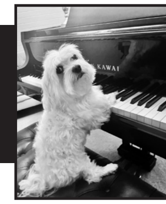
LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES



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PRESENT AT THE CREATION: ADOPTION OF MODEL STANDARD JURY INSTRUCTIONS FOR EMPLOYMENT CASES

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Mediator and Arbitrator (Retired)

Now that I am 80 years old – 50+ years a member of the Bar - but fully retired, I have begun to look back over the years of my career. This is new for me. I much preferred looking forward and planning the future to fretting or ruminating about the past. "What's next?" I liked to ask. "Where am I heading? How do I prepare for the next stage?" I often told friends my goal was to get away from the person I was yesterday. Upon reflection, the role I played in the development, adoption and approval for use of Michigan's Model Civil Jury Instructions for employment cases is among my proudest achievements.[1] See, M Civ J I, Employment Discrimination, 105.01 *et seq.;* Persons with Disabilities Civil Rights Act, 106.01 *et seq.;* Whistleblowers' Protection Act, 107.01 *et seq.;* and Wrongful Discharge, 110.01 *et seq.* I like to say I was "present at the creation."[2]

Here's the rest of the story:

In contrast to today's world where a mere 1% of cases are being tried, the 1970s and 1980s was a time when jury trials were commonplace and jury instructions critical to practice. At some point long before my time, the Michigan Supreme Court created a Standard Jury Committee with a balanced cross section of top practitioners and judges including equal numbers of plaintiff and defense counsel. Their task was to draft clear, understandable jury instructions in plain English for use by bench and bar in charging juries in preparation for their deliberations. The Committee, which still sits today, has produced instructions across a wide range of issues from cautionary instructions to the role of judge and jury; from definitions of circumstantial evidence to impeachment and evaluating the credibility of witnesses; from negligence and malpractice to definitions of ordinary care and proximate cause; from dram shop actions to No Fault automobile claims; from Probate matters to business torts. There were, *inter alia,* instructions for premises and product liability matters, wrongful death, conducting jury deliberations and assessment of damages. The Committee worked diligently to craft language reflecting settled law, fairly presented, while explaining to lay jurors in plain, understandable English how to deliberate and what standards to apply in reaching their verdict.

Once a set of instructions was finalized by the Committee, the Supreme Court published them for comment and feedback from the Bar. Once the comment period closed, the Committee considered the comments, made adjustments where warranted, and submitted a final draft to the Supreme Court which generally then published them for use. To ensure that trial courts took standard instructions seriously, the Supreme Court formulated a rule that failure to give an applicable Standard Jury Instruction was reversable error. Later, in *Johnson vs. Corbet,* 423 Mich 304 (1985) and *Moody vs. Pulte Homes, Inc.,* 423 Mich 150 (1985), the rule was relaxed to reversible only if failure to give the instruction would be inconsistent with "substantial justice."

I started practicing before Standard Jury Instructions were developed in employment cases. In my day, trial lawyers could anticipate a royal battle over every single word trial judges would use to instruct the jury. Typically, at the start of trial, each side would submit their preferred requested charges with citations to controlling authority. Party submissions were almost inevitably miles apart. Monumental battles over wording took place in chambers as each side jockeyed for approval of their preferred submission. Because closing argument could not proceed until a set of instructions was decided upon, final argument could be delayed for hours, even days after the close of evidence. The best judges, often with little or no experience in employment matters, tried to cobble together a set of jury charges that didn't for all practical purposes direct the verdict in favor of one side or the other.

Jury instruction conferences could be frustrating and painful. As plaintiff's counsel, it always seemed like we had to win our case three times: first, by persuading the court to deny summary disposition arguments; second, by persuading the court to adopt the charges we submitted; and third, by persuading the jury to award our clients their verdict consistent with the charges. I can recall trials presided over by conservative or inexperienced judges where harsh language could make the difference between justice and injustice. It was difficult enough for plaintiff to prevail in an employment discrimination case or so it seemed to me; but slanted instructions to the jury could make a plaintiff verdict nearly unobtainable. Jury instruction battles were time consuming and demanding – just when we were especially spent from long hours in trial. They were particularly frustrating because so highly dependent on the character of the trial court judge.[3]

Around 1982 or so, I sought help from George J. Bedrosian, a long-time plaintiff side trial lawyer, who had been a mentor of mine. George and Robert Krause of Dickinson Wright were the attorney co-chairs of the Standard Jury Committee under Wayne County Circuit Court Judge Theodore Bohn who chaired the meetings.[4] George had me share my experience with the Committee, urging them to develop instructions for discrimination cases. To my surprise, the Committee appointed me to convene a sub-committee to draft proposed instructions for review by the Committee. I recruited Joe Ritok from Dykema Gossett, Tom Kienbaum from Dickinson Wright, John Jacobs from Plunkett Cooney, and John Runyan from Sachs Nunn.[5]

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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.

