frequently it matters not whether a check for plaintiff's legal services and costs is issued to the plaintiff or the lawyer. Generally it is treated the same on the employer's financial records regardless of the identity of the payee. It may matter however, which department's budget is used to provide these funds. As with the plaintiff's tax consequences, knowing these fees can be segregated may also aid the employer in "finding" the necessary funds to arrive at resolution, especially if settlement monies can come from more than "one pot" of the employer.

Although these judicial and statutory guidelines are helpful to achieving satisfactory settlements, the "tax tail" should not wag the settlement dog. Even so, all counsel should keep abreast of IRC § 104 (treatment of settlement monies for physical injuries) and the IRS' view of interest received (if any) in a settlement (see Antoinette M. Pilzner and Regan K. Dahle. "U.S. Supreme Court Resolves Conflict over Taxation of Attorney Fees," on page 3, which outlines, in plain English, the basic and alternative tax treatments of funds paid on settlement of employment disputes). These additional tax matters can have significant impact on the "bottom line" to all parties of a settlement.

Mediators are not charged with knowing the latest state of the art of these tax aspects of settling an employment dispute but we do know not to underestimate their importance. We'd prefer that all counsel be conversant on these topics because they can frequently be creatively used as a catalyst to resolution. Nevertheless, non-economic or non-monetary elements of a settlement are often as, or more, critical than the financial pieces, and they generally do not have adverse tax implications to any of the parties.

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TIPS AND TOOLS TO SETTLE EMPLOYMENT DISPUTES: REMINDERS FROM THE MEDIATOR'S CHAIR

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From the mediator's chair, there are very few employment cases that don't incorporate additional settlement features. These creative tools can be economically based, or not. Because they are so common, nor one on either side of the dispute, nor the mediator, should be hesitant to suggest them as possible pieces of a settlement package.

Obviously, releases are critical to resolution. It is wise to include this feature in the negotiations from the onset. We even recommend attorney begin negotiating the desired language *before* mediation. Everyone knows it could be a hiccup in the settlement so it's best to learn about it early while there is still time to ponder what is best for all.

Never underestimate the value of a written apology from someone in upper management, including the company president. An apology does not mean ad admission of guilt if properly worded. Offers to review, revise or adopt corporate policies or practices which the plaintiff may perceive failed in his/her case or were not followed are evidence of the employer's willingness to acknowledge some contribution to the dispute without an admission of liability. Neutral letters of reference can also be negotiated. Often they not only assist in the employee's job hunt, they provide an element of recognition to the employee for the service given to the employer. Working with a mediator to craft language in these documents is productive for all. Where possible, purging a personnel file may go a long way to reducing an employee's anxiety about past performance at work.

Extending health and welfare benefits or contributing to COBRA costs, even for a limited period, helps transition employees into their new circumstances. Similarly, providing additional educational training and/or job out-placement support services may meet present needs of an unemployed plaintiff. There may be a method to "buy" additional years of employment to increase retirement benefits which answers present and future economic concerns of an employee who appears fixated on a large economic settlement. Obviously structured settlements may make sense for all participants to the dispute in some circumstances. They afford the opportunity to delay reporting taxable damages as income until actual receipt, thus spreading out tax consequences over the life of the settlement annuity. Similarly, the employer may end up paying less of the employee's taxes on such funds received by the employee.

When negotiating executive severance packages, business lawyers particularly like to explore the economic differences between 1099 income and w-2 income, from both the employer and employee's view. Similarly, the difference between lump sum payments versus staggered payments, especially at year end, can be significant not just from a cash flow perspective, but also from a new earnings and income tax perspective. Covenants not to compete, SERP's, stock options and deferred compensation (perhaps funded through an annuity purchased today) can provide great future as well as present economic benefit to a departing executive at a fraction of cost to the employer as opposed to payment in the present of a large settlement. Consulting agreements, even if "only on paper" from a mechanical perspective, afford a former executive the opportunity to represent to the rest of the world that he or she is still employed. Generally, prospective employers tend to look more favorably on persons seeking replacement employment when they are currently employed as opposed to unemployed.

Negotiation and mediation, where appropriate, also allow parties to get something more than what a judge or jury could provide in a lawsuit such as, injunctive relief and/or liquidated damages for violations of the settlement agreement or covenants not to compete arising from the negotiations. Confidentiality provisions in a settlement agreement may reduce some employers' anxiety about "floodgate" or precedent problems that settlement terms in one case might raise in a future case. Every plaintiff's case is different and consequently, every settlement is different. Recently, more and more employers are requesting a liquidated damages provision for breach of confidentiality as added protection against the "precedent" fears. Crafting creative solutions tailored uniquely to a particular plaintiff provides rationale for the single case and leaves room in future disputes for employers to adopt different negotiating standards and practices.

Neutral non-disparagement provisions often find their way into mediation settlement agreements. Parties can even reach agreement on and spell out the specific statements they will make publically and within the workplace about the status and settlement of the case. They can even identify the specific person at the company who will receive any future inquiries about the plaintiff's employment as well as the content of what will be reported to any inquiring person.

Obviously not all of these resolution options apply to every case, nor are they always the panacea to settlement. Lawyers who are familiar with these not uncommon possibilities come into negotiations in a better frame of mind and with a collaborative focus. Thinking in advance about the application of creative ideas appropriate to the particular case, makes the negotiator steady, open-minded and optimistic. Any one of these states of mind can be contagious and are frequently the attributes a mediator brings to the conversation, along with a tool box of options to build creative and lasting settlement packages. ■

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 or associate editor John G. Adam at Martens, Ice, Klass, Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@martensice.com.

THE LARGEST PENSION BAILOUT IN U.S. HISTORY LEADS TO CONTRACT CONCESSIONS

Christopher M. Trebilcock
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United Airlines Avoids Pension Obligations, Gains Labor Cost Savings

In early May, United States Bankruptcy Judge for the Northern District of Illinois Eugene Wedoff issued a ruling that permitted United Airlines ("UAL") to terminate all four of its defined benefit pension plans and transfer the assets to the Pension Benefit Guaranty Corporation ("PBGC"). *See In re UAL Corp.,* 2005 Bnkr. LEXIS 816 (N.D.Ill. May 11, 2005). Under the agreement, the PBGC will receive $1.5 billion in notes and convertible stock once UAL emerges from bankruptcy. At least one of the unions representing UAL employees is expected to challenge the bailout agreement approved by Judge Wedoff.

"Retirement dreams."

The decision is significant for at least four reasons: (1) it cleared the way for UAL to avoid defaulting on $9.8 billion in pension obligations; (2) 120,000 retired and active employees benefits are now capped at an annual maximum benefit of just over $43,000; (3) it increased pressure on the unions representing UAL's employees to agree to convert their pension plans to defined contribution plans; and (4) it raised speculation that other corporations with underfunded pension plans will seek to terminate and transfer their plans to the PBGC. Employers, employees and their attorneys should be aware that the PBGC's pension protection is capped and one of the PBGC's primary roles is to takeover failing pension plans even if it results in a cut in defined benefits to covered workers or their beneficiaries.

ERISA: Protecting Pensions, Sort Of

In 1974, Congress enacted the Employee Retirement Security Act ("ERISA"), 29 U.S.C. § 1001-1461 (2005), "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by termination of pension plans before sufficient funds [had] been accumulated in the plans." *PBGC v. R.A. Gray & Co.,* 467 U.S. 717, 720 (1984) (citations omitted). Subchapter III of ERISA is designed to guarantee that if a worker has been promised a defined pension benefit upon retirement and the vesting requirements have been satisfied, the worker will actually receive the promised pension. *Id.* (internal quotations and citations omitted). To provide federal funds to secure the pension promises established under ERISA, Congress created the PBGC, modeled after the Federal Deposit Insurance Company. *PBGC V. LTV Corp.,* 496 U.S. 633, 636-637 (1990) (citations omitted).

Beyond providing a sense of security for American workers, a primary function of the PBGC is to terminate pension funds because the funds have insufficient assets to satisfy obligations to the retired employees. *PBGC v. Republic Technologies Int.'l, LLC,* 386 F.3d 659 (6th Cir. 2004). In this situation, the PBGC "becomes the trustee of the plan, taking over the plan's assets and liabilities." *LTV Corp.,* 496 U.S. at 637. After merging the assets with its own funds, the PBGC then pays benefits according to the limits defined by the ERISA statutes. *See 29* U.C.S. §§ 1301(a)(8), 1322 (a) & (b).

Once it determines or is notified that pension fund is in risk of defaulting on its obligations "[t]he PBGC has the authority to conduct both voluntary and involuntary terminations. Voluntary terminations can take two forms. First, a 'standard termination' occurs when the employer has sufficient assets to pay all the benefit commitments of a terminated plan. The second form of voluntary termination occurs when the company does not have sufficient funds to pay its obligations to the employees. Under this latter form of termination, the employer must demonstrate financial distress to the PBGC. Involuntary termination proceedings often involve business entities that are experiencing severe financial difficulty. The PBGC may involuntarily terminate a private pension fund if it determines that any of the following four factors are present: (1) the plan has not met the minimum funding standard required by the statute, (2) the plan will be unable to pay benefits when due, (3) the reportable event described in section 1343(b)(7) of ERISA has occurred [(e.g., commencement of Chapter 11 proceedings)], or (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated. When the PBGC seeks involuntary termination, the Plan Administrator and the PBGC are authorized to issue a mutually acceptable date for plan termination." ("Section 1343(b) Standards") *PBGC v. Republic Technologies Int'l, LLC,* 211 F.R.D. 307 (N.D. Ohio 2002) (internal citations omitted).

The UAL Pension Bailout: Involuntary, Sort Of

The UAL pension bailout is an example of a hybrid involuntary termination where UAL and the PBGC sought judicial approval of a mutually agreed upon settlement agreement. As recognized by Judge Wedoff, under Section 1343(c), the PBGC could have terminated the pension plan in order to protect the pension benefit guaranty system with the consent of UAL without a court hearing, even though it would have overridden the provisions of existing collective bargaining agreements.