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

PRESENT AT THE CREATION: ADOPTION OF MODEL STANDARD JURY INSTRUCTIONS FOR EMPLOYMENT CASES

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The Sub-Committee spent the next *three* years hammering out one draft after another. Every month we met after work, often at the Supreme Court's offices in the Lafayette Building in downtown Detroit. Dean Sharon Brown of the Wayne State University School of Law was the Standard Jury Committee reporter. She often attended, as well. Dean Brown was especially helpful in researching case law precedent and guiding us on Committee practice and approach to drafting.

The Sub-Committee worked its way through multiple issues: Was it possible to draft standard jury instructions at all considering the great diversity in fact patterns these cases presented? Was the shifting burden of proof approach of *McDonnell Douglas Corp vs. Green,* 411 US792 (1973) appropriate for jury instructions? As explained in the commentary, the Committee wisely recognized early on that McDonnell Douglas was not written as a jury instruction and that reference to the shifting burdens of proof adopted by the Supreme Court to assist judges deciding circumstantial evidence cases under Title VII might lead juries to substitute poorly understood legalisms for their own common sense in deciding cases under Elliott-Larsen. Was it possible to discern among seemingly conflicting appellate decisions a clear statement of Michigan law?

The most contentious issue - the one that took the longest to resolve - was how to describe plaintiff's burden of proof. Two options were considered most seriously: Did plaintiff need to prove that discrimination was a 'significant determining factor;' or simply 'a factor that made a difference in determining the outcome? Everyone agreed plaintiff must prove discrimination was a determining factor, though it need not be the only factor. That is, plaintiff was required to prove discrimination was at least one factor that made a difference in determining the outcome analogous, some thought, to "proximate cause". Opponents of the "significant factor" language were concerned the word "significant" would mislead a jury into believing the burden of proof was higher than it actually was.

Month after month, sub-committee members exchanged case citations with one another and argued. "Look what it says here!" "No. No. Look what it says *here!"* Eventually the sub-committee concluded we could not reach unanimity[6]. We submitted our set of proposals to the Committee along with the differing versions of the burden instruction. The Committee agreed that "significant determining factor" inappropriately appeared to raise the burden in a typical juror's mind. At least one judge on the Committee argued to general agreement that the "factor that made a difference" standard was akin to the well established "but for" test. The Committee also recognized that the appellate decisions in which the "significant factor" language appeared were summary judgment cases and not jury or jury instruction matters. The Committee voted – unanimously, I believe – to reject "significant determining factor."

Our proposed instructions were then published for comment as MSJI2d 105.01 *et seq.* Many letters were received but merely rehashed the arguments we had already spent years considering.

The employment discrimination instructions were finally published for use in January 1985 and have remained pretty much intact to this day with significant expansion in 2023, long after my departure.

Somewhere in that time frame, the Supreme Court appointed me to the full committee to fill a vacancy. The Committee went on eventually to approve instructions for Wrongful Discharge, M Civ JI 110.01 *et seq.*, Michigan Persons With Disabilities, M Civ JI 106.01 *et seq*, and the Whistleblowers Protection Act, M Civ JI 107.01 *et seq*.

It was a long, arduous road. The work was difficult but the committee worked collaboratively and in good faith. We knew the importance and value of what we were doing. We reached the goal. Our jury charges are fair, balanced, and accurate. They inform the jury in plain, understandable English. We did our job. My experience with the sub-committee was deeply gratifying. Strong friendships were forged among the group of us. We made life easier for every trial lawyer and judge across the state. And we provided fair, neutral, clear, and understandable direction to guide jury deliberations throughout the court system. I went on to serve as a member of the Committee for many more years. Members of that Committee were among the best lawyers I had the privilege of working with and getting to know.

I have many things to be grateful for in my life. The honor of working with those professionals on developing Michigan jury instructions for employment litigation is among the best.

—END NOTES—

[1] When I started, they were called "Michigan Standard Jury Instructions" or MSJI. Years later, committee membership was substantially replaced and the title changed to "Model Civil Jury Instructions" or M Civ JI.

[2] I've always been a history buff and reader of memoirs. One of my favorites was "Present at the Creation: My Years at the State Department" by Dean Acheson, published in 1969. The title has stuck with me.

[3] There were few precedents for guidance in Federal Court. Jury trials were unavailable in Title VII cases until the 1991 Amendments, years after Michigan's instructions were finalized.

[4] At some point, I'm no longer certain of the date, Judge Bohn retired and was replaced by Court of Appeals Judge Harold Hood.