UAL's pension plans were underfunded by $9.8 billion on a termination basis, $6.6 billion of which was guaranteed according to the PBGC. The four plans were: the UAL Pilot Defined Benefit Plan, which covers 14,100 participants and had $2.8 billion in assets to pay $5.7 billion in promised benefits; the UAL Ground Employees Retirement Plan, which covers 36,100 participants and had $1.3 billion in assets to pay $4.0 billion in promised benefits; the UAL Flight Attendant Defined Benefit Pension Plan, which covers 48,600 participants and had $1.4 billion in assets to pay $3.3 billion in promised benefits; and the Management, Administrative

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THE LARGEST PENSION BAILOUT IN U.S. HISTORY LEADS TO CONTRACT CONCESSIONS

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and Public Contact Defined Benefit Pension Plan, which covers 42,700 participants and had $1.5 billion in assets to pay $3.8 billion in promised benefits.

Under the termination agreement between UAL and the PBGC, the PBGC determined "that the plan must be terminated because the plan sponsor has not met the minimum standard required under section 412 of the Internal Revenue Code and because the possible long-run loss of the corporation with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated. Further PBGC . . . determined that the plan should be terminated in order to avoid any unreasonable increase in the liability of the fund." *In re UAL Corp.,* at *37. Judge Wedoff applied the Section 1343(b) Standards and ruled that the settlement agreement was in the best interest of the beneficiaries and creditors. He also held that the agreement was 'essential to the continued operation of' UAL's business.

New Collective Bargaining Agreements Reached, Sort Of

Judge Wedoff's decision to approve the PBGC takeover of UAL's pensions also increased the pressure on UAL and its unions to reach agreement on new collective bargaining agreements which included millions of dollars in labor concessions. Judge Wedoff was set to rule on UAL's request to terminate the contracts on May 31. Having just witnessed their pension plans evaporate, the parties worked furiously over Memorial Day weekend and reached a tentative accord. The unions agreed to convert their defined benefit plans to a 5-percent defined contribution system. In return, UAL will transfer convertible notes to the unions when it emerges from Chapter 11. The unions expected approval by their members by Judge Wedoff's June 17 deadline.

A Future Trend In Reducing Pension Obligations, Maybe

Bringing forth memories of the savings and loan crisis of the 1980s, the UAL pension bailout has increased awareness that a similar crisis may be on the horizon for the PBGC. Recent published reports estimate that the PBGC currently faces a $23.3 billion dollar deficit and more than half of the 100 largest pension plans do not have sufficient assets to satisfy their current pension obligations. Not surprisingly, the scrutiny has also increased legislative action in Washington, D.C. The White House has joined the chorus of thousands and made calls for a legislative overhaul of ERISA. For their part, leaders on Capitol Hill have answered by holding hearings on the issue.

Although legislative amendment to ERISA is probably the right place to start, the UAL pension bailout exemplifies that securing retirement benefits for American workers is more complicated than any one statute. To prevent future UAL-type bailouts where retirees' retirement income is drastically altered, changes will also have to be made to the bankruptcy code and the National Labor Relations Act. As the UAL pension shows, the current bankruptcy code gives federal judges a wide berth to re-write years of collectively bargained labor agreements and federally guaranteed pension plans. ■

U.S. SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long, P.C.

Court Expands Theory of Liability Under ADEA

In a much-awaited decision, the United States Supreme Court ruled in *Smith v. City of Jackson,* 125 S. Ct. 1536, that the Age Discrimination in Employment Act ("ADEA") "does authorize recovery in 'disparate-impact' cases." While at first blush, this may seem to be a clear victory for potential plaintiffs, the Court limited the effect of its holding by noting that "the scope of disparate-impact liability under ADEA is narrower than under Title VII."

The plaintiffs in *Smith* were a group of police and public safety officers with greater than five years seniority who claimed that the City's new policy of granting proportionately higher pay raises to officers with less than five years seniority adversely affected them because of their age. The District Court granted the City's motion for summary judgment and the Fifth Circuit affirmed, holding that disparate impact claims were "categorically unavailable under the ADEA." The Supreme Court affirmed the result in the lower court, finding that the plaintiffs had not stated a valid disparate-impact claim, but unlike the lower court, recognized that such a claim was available under ADEA.

The Court was careful to note, however, a crucial difference between disparate impact claims of discrimination under ADEA and claims under Title VII. To defend a disparate-impact claim under ADEA, an employer need only demonstrate that the policy or decision at issue was based on a "reasonable factor other than age." Under Title VII, an employer must articulate some business necessity for the policy or decision that allegedly created the disparate impact. The Court reached this decision recognizing the inescapable fact that "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group."

USING CONSUMER REPORTS DURING THE HIRING PROCESS

Margaret Carroll Alli
Kienbaum Opperwall Hardy & Pelton, P.L.C.

Following passage in late 2003 of the federal Fair and Accurate Credit Transactions Act — which modified the federal Fair Credit Reporting Act (FCRA) — questions have arisen concerning the content and timing of the "pre-adverse action" and "adverse action" letters required by the FCRA. Although the 2003 amendments made it easier for employers to bypass complicated FCRA procedures for many internal workplace misconduct investigations, the pre-amendment requirements governing the hiring process remain largely the same.

By way of background, the FCRA regulates "consumers reports" from a "consumer reporting agency" when those reports are obtained for employment and other purposes. Generally, any third-party organization regularly engaged (usually for a fee) in conducting background checks on an applicant's fitness for employment is a consumer reporting agency and the report is a regulated consumer report. If an employer uses information in a consumer report to take adverse action — which is defined as "denial of employment or any other decision for employment purposes that adversely affects a current or prospective employee" — it must first comply with the FCRA's notice and consent requirements. These are quite rigorous.

First, the employer must obtain written consent, with full disclosure, from the applicant, on a separate form, before obtaining a consumer report. As to medical information from a consumer reporting agency, the consumer (i.e., the applicant) must provide specific written consent "that describes in clear and conspicuous language" how it will be used, the information must be relevant to the particular employment decision, and disclosure must be limited to those with a need to know.

Employers are strongly urged to obtain the FCRA-mandated written consent at the outset of the employment relationship when eager job applicants are most willing and likely to sign. That avoids having to later ask current employees for written consent should the employer need a consumer report for other purposes (for example, to investigate suspected theft, fraud, or other misconduct). Although the 2003 FCRA amendments created limited exceptions to the consent requirement for internal investigations — and one federal court recently held that an employer did not violate the FCRA by firing an employee who would not consent — practical problems and potentially expensive legal challenges may be avoided by obtaining clear written consent up front.

Second, before taking adverse action, the employer must provide a "pre-adverse action" notice to the applicant and furnish a copy of the consumer report and the Federal Trade Commission's (FTC's) Summary of Rights under the FCRA. Problematically, under current FCRA interpretation, if the consumer report identifies the source of any adverse references, that information must be disclosed to the applicant. Many consumer reporting agencies obviate this concern by not identifying source information in consumer reports given to employers.

Third, the employer must also provide a separate "adverse action" notice at the time it takes adverse action based on information in the consumer report. This notice may be oral, written, or electronic, and must include the name, address, and telephone number of the consumer reporting agency preparing the report (including a toll-free number if available) along with a statement that the agency did not make the adverse employment decision and is unable to give the consumer specific reasons why the decision was made. The adverse action notice must also tell the consumer how to obtain a free copy of the consumer report and explain the right to dispute the accuracy or completeness of any information in a consumer report directly with the agency. For obvious reasons, it is recommended that any adverse action notice be in writing.

Fourth, the employer must certify to the consumer reporting agency that it will obtain and use the consumer report only as allowed by the FCRA and applicable equal employment opportunity laws.

Curiously, the FCRA does not specify how much time must elapse between the pre-adverse action notice and the adverse action notice. Under current interpretations, the two notices cannot be in the same document and employers must allow a "reasonable time" before sending the adverse action notice. In determining what is "reasonable," the FTC has suggested allowing sufficient time for the consumer to discuss the report with the employer or otherwise respond to inaccurate information. In one widely cited opinion, an FTC staff attorney opined that five days was reasonable, though he refused to make a general rule. Since a consumer reporting agency typically has 30 days to investigate and correct an inaccurate report, waiting between five and 30 days would seem reasonable. Because the FCRA contains a defense if an employer shows it maintained "reasonable procedures" to assure compliance, it is in an employer's best interest to send all required notices and allow applicants sufficient time to receive and review any adverse consumer report. ■

FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN:

In re: Conduct in Federal Court Facilities – Temporary Exemption for Attorneys From Provisions of LR 83.31(f), Cellular Telephones

Administrative Order No. 05-AO-013

At their regular meeting on June 6, 2005, the Judges of the United States District court for the Eastern District of Michigan approved a policy governing the use of cellular telephones and equivalent communication devices (including PDA's) by attorneys in federal court facilities. The policy was approved for a period not to exceed six months, effective July 1, 2005.

NOW THEREFORE IT IS ORDERED THAT effective July 1, 2005, the Court will temporarily exempt attorneys appearing in connection with any judicial proceeding or presenting evidence of bar membership from the provisions of LR 83.31(f), Cellular Telephones, for a period not to exceed six months.

IT IS FURTHER ORDERED THAT effective July 1, 2005, Administrative Order 05-AO-014 govern the use of cellular telephones and equivalent communication devices (including PDA's) by attorneys in federal court facilities for a period not to exceed six months.

IT IS FURTHER ORDERED THAT except as provided in Administrative Order 05-AO-014 and other court orders, cellular telephones and equivalent communication devices (including PDA's) are not permitted in federal court facilities.

IT IS ORDERED.
FOR THE COURT:
Bernard A. Friedman, Chief Judge
June 21, 2005

WESTERN DISTRICT RULES ON ADMISSIBILITY OF EVIDENCE, ENFORCEABILITY OF ARBITRATION AGREEMENT, FSLA EXEMPTIONS, AND DISMISSES POLICE OFFICER'S CLAIMS STEMMING FROM TERMINATION OF EMPLOYMENT

Heather G. Ptasznik
Kotz, Sangster, Wysocki and Berg, P.C.