[5] Kienbaum eventually turned his participation over to his associate, Robert Young, who would later become a Justice of the Michigan Supreme Court himself. If there was anyone else on that sub-committee, with apologies, I'm not remembering now.

[6] There had been a unanimous vote at one point, but one member changed his vote at the next meeting. ■

SUMMER 2025 READINGS

Brad Snyder, *You Can't Kill a Man Because of the Books He Reads: Angelo Herndon's Fight for Free Speech* (2025, W. W. Norton).

Marion Nestle, *Slow Cooked: An Unexpected Life in Food Politics* (2022, University of California Press) and *Food Politics: How the Food Industry Influences Nutrition and Health* (2002, 2007, 2013, University of California Press).

John G. Adam

RESTORE THE TENURE ACT

Mark Cousens

The 2023 amendments to the Public Employment Relations Act restored the rights of public employees to full collective bargaining but did not address the 2011 statutes which essentially ended the efficacy of the then 74-year-old Michigan Teacher Tenure Act. For decades this important statute had addressed what had been an ongoing problem in public education.

Throughout the latter 19th century and for much of the early 20th century, turnover among teachers was a substantial problem as teaching jobs were viewed as political patronage and newly elected school boards replaced teaching staff with persons they wished to reward. This issue was pervasive. Indeed, the concern was addressed in a comment published in the University of Michigan Law Review in 1939 where the concern of turnover was expressed in detail:

> The large turnover in the profession was due in part to certain practices which were widespread throughout the country; among them may be noted discharge (1) because of political reasons, (2) because of non-residence in the community, (3) in order to make places for friends and relatives of board members or influential citizens, (4) in order to break down resistance to reactionary school policies, and (5) in order to effect economies either by diminishing the number of teachers and increasing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees.

Lebeis, *Constitutional Law - Schools and School Districts - Teachers' Tenure Legislation*, 37 Mich. L. Rev. 430 (1939). Available at: https://repository.law.umich.edu/mlr/vol37/iss3/5

The issue of teacher tenure got the attention of Michigan Governor Frank Murphy. In 1937, the Governor called the Legislature into special session for the express purpose of adopting a teacher tenure statute. The result was 1937 PA 4 which created a statute that protected teachers from arbitrary separation, required just cause for termination and established a due process procedure to ensure that the teacher could challenge the separation. The statute was a very large step forward toward basic protection for classroom educators. But as a compromise the Legislature made the statute optional. A school board could agree to adopt the statute but was not required to do so. This limitation continued until 1964 when the Legislature adopted 1964 PA 2 which made the Act applicable to all school districts.

The premise of the statute was that a teacher would spend two years in a probation period (increased first to 3 years, then 4 and now to 5) during which they could be separated without cause but with notice. A teacher who successfully completed their probation period acquired tenure.

As originally adopted, the Tenure Act prohibited the discharge or suspension of a teacher except for just cause. The procedure required a person (usually the school superintendent) to file a series of charges with the Board of Education listing the reasons why the teacher should be discharged. The school board would then conduct a hearing which was quasi judicial to determine whether there was cause to terminate the employee.

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RESTORE THE TENURE ACT

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The teacher could then appeal to the Teacher Tenure Commission which would accept the record of the board hearing but would address the facts de novo. The teacher could request an additional hearing before the Tenure Commission and add facts or challenge conclusions reached by the school board. The Tenure Commission would then make a decision on the merits of the charges. And it would determine what discipline was appropriate. The Commission reserved the right to reduce or modify discipline imposed by the local Board of Education. See *Lakeshore Public Schools Bd. of Educ. v. Grindstaff*, 436 Mich. 339 (1990)

This dual hearing process was the product of school boards which had wanted to retain control over the discharge procedure. But it was cumbersome. The hearings might take weeks or months as school boards conducted them in the evening and for only a few hours at a time. Moreover, battles over admissibility of evidence were frequent and locally elected board members were ill equipped to address evidentiary and procedural issues. This concern was addressed by some boards who appointed their attorney to serve as a *de facto* administrative law judge and advise them on evidence and procedure. The problem was that the local board attorney was hardly neutral and the teacher had legitimate concerns regarding the neutrality of the "judge."

During the administration of Governor John Engler, the Legislature became convinced that the tenure process was so flawed that it had to be wholly changed. Members were persuaded that local board hearings delayed the separation of a bad teacher and believed a variety of inaccurate claims that hearings took years. The result was a wholesale revision of the hearing process.

With 1993 PA 60 the board hearing process was eliminated. A board would receive charges and determine whether to "proceed" on the charges. If the Board decided to proceed, the teacher would be notified and the teacher was then responsible for submitting an appeal to the Teacher Tenure Commission. The Commission would then appoint an administrative law judge to conduct a hearing on the charges and determine whether discharge or some other sanction was justified. The teacher could then appeal that decision by filing specific exceptions to the Teacher Tenure Commission. The Commission would review the decision and rule on the exceptions. The new process was certainly streamlined although it, too, has its flaws. But this was the standard from 1993 to 2011.