Sailor v. Lowe's Home Centers, Inc., Case No. 5:03-CV-175 (March 31, 2005), Enslen, J. In this wrongful termination and slander per se action, where the terminated Plaintiff was an alleged harasser, the Defendant filed *Motions in Limine* seeking exclusion of: (1) two witnesses' deposition testimony; (2) a letter from Plaintiff's attorney requesting retraction of alleged slanderous comments and a response letter from the Defendant's corporate counsel; (3) Plaintiff's journal tracking his attempts to find employment after termination; and (4) an unemployment hearing transcript.

The Court barred deposition testimony that a witness "heard from a store cashier that Plaintiff was terminated because he sexually harassed Lieder" because it was irrelevant. However, the Court admitted deposition testimony regarding the Plaintiff's abilities to carry out his duties as an assistant store manager because it was relevant to his wrongful termination claim.

The Court excluded correspondence regarding the slander claim because MCL §600.2911, which addresses exemplary damages where retraction of slander is demanded, only deals with media defendants. Likewise, although the journal was not admissible for proving liability, the Court reserved its determination of admissibility for the purposes of proving damages (and mitigation thereof) pending proofs at trial. Further, where Plaintiff proffered to utilize the unemployment hearing transcript for the limited purpose of impeachment, the Court reserved its determination on this issue as it may pertain to a particular witness.

Anthony v. Village of Elk Rapids and Michael Miles, Case No. 1:04-CV-67 (April 20, 2005), Mckeague, J. Plaintiff, a former employee of the police department, brought a claim under 42 USC §1983 for violation of his First Amendment right of free speech and a claim under the Elliott Larsen Civil Rights Act for sexual harassment and retaliatory discharge. The Defendants moved for summary judgment on both claims.

Plaintiff claimed his termination was retaliatory because he reported that he twice detected the smell of intoxicants on the Police Chief's breath while at work, the Police Chief referred to him as a "sand nigger" and he observed the Police Chief removing three bottles of whiskey from the evidence locker. As a result of the ensuing harassment, Plaintiff required a medical leave of absence and was terminated after he returned.

The Court dismissed the first amendment violation claim against the individual defendant Police Chief. Further, the Court held that because there is no *respondeat superior* liability under a §1983 action, Plaintiff was required to demonstrate the termination decision was taken pursuant to an official policy or custom that could be imputed to the municipality defendant. Because no facts could establish a causal connection between Plaintiff's protected speech and the employer's decision to terminate employment, summary judgment was granted.

Plaintiff's allegation that the Police Chief, through various acts of sexual harassment, created a hostile work environment was partially dismissed because there is no individual liability for hostile work environment under the ELCRA. The Court also partially dismissed the ELCRA claim against the employer because Plaintiff never complained about sexual harassment prior to his discharge. Likewise, because Plaintiff admitted there was no evidence he ever complained about the sexual harassment or participated in an investigation, the retaliation claim was dismissed.

Charles Williams v. Biomat USA Inc., et al., Case No. 4:04-CV-86 (March 1, 2004), Quist, J. Plaintiff filed a complaint against his former employer and two individual defendants claiming violations of 42 USC §1981 and 1985, assault and battery, ethnic intimidation and denial of equal public accommodations, racially motivated termination under the Elliott Larsen Civil Rights Ac and retaliatory discharge arising out of the individual defendants' alleged racially motivated assaults, batteries and intimidation. Although default was entered against the individual defendants for failure to respond to the Complaint, the corporate defendant filed a Motion to Stay proceedings and to compel arbitration pursuant to the Federal Arbitration Act.

Plaintiff did not dispute he signed an Employee Acknowledgement and Agreement form agreeing to submit his claims to arbitration. The Court rejected Plaintiff's argument that the agreement was void or voidable because it did not provide for effective discovery or procedures for selecting an arbitrator. Because the corporate defendant agreed to proceed in arbitration in accordance with discovery procedures allowed by the Michigan Court Rules, the Court held Plaintiff's argument was without merit. Further, the absence of a specific procedure for selecting an arbitrator did not present an obstacle to arbitration because AAA would provide a list of approved arbitrators or select an arbitrator if the parties were unable to do so. As such, the Defendant's motion was granted.

Ramsey v. Walmart Stores, Inc., Case No. 1:02-CV-955 (February 3, 2005), Enslen, J. Plaintiffs, Assistant Store Managers for Defendant, filed an action seeking overtime pay for time worked in excess of 40 hours per week as required by the Fair Labor Standards Act (29 USC §207(a)(1)). Although Defendant argued Plaintiffs were executives and thus, exempt from the overtime requirements, the Court held that in viewing the facts in a light most favorable to Plaintiffs, there were issues of material fact remaining as to whether their *primary duties* consisted of managerial duties that fell within the exemption. Defendant was also unsuccessful in arguing that one of the Assistant Store Managers fell within the administrative exemption because material facts also existed with respect to his primary duties. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Once upon a time, many years ago, I had a case at a vitreous china plant. A vitreous china plant is what people outside the trade would call a toilet factory. The grievant's job was to move what in the vitreous china business is known as "ware" and what the rest of us would call "toilets" from one part of the plant to another on a pallet jack. He had been disciplined for operating his pallet jack in such a manner as to cause a great pile of ware to come into contact with another pile of ware and smash into a million tiny pieces. Again.

The grievant's defense was that the fault did not lie with him but with a defect in the throttle on the pallet jack. He testified that he was operating in a safe and prudent manner, waiting next to his stationary pallet jack for traffic in the aisle to clear when the throttle suddenly malfunctioned and caused the jack, laden with stacks of ware, to lurch forward. This, he testified, caused the stacks of ware to fall forward and smash into the other stacks of ware that lined the aisle.

I was able to decide that case with confidence by taking arbitral notice of Newton's First Law of Motion. To wit: a stack of toilets that suddenly lurches forward will not fall forward. It will fall backward. A stack of toilets that comes to a sudden stop as a result of being negligently driven into another stack of toilets will fall forward.

The grievant's testimony could not be true. It violated the laws of physics.

Few cases are that clear. More commonly arbitrators must wrestle with their decisions. We are therefore grateful for the ones that do not require wrestling and obligingly topple over of their own accord. You could earn your favorite arbitrator's gratitude if you follow the example of these two recent cases:

Have the foreman testify that he could positively identify the bag of weed he found in the parking lot as the *very same one* he had seen peeking out from the grievant's pocket earlier in the day.

Have the grievant testify that he was playing with his lighter in a safe and prudent manner when the complaining witness walked over and put his shirt in the flame before the grievant could stop him.

Or, if you can't arrange to have your client's testimony decide the case in favor of the other side, perhaps you could merely have his demeanor confirm the arbitrator's thoughts.

In a tardiness case, have the grievant arrive late. In an attendance case, have him fail to appear.

In a case where the accusation is use of employer equipment and supplies for personal business, have the dismissed grievant offer to have materials faxed to her husband's job.

In a case where there is an issue of the supervisor being loud and abusive, have him shriek and tremble and threaten the advocates.

These are just a few ways you can help make your arbitrator's job easier. I am always amazed at how many new ways there are. Thank you.

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
Brady Hathaway

Employers Cannot Contractually Shorten FLSA Limitations Period

Public policy "prevents an agreement to shorten the statute of limitations for FLSA claims...", according to Judge Lawson's ruling in *Wineman v Durkee Lakes Hunting & Fishing Club, Inc,* 352 F Supp 2d 815 (2005). A six-month limitations provision in the plaintiffs' employment contract was reasonable and enforceable, however, as to their common law breach of contract claims. This held true even though the plaintiffs kept working for the employer after their written employment contracts expired, which would have forced them to sue for unpaid benefits while they still worked for the employer. "Although lawsuits generally do not advance good relations between employees and employers, it is not uncommon for employees to bring ... [claims] against their current employers" and "the law prohibiting retaliation by employers exists to address just such a situation."

Exclusive Remedy Clause Does Not Bar Assault and Battery Claim

The exclusive remedy clause of the Michigan Workers Disability Compensation Act does not prevent the plaintiff from pursuing an assault and battery claim against five co-workers, provided the plaintiff amends his complaint to allege that they intended to injure him. The plaintiff in *Kennedy v RWC, Inc,* 359 F Supp 2d 636 (ED Mich, 2005), alleged that five male co-workers repeatedly groped his genital region and buttocks at work, causing him to "jerk upright" and re-injure his surgically repaired back. Although these co-workers could not be individually liable for sexual harassment under state or federal law, Judge Lawson ruled that they could be liable for intentional torts such as assault and battery. "[A]lthough an employee may maintain a workers' compensation action for on-the-job injuries resulting from 'horseplay,' that action is not his exclusive remedy — and he may also sue his co-workers for their 'horseplay' — if that conduct also amounts to 'intentional torts,' as that term has been defined by the Michigan legislature. In other words, 'horseplay' can be both compensable under the Act and an intentional tort within the Act's definition that could be prosecuted in the traditional manner, so that the Act's provisions would provide the injured worker *a* remedy, but not his *sole* remedy."

Unlisted Job Requirement Legitimately Separated Plaintiff from Successful Applicant

Although it was not a listed job requirement, the plaintiff's lack of "criminal justice experience" rendered him less qualified than, and not similarly situated to, the successful candidate in *Young v Oakland County,* e-journal No. 25737, rel'd 12/29/04. Judge Gadola reached this result by reviewing the job description for the soughtafter Chief Community Corrections Field Operations Manager position, a "great portion" of which "dealt with the criminal justice system." Judge Gadola added that the decisionmaker's deposition testimony "clearly demonstrated that Defendant believed [the successful candidate] to be a better choice than Plaintiff, not because of his race, but because of his experience [in the criminal justice system]." The plaintiff was therefore unable to prove his *prima facie* or pretext burdens, even though he was one of the 29 candidates initially placed on the "Top Five" list, and was among the 23 candidates who met the express qualifications for the position. Additionally, "Plaintiff's contention that Defendant could not know whether Mr. Gatt was more qualified than Plaintiff without interviewing Plaintiff lacks merit. The application procedures prior to the interview stage provided ample opportunity to discover the type of work experience possessed by each candidate."

Report Mentioning Plaintiff's Protected Activity Does Not Prove Illegal Motive

In *Serrin-Brandel v. Pier 1 Imports (U.S.), Inc.,* 2005 WL 852642 (E.D. Mich), Judge Lawson ruled that the employer's internal report, which mentioned the plaintiff's "conscious decision to circumvent HR" by reporting a co-workers alleged conduct to the police and subsequent failure to inform management that she had done so, was not direct evidence that the plaintiff was fired for lodging a police report. The language was contained in a report that registered displeasure with the plaintiff's conduct toward human resources, failure to provide truthful information during an investigation, and attempt to "circumvent" an ongoing company investigation by using the police to compromise its target. The mere mention of the protected activity, which was "only incidental" to an overall description of the plaintiff's conduct, "does not provide an inferential link to an illegal motive" sufficient to support the plaintiff's WPA claim, and does not belie evidence that the employer terminated the plaintiff for conduct that pre-existed her protected activity.

Asking About Plaintiff's Retirement Plans Does Not Prove Age Bias

Judge Rosen ruled in *Scuderi v Monumental Life Insurance Co,* 344 F Supp 2d 582 (ED Mich, 2004), that asking a protected age employee about her retirement plans is not evidence of age discrimination. Regardless, the questions could not prove age discrimination because "other than the fact that these comments were made by Plaintiff's supervisor, Plaintiff presents no evidence that establishes a nexus between these stray comments and the employment action taken by Monumental against her." Judge Rosen also rejected the plaintiff's claim that she was treated differently than similarly-situated younger employees. The plaintiff must show that the "comparables" were similar in "all respects," and Judge Rosen refused to equate different offenses simply because they were all contained in the "dischargeable offenses" section of the employer's policy manual.

Comparators' Deficiencies Must Be of the Same "Quantity or Quality"

Judge Gadola dismissed an African-American plaintiff's race discrimination claim in *Bigham v Health Express, Inc,* 346 F Supp 2d 942 (ED Mich, 2004), because she failed to present evidence sufficient to prove that a Caucasian employee who "had the same quantity or quality of deficiencies" was treated better. "While there may have been other employees who made personal telephone calls, there is no evidence of another employee who had the same combination or extent of deficiencies and was treated differently. There is also no evidence of another employee having a heated discussion with Mr. Canner, contacting clients while suspended, or warning a coworker." Even if the plaintiff could sustain her *prima facie* case, she could not prove pretext in light of her admission that she committed many of the infractions that led to her termination.

Post-Pregnancy Conduct, If Closely Linked to a Recent Pregnancy, May Support Pregnancy Discrimination Claim

In *Russell v Bronson Heating and Cooling,* 345 F Supp 2d 761 (ED Mich, 2004), Judge Borman ruled that the plaintiff could sustain her pregnancy discrimination claim even though the adverse employment action occurred after she gave birth. The plaintiff must prove that the adverse action occurred because of her pregnancy, not that it occurred during her pregnancy. Evidence that the plaintiff was terminated just before she was scheduled to return from

pregnancy-related FMLA leave, combined with a supervisor's alleged statement that the plaintiff would be "gone as soon as she had the baby," created a material factual question whether the employer discriminated against her because of pregnancy, interfered with her FMLA rights, and/or retaliated against her for asserting her FMLA rights.

Judge Borman also ruled that the plaintiff had timely filed her hostile environment claim, even though she failed to identify any specific example of sexual harassment that occurred within the 300-day limitations period. This was because the plaintiff testified that the hostile environment never stopped, and eventually culminated in a termination that occurred within the 300-day period. Judge Borman then ruled that the plaintiff presented a triable sexual harassment claim by alleging, *inter alia*, that her supervisor repeatedly asked her to engage in a sexual relationship, gave her shoulder massages, booked a single room for the two of them at a work-related seminar, repeatedly asked about her romantic life, and frequently suggested that the two of them go away together for weekends or vacations. This alleged conduct was "inherently sexual" because it was based on a romantic interest, and an average person would find it "severely hostile." The employer could be held liable for such conduct because the plaintiff alleged that the harassment culminated in her termination.

In *Malone v USA Today,* 348 F Supp 2d 866 (ED Mich, 2004), Judge Feikens ruled that a supervisor's alleged statement that women with children might not be a "good fit" in the circulation department was not direct evidence of pregnancy discrimination. The alleged remark was isolated, made during a conversation regarding the supervisor's "personal experiences as both a father and a supervisor," and did not directly establish that the adverse employment decision was based on the plaintiff's pregnancy. Moreover, "a six month delay between an alleged statement and USA Today's termination of Plaintiff's employment cannot be considered 'proximate in time.'" A second isolated comment, where the same supervisor allegedly asked the plaintiff whether she was coming back to work after her pregnancy "appears to be a supervisor's justified interest in whether an employee will be taking time off" and does not reasonably support an inference of pregnancy discrimination.

The plaintiff's circumstantial case also failed, since it appeared that the allegedly discriminatory behavior did not begin until the plaintiff was no longer pregnant and where the critiques that prompted the adverse employment decision preceded her pregnancy.

Truck Drivers Deemed Independent Contractors, Not Employees

Despite identifying 57 individuals as "active drivers," the defendant in *Nichols v All Points Transport Corporation of Michigan, Inc.,* 2005 WL 701066 (ED Mich, 2005), fell beneath the FMLA's 50-employee jurisdictional threshold because it never paid more than 33 drivers in any given week and had only 11 full-time employees. Regardless, Judge Cleland applied the "common law agency test" to conclude that the truck drivers were independent contractors, not employees. Although the drivers had an exclusive agreement with the company, displayed company placards on their trucks and were integral to the defendant's business, they were terminable at will, responsible for making capital investments in and maintaining the trucks they drove, able to hire assistants, operated with entrepreneurial risk, controlled the method of performance, paid their own taxes, and had to pay for all vehicle repairs, tolls, fuel, taxes, permits, licences and expenses.

Positive Performance Evaluations Belie "Direct Threat" Defense

Although the employer in *Kiely v Heartland Rehabilitation Serices, Inc,* 360 F Supp 2d 851 (ED Mich, 2005), presented a "formatible" argument that the plaintiff, a legally blind physical therapy assistant, posed a direct threat to patients and co-workers, the plaintiff raised a material factual question by showing that his employer knew about his impairment when it hired him, gave him several positive performance reviews and did "not address their concerns regarding Plaintiff's abilities on a detailed evaluation form specifically used to evaluate an employee's abilities."

Supervisor Satisfied FLSA's "Executive" Exemption, Despite Limitations on Authority

In *Beauchamp v Flex-N-Gate LLC,* 357 F Supp 2d 1010 (ED Mich, 2005), Judge Rosen ruled that a production supervisor was "employed in a bona fide executive capacity," and therefore exempt from FLSA overtime requirements. Cautious not to focus merely on the plaintiff's job title, Judge Rosen noted that the documentary and testimonial evidence showed that the plaintiff was paid at least $37,000 per year, assigned employees work, handled employee complaints, recommended changes in work procedures and production methods, enforced company policy, disciplined employees, trained and evaluated employees, reviewed employees' performance and supervised as many as twenty subordinates. Although some of the plaintiff's authority was limited by internal and external constraints, "nothing in the governing regulations or relevant case law requires that a supervisor must have unfettered discretion in the performance of his management duties in order to be deemed an 'executive.'"

Jury Must Decide Whether Union Miscounted Votes

Declarations from enough voters to effect an election result, all swearing that they voted against a contract, presented a triable question in *McCuiston v Hoffa*, e-Journal Number: 25749, dec'd 1/6/05, whether the union and certain union representatives violated the plaintiffs' equal voting rights and the union constitution by claiming the contract had been ratified. Judge Feikens ruled that plaintiffs had standing to seek injunctive relief because they were bound by the allegedly unratified contract, and because a similar vote would occur in 2008. The plaintiffs could not pursue compensatory damages, however, because they were all currently working and the reduced job security they claimed to fear was speculative.

Employer Cannot Seek Contribution in an FMLA Action

Actions for contribution or indemnity are "not allowed under the FLSA," according to Judge Lawson's ruling in *Finke v Kirtland Community College Bd of Trustees,* 359 F Supp2d 593 (ED Mich, 2005). The college was therefore unable to seek contribution or indemnification from an administrator who could be considered a co-employer under the FLSA, but whom plaintiff chose not to sue.

Plaintiff Not "Substantially Limited" By Eye Disease

Keratoconus and recurrent corneal erosions, which made the plaintiff in *Jamison v Dow Chemical Co,* 354 F Supp 2d 715 (ED Mich, 2004), hypersensitive to dust, chemical vapors, bright lights, wind and sunlight, did not substantially limit his ability to see. Judge Lawson reasoned that the plaintiff admitted that he could perform "many basic tasks", such as driving, running errands, shopping, caring for himself, completing household chores, reading, paying bills, preparing meals, watching movies and playing sports like basketball, football and baseball. Regardless, the employer placed the plaintiff in five different positions in an effort to accommodate his eye condition, and the plaintiff failed to prove that he could perform the positions he claimed his employer should have offered him as an accommodation. ■

INDIVIDUAL SUPERVISOR LIABILITY RETURNS BUT BEWARE OF NOTICE REQUIREMENT

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The Michigan Supreme Court recently decided two employment cases. Elsewhere in this issue is an excellent discussion of *Garg v. Macomb County Community Mental Health Services,* 472 Mich. 263 (2005), which struck down the continuing violations doctrine, overruling *Sumner v. Goodyear Tire & Rubber Co.,* 427 Mich 505 (1986). This article will discuss *Elezovic v. Ford Motor Company,* 472 Mich 408 (2005), which overruled *Jager v. Nationwide Truck Brokers, Inc.,* 252 Mich. App. 464 (2002), a case which I wrote about in an earlier edition of *Lawnotes*.