In the Spring of 2011, the Legislature launched a wholesale assault on the rights of public employees including teachers. In addition to myriad changes to the Public Employment Relations Act, the Legislature rewrote the discharge standard in the Tenure Act. 2011 PA 100. The just cause standard was repealed. Instead, termination could made only for a reason "...that is not arbitrary or capricious and only as provided in this act." MCL 38.101.

The phrase "arbitrary and capricious" was used frequently in cases determining the purpose of the Tenure Act: The first case considering the validity of the Tenure Act noted that "Its purpose is to maintain an adequate and competent teaching staff, free from political and personal arbitrary interference." And "It promotes good order and the welfare of the State and of the school system by preventing removal of capable and experienced teachers at the personal whims of changing office holders." *Rehberg v. Board of Educ. of Melvindale* 330 Mich. 541, 545 (1951). See also *Wilson v. Board of Ed. of City of Flint*, 361 Mich. 691, 693–94 (1960) (The statute above referred to, from which pertinent excerpts were quoted, represents Michigan's participation in a national movement directed towards the reduction of the large turnover in the teaching profession).

After 2011 discharge of a teacher did not require cause. Instead a termination only had to have a reason. The validity of the reason could not be challenged. The Tenure Commission defined the standard in *Cona v Avondale School District* (11-61)

> A decision is arbitrary and capricious if it is based on whim or caprice and not on considered, principled reasoning. Chrisdiana v Department of Community Health, 278 Mich App 685, 692 (2008). Notwithstanding that the arbitrary or capricious standard of review is highly deferential, our review is not a mere formality and we are not required merely to rubber stamp the decision of a controlling board. Our responsibility in this case is to review the quality and quantity of the evidence and to determine if the decision to discharge appellant is the result of a deliberate, principled reasoning process supported by evidence. If there is a reasoned explanation for the decision, based on the evidence, the decision is not arbitrary or capricious

The decision was affirmed by the Court of Appeals. *Cona v. Avondale School Dist*., 303 Mich.App. 123, 143 (2013) (Respondent had principled reasons for discharging petitioner from employment. The written tenure charges were developed with reference to specific circumstances and conduct that, in Heitsch's professional judgment, affected petitioner's ability to continue serving as a teacher).

The current standard has not been addressed since 2011. Despite the welcome restoration of PERA, the Tenure Act remains subject to a discharge standard which requires no more than a reason. The teacher can challenge the facts, *i.e.* show that the reason articulated is not true. But the Tenure Commission may not itself decide that the reason, even if true, is simply not a valid basis for discipline.

The discharge standard in the Tenure Act should be restored to "just cause." The current standard produces absurd results. During COVID-19 a teacher, teaching remotely, left her microphone open while she spoke with her husband. She had not intended that conversation to be heard. While speaking with her spouse she made a caustic remark about a student. Because the teacher's microphone was live, the student overheard the comment. The local Board of Education adopted charges seeking the teacher's discharge because the student was upset over the comment.

The teacher in question had a sterling record. Her classroom was used as an example of outstanding teaching when visitors came to the school district. The teacher's evaluations were uniformly "highly effective." During a hearing on the charges against her, the District's retired superintendent testified for the teacher noting that she was an outstanding teacher. The record supported the teacher. And under a "just cause" standard, the teacher's behavior might have merited only a reprimand. But under the "arbitrary and capricious" standard, there was genuine concern that the Administrative Law Judge would find that the school board had a reason for its actions and that the teacher would be terminated. The teacher, whose excellence was not in doubt, chose to voluntarily resign from her position and teach in another district. The result was that the school district lost a fine educator who simply did not wish to gamble with her future.

The arbitrary and capricious standard was adopted for the purpose of preventing real challenges to decisions made by school boards. It was part of an effort to prevent public employees from challenging decisions made by management that impacted them. It is time to restore the tenure act. The "just cause" standard should be adopted and the tenure act restored to its original purpose.

Teachers who are represented for collective bargaining now have the right to bargain "just cause" provisions in collective bargaining agreements. But not every teacher will have access to a strong grievance procedure. And a labor organization may not choose to support every grievance challenging discipline. Prior to 2011 teachers had two options – a grievance under a collective bargaining agreement or an appeal to the tenure commission. Conflicts between the two have been addressed by the Court of Appeals. See *Dearborn Heights School Dist. No. 7 v. Wayne Cnty. MEA/NEA*, 233 Mich.App. 120 (1998).