In *Jager,* the Michigan Court of Appeals held that supervisors cannot be held individually liable for sexual harassment, relying on the statutory language of the Elliott-Larsen Civil Rights Act (ELCRA), M.C.L.A '' 37. 2101 *et seq*. and "well-established rules of statutory construction."

Following *Jager,* the Court of Appeals, in *Elezovic v. Ford Motor Company,* 259 Mich App 187 (2002), stated that "*Jager* was wrongly decided." But the Court refused to convene a special panel to resolve the conflict between *Jager* and *Elezovic*. *Elezovic v. Ford Motor Co.,* 259 Mich App 801 (2004). Two other Court of Appeals decisions had distinguished *Jager,* holding that for retaliation claims under ELCRA, "*Jager* … does not foreclose individual liability." *Mick v. Lake Orion Community Schools,* 2004 WL 1231944;*Rymal v. Herman Baergen,* 2004 WL 1260260. Those courts relied on the difference in language between the anti-retaliation and the anti-discrimination provisions of ELCRA.

The Michigan Supreme Court then granted leave to appeal in *Elezovic v. Ford Motor Co.*, 470 Mich 892 (2004), explicitly instructing the parties to "include among the issues briefed whether a supervisor engaging in activity prohibited by the Michigan Civil Rights Act may be held individually liable for violating a plaintiff's civil rights." In overruling *Jager*, the Supreme Court responded to the defendant's suggestion that it adopt the rationale federal courts use in Title VII cases and decide the case "on the basis of the 'policy' and 'object' of Title VII rather than what the statute actually says … ." The Court declined to do so:

This court has been clear that the policy behind a statute cannot prevail over what the text actually says. The text must prevail. … Because MCL 37.2201(a) provides that an "employer" includes an "agent" of the employer, an agent can be held individually liable under the CRA.

Unlike *Jager,* the Supreme Court concluded that including agent in the definition of employer was not meant merely to establish vicarious liability for the agent's employer.

However, the Court's holding on the second issue presented by *Elezovic* may have a greater impact on future cases. That is whether the corporate defendant had adequate notice of the sexual harassment. Plaintiff informed two members of management (referred to by the Court as "low-level supervisors") that she had been harassed by her supervisor (Bennett), but requested that they keep her allegations confidential.

While doing so violated company policy, the majority said Ford was free to discipline the managers for that violation, but held that their failure to inform human resources personnel was not sufficient to put Ford on notice that sexual harassment had occurred or was occurring at the plant. The choice of whether to notify the company and start the process of investigation belongs to the victim of harassment and this victim, said the Court, made the choice not to go forward when she asked for confidentiality, thus waiving the right to give notice.

However, there was other evidence of notice. Plaintiff had filed numerous complaints and grievances over the years against Bennett in which she used the terms "harassment" and "hostile environment," but the majority found that because she did not use the term "sexual harassment," the complaints were insufficient notice. In addition, Justice Cavanaugh, in dissent, notes that additional supervisors, from whom plaintiff did not request confidentiality, had notice of plaintiff's sexual harassment allegations – notice they received "from one of plaintiff's coworkers and from *the alleged harasser himself.*" (Emphasis in original).

And in her dissent, Justice Weaver discusses even more evidence, such as letters from plaintiff's treating psychologist, who noted plaintiff's discomfort with Bennett, and a letter from an attorney informing Ford that his office was investigating "ongoing acts of discrimination and retaliation" and went on to say he may take action to "insure that our client is not subjected to working in a hostile environment." Plaintiff's psychologist also telephoned Jerome Rush, Supervisor of Labor Relations, asking Rush to intervene on plaintiff's behalf.1 Justice Weaver accused the majority of creating a "rule of automatic waiver," where "any time an employee requests confidentiality when reporting sexual harassment, the employee will have waived notice."

Looking at the totality of the evidence, it defies comprehension that a sophisticated employer such as Ford Motor Company did not have notice that plaintiff was being sexually harassed.

— END NOTE —

[1]Other employees had also complained that Bennett sexually harassed them. See Perez v. Ford Motor Co., 2005 WL 562637. ■

EASTERN DISTRICT ALLOWS ATTORNEY CELL PHONES!

Chief Judge Bernard A. Friedman issued an order on June 21, 2005 exempting attorneys from the Court's cell phone bar for up to six months. See box on page 11. The cell phone policy may be read in full on the Court's website: www.mied.uscourts.gov.

SIXTH CIRCUIT ADDRESSES DISCRIMINATION ISSUES, HYBRID CAUSES OF ACTION UNDER THE LMRA, AND COMPELLING ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT

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From February 2005 to April 2005, the Sixth Circuit published about 17 cases dealing with a wide variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "http://pacer.ca6.uscourts.gov/opinions/main.php".

Labor Management Relations Act – Hybrid Cause of Action

In *Higgins v. Int'l Union, Security, Police, Fire Professionals of America (SPFPA)*, Docket No. 03-2203 (February 4, 2005), the Sixth Circuit affirmed the dismissal of a hybrid cause of action brought by several union members, holding that the plaintiffs failed to establish a breach of contract by their employer (DaimlerChrysler) or a breach of the duty of fair representation by their union. The lawsuit arose out of an amendment to the collective bargaining agreement, adopted due to anticipated layoffs, without membership ratification, which gave DaimlerChrysler the ability to hire supplemental employees at an increased wage rate, but limited the proportion of such employees to 15% of the permanent workforce. The plaintiffs argued that this amendment constituted an economic change with adverse economic consequences for union members, and thus should have required ratification by the members. The Sixth Circuit did not address this argument, holding that even if this was indeed the case, "our extensive review of the record in this case produced no substantive evidence that the employees were adversely impacted by the signing" of the amendment. Therefore, membership ratification was not required, given that the parties had a history of modifying the collective bargaining agreement without membership ratification where there was no adverse impact. While the amendment did give DaimlerChrysler more latitude in hiring supplemental employees, it was generally allowed to use such employees well before this time. Also, the amendment explicitly provided that any overtime must first be offered to permanent employees before being offered to supplemental employees.

Americans With Disabilities Act – Perceived Disability

In *Moorer v. Baptist Memorial Health Care System*, Docket Nos. 03-5855/5965 (February 11, 2005), the Sixth Circuit affirmed the district court's judgment in favor of a plaintiff on his ADA claim, holding that the court was correct in finding that the employer regarded him as disabled, and that the plaintiff was discharged due to his perceived disability, alcoholism. The central issue was whether the plaintiff's alcoholism was perceived as a substantial limitation on his ability to work, which requires a showing that the employer perceived him as unable to work in a broad class of jobs (meaning the same general type of work in the same geographic area). The Sixth Circuit held that the fact that the employer believed the plaintiff's alcoholism "made him unable to perform his hospital administrator job, which required a broad range of managerial skills, permits the reasonable inference that [the employer] believed that [the plaintiff's] alcoholism rendered him incapable of performing a substantial number of managerial jobs." The court also reversed the district court's grant of summary judgment in favor of the employer on the plaintiff's FMLA claim, holding that because the plaintiff had not actually been terminated until he was on leave, a fact finder was entitled to infer that he "would not have been fired absent his actual taking of that FMLA leave."

Federal Arbitration Act – Compelling Arbitration

In *Walker v. Ryan's Family Steak Houses, Inc.*, Docket No. 03-6468 (March 9, 2005), the Sixth Circuit denied the defendant employer's motion to dismiss the plaintiffs' complaint and to compel arbitration. The arbitration agreement at issue sought to refer all employment-related disputes to arbitration, by virtue of a separate agreement with a company which runs an arbitration program. The court held, however, that because this agreement "merely obligates" the arbitral company to administer its procedures for the employer's benefit, it does not actually require the employer to submit its employment claims to this particular forum. Thus, the arbitration agreements entered into by the plaintiffs contained a misrepresentation; that the employer was obligated to utilize the same dispute resolution procedure. Also, the Sixth Circuit held that, under Tennessee law, an employer's promise to consider an employment application is not adequate consideration for a promise to arbitrate employment disputes that are wholly unrelated to the application or hiring process. The court was also motivated by the fact that several plaintiffs had been hired without first executing the arbitration agreement, which undercut the employer's claim that it would only consider hiring individuals who had first signing the arbitration agreement.

Pregnancy Discrimination Act – Timing of Pregnancy

In *Kocak v. Community Health Partners of Ohio, Inc*., Docket No. 03-4650 (March 11, 2005), the Sixth Circuit affirmed the district court's granting of summary judgment in favor of an employer in a pregnancy discrimination case. The court criticized the district court's reasoning, however, holding that it was not dispositive that the plaintiff had not been pregnant at the time the alleged discrimination occurred. Rather, the Sixth Circuit held that the Pregnancy Discrimination Act prohibits an employer from discriminating against a woman because of her capacity to become pregnant, and that the plaintiff could survive summary judgment by presenting evidence that would create a genuine issue of material fact about whether the defendant refused to hire her because she might become pregnant again. The plaintiff was unable to do so; the defendant produced evidence that the plaintiff was not re-hired because she was an unreliable employee and was avidly disliked by her peers. Thus, although the plaintiff fell within the protection of the Pregnancy Discrimination Act, she failed to present a cognizable claim under the statute.

ERISA – Long-Term Disability Benefits

In *Moon v. Unum Provident Co*., Docket No. 03-1626 (March 22, 2005), the Sixth Circuit reversed the district court's denial of a plaintiff's motion for judgment on the administrative record, holding that the employer's final decision to terminate the plaintiff's long-term disability benefits was arbitrary and capricious. Despite the fact that the plan vested the administrator with complete discretion in making eligibility determinations, the court noted that its necessarily deferential review should not be inconsequential: "while a benefits plan may vest discretion in the plan administrator, the federal courts do not sit in review of the administrator's decisions only for the purpose of rubber stamping those decisions." In this case, the only medical opinion contrary to the plaintiff's treating physician was a doctor employed by the plan administrator, who engaged in a selective review of the administrative record. In particular, this physician "seized upon a single blood pressure measurement performed by a doctor who himself cautioned that the plaintiff's hypertension appeared to be intractable." Thus, the Sixth Circuit held that the plan administrator had not offered a "reasoned explanation" to support its decision. ■

MERC UPDATE

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Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 24 Decisions and Orders in a variety of cases. A brief summary of 4 of those cases follows. Of the 24 cases, 13 were unfair labor practice hearings, 3 were representation and/or unit clarification hearings, 5 were duty of fair representation/unfair labor practice hearings, 1 was an Order Denying a Request for Compliance Hearing, 1 was a Decision and Order Denying Motion for Consideration, and 1 was an Order on Remand from the Michigan Court of Appeals. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

UNFAIR LABOR PRACTICES.