As a trade unionist I hope that teachers recognize that their collective bargaining agreement is the best source for employment protection. But not every educator will agree. And they should have the choice to pursue the remedy they believe best applies to their situation. That choice should be restored. The Tenure Act should be amended to eliminate the "arbitrary and capricious" standard and restore the "just cause" standard for discipline. ■

LAW SCHOOLS, A NEW BOOK CALLED *LAWLESS*, AND THE PAPER CHASE IN 2025—STRESS, EXPENSE, ILLIBERALITY, SURGING APPLICATIONS, AND UNCERTAIN PROSPECTS

Stuart M. Israel

The path to becoming a new overstressed lawyer of uncertain prospects runs through a costly, anxiety-producing testing and application process and the momentary joy of a law-school acceptance letter, followed by years of fraught, painfully-expensive legal education requiring at least a serviceable mastery of a curriculum of mixed value, a sizeable measure of repetition, some tedium, and a bar examination of dubious utility.

Yet increasing numbers of college graduates are lining up to take the first step to joining the Learned Profession of Law. Should they be given *Miranda* warnings? Some considerations follow. Discuss and decide.

1. Stress.

There is "compelling research demonstrating that the legal profession is struggling with depression, anxiety, and substance abuse issues." So found the Michigan Supreme Court and the State Bar of Michigan. In response, in 2022 they created the Michigan Task Force on Well-Being in the Law.

Some of that research—released by the American Bar Association and others—shows that lawyers experience high rates of problematic drinking and drug abuse, stress, anxiety, and other mental health conditions, including clinical depression, suicidal ideation, and suicide. Lawyers are most vulnerable in their first 10 years of practice. For many, the difficulties begin in law school.

The Court created the Commission on Well-Being in the Law in 2023 to "continue the forward momentum to change the climate of the legal culture" and "foster an environment that encourages members of the legal profession, law students, and court staff to strive for greater mental, physical, and emotional health." The Commission is to "build upon" the Task Force's August 2023 recommendations and "continue to work with stakeholders to identify and implement additional strategies to reduce the stresses to mental health in the legal profession." Mich.S.Ct. AO No. 2023-1 (Sept. 20, 2023).

The Task Force report and recommendations, and information about the Commission and the State Bar's Lawyers and Judges Assistance Program, are at michbar.org and courts.michigan.gov/administration/special-initiatives/well-being-in-law/.

More information about legal-profession and law-student "well-being" studies, resources, and national initiatives is at americanbar.org and lawyerwellbeing.net.

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LAW SCHOOLS, A NEW BOOK CALLED *LAWLESS*, AND THE PAPER CHASE IN 2025—STRESS, EXPENSE, ILLIBERALITY, SURGING APPLICATIONS, AND UNCERTAIN PROSPECTS

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Law schools, too, provide "well-being" assistance for students. Under "health and wellness," for example, michigan.law.umich.edu offers "physical, mental, emotional, and spiritual health" services and "strategies"—and cautions that "a healthy and balanced lifestyle can be a challenge to maintain given the demands of law school."

Being a lawyer is stressful. So is being a law student, and you have to pay tuition.

2. Expense.

Becoming a lawyer requires substantial investment—in time, effort, money, and deferred gratification. Typically the process takes seven-plus income-limited years, starting with a four-year college degree, followed by three law school years, and then by more months preparing for and passing a generalist bar examination, likely recognized only in one state.

Most states require practicing lawyers to have a degree from an ABA-accredited law school. To be accredited, a school must provide a three-year full-time curriculum or the part-time equivalent. The 2024-2025 Standards and Rules of Procedure for Approval of Law Schools, enacted by the ABA Section of Legal Education and Admissions to the Bar, are at americanbar.org. The Michigan Board of Law Examiners considers ABA-accredited law schools to be "reputable and qualified."

In England, it seems, you can become a solicitor or a barrister—with a degree, a qualifying examination, and qualifying work experience—in five or six years.

Implementing, say, a six-year combined undergraduate and law degree program would get an American student into the workforce sooner and save that student a year of tuition. A year of tuition, as the saying goes, ain't chopped liver.

University of Michigan Law School 2025 tuition rates are $69,584 (in-state) and $72,584 (out-of-state). The 2025 tuition rates at Wayne State University Law School are $39,851 (in-state) and $44,460 (out-of-state). Michigan State University College of Law 2024-2025 academic-year tuition rates are $44,682 (in-state) and $49,424 (out-of-state). Tuition for 2025 at the University of Detroit Mercy and Cooley law schools is about $51,000. These numbers come from an AI-assisted Internet search and may not be official, but they provide context for cost-benefit analysis

A six-year path to lawyerhood would change the economics of legal education (1) by reducing student-paid (or borrowed) tuition expense (good for students) and (2) by limiting tuition revenue (bad for universities). This change—I think—would not measurably diminish the quality of first-year lawyer acumen or long-term professional performance. Why the seven-year/two-degree/bar-exam path? *Cui bono*?

3. Curriculum and culture.

The modern debate about the three-year law school curriculum—with its focus on legal reasoning and doctrine, principally inculcated by the case-focused Socratic Method—began more than 50 years ago among advocates and opponents of changes—such as adding skills-development and clinical courses; expanding multidisciplinary study, emphasizing the social sciences; paying more attention to professional responsibility; paying some attention to the business of law, law office management, and legal services delivery, affordability, and accessibility; and broadening the appellate-brief/law-review-note/memo-to-senior-partner orientation of legal writing programs.

In recent years, debate in law schools (as elsewhere in universities) has involved tensions between classical liberalism and critical theory—tensions which affect curriculum, pedagogy, student-admissions practices, and faculty qualifications. The battles often are ideological—over the purposes of law and legal education; the nature of the lawyer's societal role and professional responsibility; the theory and practice of academic freedom; and the application of free speech principles to faculty and students.

These things and more are the subject *of Lawless—The Miseducation of America's Elites* (2025). The book's author—lawyer and constitutional scholar Ilya Shapiro—is a self-described "advocate for free speech, constitutionalism, and classical liberal values," called variously by others "libertarian" and "conservative."

In *Lawless*, Shapiro calls for a return to the "culture of free speech and intellectual diversity" in American law schools. Shapiro provides many examples of the erosion of that culture, with the centerpiece being his own "cancelled" association with the Georgetown University Law Center.

4. The "spirit of illiberality."

Georgetown selected Shapiro to become the executive director of the Georgetown Center for the Constitution. He "onboarded" in early 2022, but was immediately put on "administrative leave," and never served as director. Shapiro's short-lived association with Georgetown ended in June 2022 because of his January 2022 late-night "hot take" Tweet.

A few days before he was to begin at Georgetown, Shapiro tweeted his disapproval of President Biden's plan to fill the next Supreme Court opening, to be created by Justice Stephen Breyer's retirement, with deference to "the latest intersectionality hierarchy." Shapiro criticized Biden's plan to limit possible appointees to black women.

Biden's plan excluded who Shapiro believed to be Biden's "objectively best pick" for the SCOTUS opening: Sri Srinivasan, then and now District of Columbia Circuit chief judge.

President Obama appointed Srinivasan to the D.C. Circuit in 2013 and had Srinivasan on his short-list of potential appointees to fill the vacancy created by the 2016 death of Justice Antonin Scalia. Obama's appointment ultimately went to Merrick Garland, then D.C. Circuit chief judge, but lapsed in January 2017 without Senate confirmation. The opening was filled by President Trump's appointee, Justice Neil Gorsuch.

When he tweeted in January 2022, Shapiro was a close observer of the Supreme Court and commentator on the appointment process. In 2020, he published *Supreme Disorder—Judicial Nominations and the Politics of America's Highest Court*.

Shapiro tweeted that Srinivasan would "objectively" be Biden's "best pick," that Srinivasan was progressive and very smart and would bring the "identity politics" benefit of being the first "Asian (Indian) American" on the Supreme Court. Shapiro tweeted that Biden's plan would necessarily exclude best-candidate Srinivasan in favor of a to-be-named "lesser black woman"—whose selection would always have an "asterisk attached."

A month after Shapiro's Tweet, Biden announced that D.C. Circuit Judge Ketanji Brown Jackson would succeed Breyer. She was sworn in on June 30, 2022.

Shapiro and his Tweet—particularly his "lesser black woman" phrase—generated a "firestorm" of disapprobation from many Georgetown students, faculty, staff, and alumni and others "out for blood" and "cancellation." Others in and outside the "Georgetown Law community" supported Shapiro's viewpoint as informed by constitutional and meritocracy principles (boosted in June 2023 by *Students for Fair Admissions v. Harvard*).

Shapiro apologized for his Tweet's "inartful" phrasing, but defended his viewpoint.

In *Lawless*, Shapiro writes about the four-month "investigation" of his 74-or-so-word Tweet by Georgetown equal opportunity, affirmative action, civil rights, and human resources officials and about his public and private ordeal—part "hell," part "purgatory."

Shapiro also writes more broadly about the lack of "intellectual diversity" and the prevalence of "cancel culture" in American legal education—the product of "unprincipled" and "weak leadership," ideological "groupthink," and "safetyism."

Shapiro addresses what Barton Swaim—in his March 11, 2025 *Wall Street Journal* review of *Lawless*—calls the "spirit of illiberality at the nation's law schools."

5. "Hostile work environment."