Jackson County

Case No. C03 E-104 (March 18, 2005)

The ALJ issued his Decision and Recommended Order finding that Respondent, Jackson County, had violated PERA by bypassing Charging Party, Police Officers Association of Michigan, and bargaining directly with unit members. Respondent filed timely exceptions. The Commission adopted the ALJ's Decision and Recommended Order.

Respondent and Charging Party were parties to a collective bargaining agreement that expired on December 31, 2001. After the parties were not able to reach a new agreement, the parties engaged in Act 312 interest arbitration. During that process, Respondent proposed a settlement that included a retroactive wage increase for unit members which was rejected by Charging Party. On April 15, 2003, Respondent mailed letters to bargaining unit members notifying them of this offer. Each of the letters contained Respondent's proposal including the percentage increase for each year of the contract as well as the approximate amount the employee would receive in retroactive pay if the offer had been accepted. The letter also characterized the Act 312 process as costly, laborious, and time consuming.

The Commission noted PERA permits limited communication regarding the status of bargaining provided that it is done in a noncoercive manner. In this case, the Commission found Respondent did more than convey factual information. The communication disparaged Charging Party's exercise of a statutory right. Respondent attempted to persuade individual bargaining unit members that the representation afforded them by Charging Party was inappropriate and that the acceptance of Respondent's offer would better serve their interests. By dealing with individual bargaining unit members in this manner, Respondent engaged in prohibited direct bargaining. Therefore, the Decision and Recommended Order of the ALJ was adopted in its entirety.

Eighth Judicial District Court (Kalamazoo County)

Case No. C03 C-064 (March 18, 2005)

The ALJ issued a Decision and Recommended Order finding that Respondent violated PERA by unilaterally changing employee work hours. Respondent filed timely exceptions alleging that Charging Party's right to bargain as to hours of work was waived by an expired collective bargaining agreement between Respondent and the labor organization that previously represented the bargaining unit. The Commission adopted the Decision and Recommended Order of the ALJ.

On November 6, 2002, Charging Party, Fraternal Order of Police, was certified as the bargaining representative for a unit of full-time and regularly scheduled part-time non-supervisory employees of Respondent, Eighth Judicial District Court. The unit was previously represented by United Auto Workers. On January 1,1999, the Eighth Judicial District Court was created by merging three area district courts. After the merger, Respondent and the UAW entered into a collective bargaining agreement which Respondent argued the language in the agreement amounted to a waiver of the right to bargain over hours of work.

Effective January 2, 2003, Respondent notified its employees that the hours of work would be changed and that flex time would be suspended. Charging Party demanded to bargain over the proposed changes. The changes were implemented by Respondent before the parties began negotiations for their first collective bargaining agreement.

The Commission found that the collective bargaining agreement with the UAW did not bind Charging Party. The Commission relied on the holding of the ALJ in *Eugene Ovine, Inc.*, 328 NLRB 294 (1999), finding that "[t]he acquiescence of the employees' former bargaining representative in the employer's unilateral action in the past is not binding upon the newly certified union." Therefore, Respondent's unilateral change of employees' working hours violated its bargaining obligation with Charging Party.

Genesee County Sheriff's Department

Case Nos. C00 D-52 and C00 H-153 (January 25, 2005)

Charging Parties, the American Federation of State, County, and Municipal Employees and Michael Cherry, alleged that Respondent Genesee County Sheriff's Department violated PERA by discriminating against Cherry and other employees because of their protected concerted activity and by interfering with other rights protected by PERA. The ALJ found that certain of the allegations had merit. Both parties filed timely exceptions to the Decision and Recommended Order of the ALJ. The Commission found merit in several of Respondent's exceptions.

The ALJ found that Respondent violated PERA by suspending deputies Michael Cherry and Michael Potoczny for comments made about employee Tina Fielder, by allocating Cherry a low score on his 2001 performance evaluation, by suspending Lynda Germaine-Cherry, and by giving Wayne McIntyre a negative performance evaluation for testifying in a MERC hearing.

Michael Cherry was a deputy in the Sheriff's Department. He became a member of the Union's executive board and served as Vice President of the Union for a period of time. In the past, command officers had expressed concerns relating to Cherry's judgment and performance. He had also received disciplinary suspensions in the past. In September of 1999, Cherry overheard a conversation between two supervisors in which they referred to several employees as "shit stirrers." There was disputed testimony as to whether Cherry was listed by name during this discussion.

In August of 2001, Cherry was considered for a promotion to sergeant. He had been considered on a total of ten occasions between 1999 and 2001. Cherry received a significantly higher numeric performance evaluation in 1999 than he received in 2001. Respondent's Undersheriff testified that Cherry had not demonstrated that he could perform as a supervisor.

As to this issue, the Commission found that Charging Party had not established a nexus between Cherry's union involvement and the Sheriff's allotment of Cherry's performance points. Therefore, the ALJ improperly shifted the burden of proof to the Employer to demonstrate its rationale.

Cherry and Deputy Michael Potoczny also took issue with discipline they received for comments about Tina Fielder, the administrative assistant to the Sheriff. Cherry claimed that the Undersheriff told him that Fielder's promotion was a "token promotion" to gain

African-American support in the upcoming election. Cherry told several individuals about this alleged comment, including Deputy Potoczny. Several months later, during a grievance meeting, Potoczny stated to Fielder that she was a token appointment. For this conduct, both Cherry and Potoczny received suspensions.

As to this issue, the Commission disagreed with the ALJ's finding regarding Cherry's discipline. The Commission found that Cherry was disciplined by Respondent for what Respondent perceived to be misconduct and not based on protected concerted activity. The Commission reached a different conclusion with respect to the discipline of Potoczny. This remark occurred during a grievance meeting. The Commission has long held that an employee's conduct or comments during a grievance meeting are protected even though they may be insulting or offensive. While Potoczny's comment to Fielder may have been offensive, it did not amount to the type of conduct so severe to render it unprotected. As to this issue, the Commission affirmed the ALJ's finding.

On January 4, 2000, Respondent disciplined Deputy Germaine-Cherry for failing to pick up the police cars as ordered, leaving the District without permission, and responding that a report was "chicken shit."

The Commission found that Germaine-Cherry reacted inappropriately and used foul language. The Commission found no violation of PERA in Respondent's actions.

Respondent did not except to the ALJ's finding that it violated PERA when McIntyre's evaluation contained a statement that he perjured himself in testifying in a MERC hearing. The Commission agreed that such a statement violated PERA and ordered that that portion of the evaluation be eliminated.

As discussed herein, the Commission found merit in many of Respondent's exceptions. The Commission found no merit in Charging Party's exceptions. The ALJ's Decision and Recommended Order was modified in accordance with the conclusions reached by the Commission.

UNIT CLARIFICATION/REPRESENTATION

Charter Township of Lansing

Case No. R03 L-177 (February 28, 2005)

Petitioner, Teamsters Local 580, filed a petition seeking to accrete the part-time code compliance officer and part-time water department secretary to its existing bargaining unit of clerical employees employed by the Charter Township of Lansing. The Employer argued that the petition should be dismissed because the positions at issue were part-time and as such excluded pursuant to the parties' collective bargaining agreement. The Employer also argued that the position of code compliance officer was an independent contractor not employed by the Township. The Commission found that a question of representation existed.

The recognition clause of the parties' collective bargaining agreement specifically excluded part-time and temporary employees. The code compliance officer position had been in existence since 1999. The position was responsible for enforcing municipal ordinances, including regulations pertaining to disabled vehicles, trash, and overgrown grass. The normal working hours for the position were 8:30 a.m. to 12:30 p.m., Monday through Friday. The incumbent in the position reported to the building inspector for the Township and occasionally attended meetings with the building inspector and the Township supervisor. The Township paid the employee hourly and did not withhold taxes from her paycheck.

The water department secretary position had existed for approximately four to five years. The incumbent worked at the water department performing clerical duties. The hours of employment varied from 12 to 25 hours per week.

The Employer contended that the parties' collective bargaining agreement explicitly excluded the positions at issue. The Commission noted that it has always reserved the right in litigated representation cases to add unrepresented employees who should be in the unit. Thus, bargaining history cannot be used to exclude unrepresented employees. Similarly, an exclusion in a recognition clause does not, in and of itself, constitute a waiver of representation. Since the employees in these positions had a substantial and continuing interest in their employment, the fact that they were part-time employees did not exclude them from the unit.

As to the independent contractor issue, the Commission noted the essential test was whether the employer maintained control over the manner and means of performing the work. Additionally, the Commission also looked to whether the work done by the code compliance officer could be characterized as an integral part of a larger common task.

In this case, the Commission found that the duties and responsibilities of the code compliance officer were an integral part of the common task of enforcing ordinances of the Township. Additionally, the position reported to the Township office each day and consulted with the building instructor. For these reasons, the Commission concluded that the code compliance officer was an employee of the Township. As the Employer's defenses did not justify exclusion of the positions, the Commission found that the Employer could voluntarily accrete the positions or alternatively an election would be ordered. ■

MICHIGAN SUPREME COURT UPDATE

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***Magee v. DaimlerChrysler Corp.*, 472 Mich. 108 (2005) (per curiam).**

The Michigan Supreme Court dismissed Plaintiff's discrimination claims because they were not timely filed within the three year statute of limitations. Although the Plaintiff's last day of work was September 12, 1998, she did not resign her employment until February 2, 1999. On February 1, 2002, Plaintiff filed suit pursuant to the Elliott-Larsen Civil Rights Act ("ELCRA") alleging unlawful sexual harassment, sex and age discrimination, and retaliation.