Ultimately, Georgetown did not accede to the demands to fire Shapiro. After the four-month "administrative review" of his Tweet, Shapiro prevailed on a technicality he did not raise—that he was a "third party and not an employee" on the date he tweeted.

The Georgetown Office of Institutional Diversity, Equity, and Affirmative Action (IDEAA) issued a June 2022 report. As Shapiro was not yet an employee when he tweeted in January 2022, the report made "no determination as to whether" Shapiro "violated IDEAA policy." IDEAA referred "the matter" to the law dean. But, despite lacking jurisdiction, IDEAA concluded that the Tweet had a "significant negative impact" on "the Georgetown Law community" and recommended that the dean "implement appropriate corrective measures" to address the "profound" effect of Shapiro's "objectively offensive comments."

The day the no-determination report issued, the law dean ended the leave and reinstated Shapiro. Shapiro was to "begin his duties" as the Georgetown Center for the Constitution executive director the next day. But the dean expressed "concerns" about "recurrence of offensive conduct." He warned that Shapiro must "comply with University policies relating to non-discrimination, anti-harassment, and non-retaliation, as well as professional conduct" or "be subject to disciplinary action."

Although he survived Georgetown's four-month scrutiny of his Tweet, Shapiro resigned. He was not willing—he wrote—to submit to the law school's "hostile work environment"—in which "neither the due process of law nor justice actually prevails" and things are governed by an "orthodoxy that stifles intellectual diversity, undermines equal opportunity, and excludes dissenting voices."

6. Lessons for labor and employment lawyers.

Labor and employment lawyers will find the paperwork—the dean's reinstatement letter, the IDEAA no-determination report, and Schapiro's resignation letter—particularly interesting. The appendix (pp. 211-241) includes all three, the first two with Shapiro's annotations. The dean's letter and the IDEAA report are not models of effective human-resources communication—unless they were intended to induce Shapiro's resignation.

The dean's letter, the IDEAA report, and Shapiro's responses offer lessons for lawyers who create and enforce employer speech-codes, lawyers who represent employees subject to speech-codes, and arbitrators and judges who adjudicate speech-code discipline.

The grandiose bromide-laden language and selective focus of the dean's letter and the IDEAA report invoke objectively-definable legal concepts (*e.g.,* "discrimination," "harassment," free speech)—but—employing what Francis Fukuyama calls the "therapeutic ethos"—they judge Shapiro based on "effect"—subjective eye-of-the-beholder reactions to his ideas, *e.g.,* the "pain," "outrage," "upset," "offense," "deep concern," "anger," and "hurt" felt by some in the law school "community" not kept "safe" from the "harms" of exposure to Shapiro's criticism of Biden's plan for filling a SCOTUS opening.

7. "Double standard."

Part of Shapiro's case is that his employer engaged in what labor and employment lawyers call disparate treatment and inconsistent enforcement of ill-defined expectations, anathema to the rule of law. This defect in the employer's conduct was noted by "center-left" *New York* magazine columnist Jonathon Chait, whose June 6, 2022 column called out Georgetown's "irresolvable contradiction."

On the one hand, there were Georgetown's policies of "free and open inquiry," "deliberation and debate in all matters," and "untrammeled" expression of ideas, at least partially-demonstrated by its record of allowing "left-leaning " professors to freely express ideas that "certainly could be construed as offensive or threatening."

Chait provides the example of Georgetown's tolerance for a professor's tweeted view that supporters of "serial rapist" D.C. Circuit Judge Brett Kavanaugh's 2018 SCOTUS appointment were "entitled white men" who "deserve miserable deaths while feminists laugh" at their dying "gasps" and "castrate their corpses and feed them to swine."

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LAW SCHOOLS, A NEW BOOK CALLED *LAWLESS*, AND THE PAPER CHASE IN 2025—STRESS, EXPENSE, ILLIBERALITY, SURGING APPLICATIONS, AND UNCERTAIN PROSPECTS

(Continued from page 7)

On the other hand, there was Georgetown's determination—labelled non-determination—that but for its timing, Shapiro's tweeted criticism of Biden's identity-conscious SCOTUS appointment plan—criticism found "offensive" by some, "objectively" so by the IDEAA report—made Shapiro unfit for employment.

Chait wrote that Georgetown revealed its "double standard in which conservatives must avoid giving offense while progressives are free to express any unguarded thought."

In her January 30, 2022 column in *The Free Press*, Bari Weiss also compared Georgetown's defense of the other professor's tweeted call for death and castration of white-male Kavanaugh-supporters with Georgetown's response to Shapiro's tweet.