Plaintiff's complaint failed to allege any discriminatory acts that took place after September 12, 1998. The Supreme Court stated that MCL § 600.5805(10) establishes that the applicable statute of limitations period under ELCRA is three years from the date of "injury." Because Plaintiff alleged no discriminatory conduct after September 12, 1998, the statute of limitations period had expired on September 12, 2001.

In reaching its decision, the Supreme Court distinguished its decision in *Collins v. Comerica Bank,* 468 Mich. 628 (2003) in which it held that a cause of action for discriminatory termination does not accrue until the date of termination. The Supreme Court found that *Collins* did not apply because it involved a termination, not a resignation. Accordingly, the Court reversed the Michigan Court of Appeals' decision and granted summary disposition on DaimlerChrysler's behalf.

NLRB REVISITS MAJOR CLINTON BOARD RULINGS

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The National Labor Relations Board is currently operating with only three members (Republicans Robert Battista and Peter Schaumber, and Democrat Wilma Liebman), following the expiration late last year of the terms of two members (Republican Ronald Meisburg and Democrat Dennis Walsh). Before the two members departed, the Board continued its reexamination of Clinton Board decisions and issued a number of significant rulings. At this writing, it is unclear when or by whom the two vacant seats will be filled.

Unit Status Of Jointly Employed "Contract" Workers

In what may be the most significant change affecting employers generally, the Board ruled in *Oakwood Care Center* on November 19, 2004, by a 3-2 party-line vote, that jointly employed "contract" workers hired through staffing agencies cannot be combined with regular employees in a single bargaining unit unless both employers consent. The Clinton Board had held in its controversial *M.B. Sturgis* decision in 2000 that a unit combining these workers, over the objection of one or both employers, was permissible so long as "community of interest" factors were satisfied. The *Oakwood* decision reverses *Sturgis* and returns to the traditional Board rule that, because it would produce a multi-employer unit, combining the two groups into one unit is permissible only with full consent. The *Sturgis* rationale was described by the Board's majority as "misguided both as a matter of statutory interpretation and sound national labor policy."

Harassment-Free Workplace Rules

In its 1998 decision in *Lafayette Park Hotel,* the Clinton Board generated a great deal of uncertainty regarding employer-promulgated rules that prohibited abusive or harassing workplace behavior. Such rules were at times invalidated if the Board members through there was even a remote chance an employee could interpret the rule as prohibiting or restricting union or other protected activity. In its November 19, 2004 decision in *Lutheran Heritage Village-Livonia,* the new Board, again by a 3-2 vote, flipped the presumption for rules that did not specifically refer to union or other protected activity, and stated that it would "not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way." Thankfully, a return to common sense.

Election Objections Based On Plant Closing Threats

The Clinton Board had held in its 2000 decision in *Spring Industry* that, when a union objected to an employer's election victory on the ground that plant closing threats had been made, the Board would presume that such threats had been disseminated generally throughout the workforce and had therefore widely disturbed laboratory conditions for the election. Once again by a 3-2 vote, the new Board held in *Crown Bolt Inc.,* issued December 29, 2004, that this deviation from precedent was improper and that such objections should be subject to the usual burden of proof resting with the party seeking to overturn an NLRB election — which is the union in this type of case. In other words, the union must establish through witnesses that a plant closing threat was in fact widely disseminated throughout the workforce, rather than requiring the employer to prove it was not.

Overbroad No-Solicitation Rule Does Not Set Aside Election

In a somewhat related ruling, *Delta Brands Inc.,* issued February 7, 2005, a 2-1 panel majority found that the inclusion of an overbroad no-solicitation rule in the employer's policy manual, which was in force during the critical period preceding an NLRB election, did not satisfy the union's burden of proving objectionable conduct sufficient to overturn the election. The manual was 36 pages long, the no-solicitation rule was not adopted in response to the union's campaign, and the evidence presented by the union established that only one employee had received the manual during the critical period. Although the election had been decided by two votes, the majority concluded that "the inclusion of the no-solicitation rule in the employer's policy manual, standing alone, is [not] sufficient to establish that the outcome of the election could have been affected." A sharp dissent argued that all of the voting employees were required to read and adhere all of the employer's rules and that the Board should presume employees' knowledge of the overbroad rule.

Employer Lockouts To Bring Pressure To Bear

In two related decisions, *Midwest Generation and Bunting Bearings Corp.,* issued respectively on September 30 and October 29, 2004, both decided by 2-1 majorities, the Board addressed an infrequently used but sometimes highly effective labor strategy — the *partial* lockout to support an employer's bargaining position. Employer lockouts tend to fall into two categories: "defensive" lockouts that protect an employer's property or other interests, and "offensive" lockouts that bring pressure to bear on the union and its members during bargaining. Unless there is proof of an anti-union motive, temporary replacements are permitted during an otherwise lawful offensive or defensive lockout. There has been uncertainty, however, regarding an employer's ability to lock out a strategically selected portion of its workforce.

In *Midwest Generation* the employer locked out economic strikers when they declared their strike over, but it did not lock out non-strikers and crossovers who had worked during the strike. The employer told the union that the locked out full-term strikers could come back when "a new contract is agreed to and ratified" — which the Board majority held was permissible bargaining pressure motivated by a legitimate business justification. In the majority's view, this justification overcame the dissent's claim that the employer was simply discriminating based on the extent of protected strike activity, i.e., locking out the strikers but not the non-strikers.

In *Bunting Bearing Corp.* the Board majority found a post-impasse lockout of seniority employees (who were union members), but not of probationary employees (who were not union members),

to be lawful inasmuch as, in the majority's view, the two groups had divergent interests and voting rights vis-à-vis the terms of a new labor contract. The partial lockout brought economic pressure to bear on those who had a more "vital" interest in the bargaining proposals and also had a right to vote on those proposals. This rationale, once again, overcame the dissent's claim of straightforward discrimination based on union membership.

In a recent court enforcement action, *Dayton Newspapers, Inc. v. NLRB,* the U.S. Court of Appeals for the Sixth Circuit recognized an employer's right to lock out unionized employees after the union strategically called a "quickie" strike timed to jeopardize the employer's move from one facility to another. The court also found legitimate the employer's refusal to reinstate certain locked out employees whose jobs were to be eliminated as part of the move. However, the court affirmed the Board's conclusion that, following the union's offer to return to work with assurances, the employer had failed to prove a legitimate business justification for continuing the lockout because it made "moving target" demands on the union that were difficult or impossible for the union to evaluate and bargain over. The court additionally affirmed the Board's rulings that the employer had coercively threatened employees regarding the consequence of striking, and had engaged in improper "direct dealing" by approaching strikers and proposing new terms that had not been proposed to the union.

The *Dayton Newspapers* case illustrates the legal risks associated with the Board's *post hoc* evaluation of an employer's business justifications and bargaining positions. While powerful weapons, lockouts obviously present potential for major backpay liability if a violation is subsequently found. And of course an employer contemplating a lockout must take into account the practical, political, and publicity factors that are likely to accompany it. ■

MICHIGAN ADOPTS SOCIAL SECURITY NUMBER PRIVACY RULES

Eric J. Pelton
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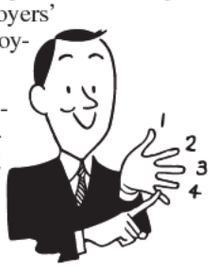
On March 1, 2005, the Michigan Social Security Number Privacy Act took effect. Among its many requirements and prohibitions, the Act places restrictions on employers' use of the social security numbers of employees.



"Four digits only!"

In general, the Act prohibits the public display of all or more than four sequential digits of social security numbers and precludes the use of such numbers as a primary account number for an individual or on an identification badge or card, membership card, permit, or license. The Act also prohibits using or transmitting numbers over the internet or a computer system, or to gain access, unless the connection is secure, or including numbers on documents or information sent to an individual.

There are numerous exceptions for governmental agencies, for applications and enrollment processes initiated by an individual, and for documents related to employee health insurance benefits. There is also a broad exception where use of a social security number is authorized or required by state or federal statute, by court order, or pursuant to legal discovery or process.

The Act allows employers to use all or more than four sequential digits of a social security number in the ordinary course of business to verify an individual's identity; to investigate an individual's claim, credit, criminal, or driving history; to provide or administer employee health insurance or membership benefits, claims, or retirement programs; or to administer the ownership of shares of stock or other investments.

Beginning January 1, 2006, employers who obtain social security numbers in the ordinary course of business must create a privacy policy that at a minimum:

- Ensures confidentiality of the numbers to the extent practicable;
- Prohibits unlawful disclosure of the numbers;
- Limits access to information or documents containing the numbers;
- Describes how to properly dispose of documents containing the numbers; and
- Establishes penalties for violation of the policy.

The Act provides that employers who create such a privacy policy must publish it in an employee handbook, in a procedures manual, or in one or more similar documents which may be made available electronically. A privacy policy is not necessary where an employer uses a social security number in compliance with the federal Fair Credit Reporting Act such as conducting a credit history or background check (however, the FCRA has its own complex requirements).

Knowing violations of the Act are a misdemeanor punishable by imprisonment for not more than 93 days, or a fine of not more than $1,000, or both. An individual whose rights have been violated may recover actual damages in a civil action. If a knowing violation can be established, the individual may recover actual damages or $1,000, whichever is greater, as well as attorney fees. Before suing, though, an individual must provide at least 60 days written notice to the person alleged to have violated the Act. The notice must make a demand for the amount of actual damages with reasonable documentation of the violation and the actual damages caused by the violation. Employers will not be held liable for violations of the Act by their agents where a privacy policy has been created under the Act, or for acting in compliance with the Fair Credit Reporting Act, so long as reasonable measures are in place to enforce the policy and redress violations.

Every Michigan employer using social security numbers should determine whether each type of use is necessary and falls within an exception, and whether development of a privacy policy is required and prudent. Employers have until January 1, 2006 to ensure full compliance. ■

MERC CORNER

Nora Lynch
Michigan Employment Relations Commission Chair
Ruthanne Okun
Bureau of Employment Relations Director

The "MERC Corner" will appear regularly in *Lawnotes* and will cover matters related to changes in the agency's rules, policies, practice and procedure, notable occurrences, etc. It will supplement the "MERC Update" and annual survey of MERC-related appellate decisions, which are regular features in *Lawnotes.*

MERC Rules and Regulations

MERC's General Rules and Regulations (now R 423.101-423.194) were amended in 2002 to codify and expand upon existing practice and procedure. The amended rules may be accessed via MERC's website at www.michigan.gov/merc. They are also contained in a booklet, "Employment Relations Commission Statutes and Rules," which may be purchased from MERC at a nominal cost. The amendments clarify many areas of MERC practice. Highlighted below are some of the more significant rule amendments.

Part 4. Representation Proceedings (R 423.141-423-149b)

Rule 141(3) specifically delineates MERC policy regarding the time periods when election petitions may be filed where there is a collective bargaining agreement covering employees in the bargaining unit, including governing periods for public, private, and school employees. New Rules 142 and 143 set forth requirements for self-determination elections and unit clarification petitions respectively.

Part 6. Motion Practice (R 423.161-423.167)

This is a new section setting forth timelines for motions, briefs in opposition, requests for oral argument, and requirements for motions made at hearings. Requirements for specific motions are also delineated, including motions for more definite statement, motions to strike, motions for summary disposition, motions for reconsideration, and others.

Part 7. Hearings (R 423.171-423.179)

Rule 176 expands on the previous rule regarding requirements for exceptions to the decision and recommended order of the administrative law judge, particularly with respect to the format of supporting briefs. Note that the party filing exceptions is required to file an original and 4 copies of the exceptions and brief in support, *and 2 copies of any exhibits* submitted at hearing. Section 8 of this rule clarifies MERC's policy on extensions of time to file exceptions, cross exceptions, or briefs in support of a decision and recommended order. Upon request, one extension of not more than 30 days is granted; subsequent extensions are granted only upon a showing of good cause. New Rule 177 governs compliance proceedings, setting forth pleading requirements regarding back pay and other relief.

Part 8. Filing and Service of Documents (R 423.181-423.184)

Long-time practitioners before MERC should note in particular new Rule 184 which provides specific requirements for the form and style of motions and briefs, including the size and type of paper, method of binding, margins, font size, and spacing. Except as permitted by the Commission or an administrative law judge, motions and briefs are limited to 50 pages.

Part 3. Fact Finding (R 423.131-423.138)

Rule 135 allows a party to strike a fact finder from the panel list if that individual is an advocate. The parties may also mutually select a fact finder from the Commission's panel. The fact finder's power to remand the parties to further mediation is specifically set forth in Rule 136(6).

Publication of MERC Decisions

Opinions Press, the long-time publisher of MERC Labor Opinions and of its Act 312 and Fact Finding Decisions ceased publication at the end of 2002. Commission decisions are being published by Labor Relations Press in its Michigan Public Employee Reporter, are available on both Westlaw and Lexis, and since 1998, are available on MERC's website. When citing to Commission decisions issued after 2002, please cite to Michigan Public Employee Reporter using the following format: *City of St Clair Shores,* 17 MPER 27 (2004). Act 312 Decisions and Fact Finding Reports are no longer contained in official publications. They are currently catalogued at the Michigan State University Labor & Industrial Relations Library and are posted on MSU's website, at http://turf.lib.msu.edu/awards/

MERC ALJs Join State Office of Administrative Hearings and Rules

On January 14, 2005, Governor Jennifer M. Granholm signed Executive Order 2005-1, creating the State Office of Administrative Hearings and Rules (SOAHR) and consolidating all administrative hearing functions into SOAHR. Pursuant to Section II (H) of the Executive Order, SOAHR may only assign hearing officers to perform administrative hearing functions for MERC from a list of hearing officers approved by MERC. On March 27, 2005, MERC ALJs Roy Roulhac, Julia Stern, and David Peltz were transferred into SOAHR. Discussions are ongoing with SOAHR with respect to how the Executive Order will impact MERC. ■

KELMAN'S CARTOON

"So here are your choices. You can bring back a verdict for the plaintiff. Or a verdict for the defendant. Or you can come up with an unprincipled, split-the-difference compromise. Or you can hopelessly deadlock."

VIEW FROM THE CHAIR

James M. Moore, ***Chair***
Labor and Employment Law Section

THE UGLY ABYSS

I am related by marriage to a family that endured one of the more infamous episodes in American social, political and legal history—the incarceration of some 120,000 persons, most of them citizens, whose offense was to share ethnicity with the people of a country at war with the United States. The wholesale evacuation of Japanese-Americans from their homes and farms in the western part of the country (but not in Hawaii, where the economic disruption would have been too great) has received some attention of late as a cautionary tale as this country wages a war in the Middle East. The demonization of a people is an easy response to a complicated and sometimes terrifying world.

There are Michigan connections to the internment, beyond the diaspora of Japanese- Americans after World War II. Prominent among them is Mr. Justice Frank Murphy, whose dissent in one of the evacuation cases, *Korematsu v. United States, 323 U.S. 214 (1944),* stands tall against the views and opinions of some more prominently celebrated civil libertarians of the time. In contrast to Justice Black's majority opinion, Justice Frankfurter concurring, with its sweeping obeisance to the "judgment" of "properly constituted military authorities," Justice Murphy observed that the "justification for the exclusion is sought . . . mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence." His careful review of the record debunked virtually every reason advanced by the military "experts" to justify the internment. The Michigan Legal Milestone recognizing Justice Murphy's dissent is located at his family home in Harbor Beach. Fred Korematsu, who died in March of this year, took part in the August 1996 dedication ceremony. In 1984 his conviction was vacated. *Korematsu v. United States, 584 F. Supp. 1406 (D. Ore.).* With the obvious assistance of hindsight, the district court found, among other things, that the government had deliberately provided misleading information and withheld relevant evidence in its wartime presentation to the courts.

There is not much left of most of the ten concentration camps (a term Justice Black deemed "unjustifiable"). They are scattered from California to Arkansas. Attempts to preserve them in some fashion have been frustrated by the demise of most of their "residents," coupled with their largely remote locations. A couple of years ago my wife and I were on vacation in Oregon and made a point of visiting what remains of the Tule Lake camp. It is located in what can charitably be described as a desolate area of California just below the Oregon border. It is now a yard for the California Department of Transportation. There is a plaque and a fence line and one original building, a small wooden structure that we were told was the camp jail. The nearby county historical museum includes a display about the internment and on the grounds of the museum, along with assorted farm implements, there is one of the tarpaper-covered structures that housed families; after the war they were used as temporary housing by farm workers. One of the guard towers is also on display. My late mother-in-law, then in her early 20s, spent the first eighteen months of the internment there before being sent, with her family, to the camp near Jerome, Arkansas. She left Tule Lake when the military designated it as a "segregation center" for the most recalcitrant internees, notably those who refused to execute the "loyalty oath." In Jerome my mother-in-law met my future father-in-law, who was visiting his family. My in-laws and all their siblings were American citizens by birth. Their parents, having been born in Japan, were aliens and were ineligible for citizenship; most Asians were not allowed to become naturalized citizens until 1952.

In fact, my father-in-law was never interned since he had joined the Army in November, 1941. At his October 1944 mustering out at the Presidio in San Francisco he was told he could not remain in California. Although he had no intention of returning to his family farm near Sacramento he refused to leave the Presidio without a document authorizing him to reside in California. When he was finally given this "permission slip," he left the Presidio and California for a job and a fresh start in Detroit.

It has been said that those who ignore history are destined to repeat it. It is certainly true that world today is, as we lawyers like to say, distinguishable from the circumstances of 1942. But the kind of thinking that allowed this nation to imprison thousands of its citizens in 1942 has certainly not been extinguished. And it would be unwise to ignore what happened sixty years ago when critically examining the attitudes and actions of the government and its agents and indeed all of us in the present day. Justice Murphy got it right when he declared that it was the "the ugly abyss of racism" that fostered the internment. While acknowledging that there were doubtless some disloyal persons of Japanese descent, he observed that to give "constitutional sanction" to the inference that individual disloyalty proved group disloyalty "is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow." History has demonstrated that Justice Murphy was wiser than most. Let us hope the passions of today do not prove Justice Murphy a prophet as well.

"The oppressed and the oppressor alike are robbed of their humanity."

– Nelson Mandela, *The Long Walk to Freedom.*

INSIDE *LAWNOTES*

- Tim Howlett and Ryan Mulally review the Michigan Supreme Court's *Garg* decision abolishing the "continuing violations" doctrine. Ann Warner reviews the Court's *Elezovic* decision on supervisor liabiility under ELCRA.
- Antoinette Pilzner and Regan Dahle shed light on taxation of attorney's fees.
- Tracy Allen offers a mediator's perspective on settling employment disputes.
- Chris Trebilcock looks at the United Airlines pension situation, and its broader implications.
- Eric Pelton reports on Michigan's new Social Security Number Privacy Act.
- Nora Lynch and Ruthanne Okun inaugurate the MERC Corner.
- Margaret Alli reviews restrictions on using "consumer reports" in the hiring process.
- Barry Goldman offers a little toilet humor — er — wisdom.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MDCR and EEOC news, websites to visit, a cartoon by Maurice Kelman, and more.
- Authors Tracy L. Allen, Margaret Carroll Alli, Regan K. Dahle, Barry Goldman, Jesse Goldstein, Kurt M. Graham, Timothy H. Howlett, Stuart M. Israel, Maurice Kelman, Nora Lynch, James M. Moore, Ryan K. Mulally, Ruthanne Okun, Theodore R. Opperwall, Eric J. Pelton, Antoinette M. Pilzner, Heather G. Ptasznik, Michael M. Shoudy, Jeffrey A. Steele, Christopher M. Trebilcock, W. Ann Warner, and more.

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