In the earlier situation, Georgetown said its policies allow professors to freely express their "own ideas"—"even when the ideas may be difficult, controversial or objectionable." In contrast, the law dean publicly denounced Shapiro's ideas as "appalling," "damaging," and "at odds with everything we stand for at Georgetown Law." He then put Shapiro on "administrative leave" and barred Shapiro from campus pending review.

What the dean found "appalling" and "damaging" in Shapiro's Tweet was a mainstream view. Weiss cited an "ABC/Ipsos poll" showing that 76% of Americans believed Biden should consider "all possible nominees" and appoint Breyer's replacement "on merit and not identity." Only 23% wanted Biden to limit his consideration to black women.

It seems the content of Shapiro's ideas was what the dean found to be "at odds" with "everything" for which Georgetown Law stands—that Georgetown's commitment to "untrammeled" academic freedom is viewpoint-dependent. But, as one labor-law tome counsels about workplace standards: "It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner."

Georgetown ignored the "irresolvable contradiction" between its words and deeds. No accountability for the "double standard" was needed because of the hire-date "technicality"—a *deus ex machina*—a jurisdiction-defect the IDEAA and its BigLaw lawyers discovered after their four-month review of the "effect" and "impact" of Shapiro's ideas.

8. Heckler's veto.

Shapiro laments other things he sees as adversely affecting legal education, not the least being the "expanding cohort of well-compensated bureaucrats"—"careerist" administrators who conform to fashionable dogma; "placate" suppressors of speech the suppressors declare to contain "harmful" viewpoints and "offensive" ideas; and display "amoral" disregard for the "core truth-seeking mission" of academic institutions.

The "miseducation" of America's legal elites, Shapiro says, is a threat to democracy. The law schools train "future lawyers and politicians and judges" who will be "gatekeepers" of the "institutions on which American prosperity, liberty, and equality sit." Legal education should embrace intellectual diversity and safeguard—not undermine—the rule of law.

Shapiro pays particular attention to the increasingly-common "cancellation" of discourse by students and faculty permitted by their law schools to use verbal and physical "heckler's vetoes" to suppress the expression of "offensive" ideas by others.

Among his examples, Shapiro describes the 2023 "shutdown" by Stanford law students of a talk by a social-conservative—*i.e.,* "problematic"—Fifth Circuit judge invited by the Federalist Society student chapter to speak about "doctrinal flux" at the Supreme Court on Covid, gun control, and social media issues. "Protestors" disrupted the event and shouted down the judge, saying, among other things, that they "hate" the judge and the Federalist Society; that the judge couldn't "get in" to Stanford (he got his J.D. from Louisiana State and a later LL.M. from Columbia); and that the judge deserved no respect, had no "right to speak" in the disruptors' "jurisdiction," and should "leave and never come back." One future lawyer shouted to the judge: "I hope your daughters get raped!"

Five law school administrators were present at the event, but did not support the judge's call for "reasoned debate." One, then an associate dean, told the judge that his opinions caused "real harm" and "absolute disenfranchisement" of "rights" and she was "pained" the judge was "welcome" (by some) to speak at Standford law school.

Shapiro says legal education is "in crisis." He fears that law schools are turning out graduates kept "safe"—insulated from heterodox views throughout law school—who as lawyers and judges will be "ignorant, ahistorical activists" with "limited analytical and reasoning skills." Shapiro offers ideas for reforming what he calls the "anti-intellectual structures" that law schools "have allowed to deform the legal-education project."

Shapiro paints a picture of legal education far removed from the world of Professor Kingsfield—of *The Paper Chase* (novel 1971, movie 1973, TV series 1978 and 1983)—whose students each arrived at law school with "a skull full of mush" but, once rigorously (and mercilessly) challenged by Kingsfield, graduated "thinking like a lawyer."

9. *Lawless* reviewed.

Former attorney general William P. Barr calls *Lawless* "a sobering must-read"—the "shocking story of how our most prestigious law schools were overtaken by student mobs, enabled by faculty and bureaucrats who care more about diversity quotas and 'safety' than truth-seeking and the robust exchange of ideas."

The *WSJ* review calls *Lawless* "a spirited essay on the craven administrators and stupid dogmas ruling America's most prestigious law schools" and "most or all of this county's allegedly top universities."

Stuart Kyle Duncan, the Fifth Circuit judge shouted down at Stanford in 2023, reviewed *Lawless* on March 27, 2025 at fedsoc.org. His footnotes include electronic links to the transcript and a recording of the Stanford event and to the law dean's post-event (kind of) apology. Duncan also quotes a survey posted by FIRE (Foundation for Individual Rights and Expression) revealing that many Stanford students hold beliefs "completely out of step" with free speech principles, *e.g.,* endorsing as always, or sometimes, or at least rarely, "acceptable": "shouting down a speaker to prevent them from speaking on campus" (3/4 of students); "blocking other students from attending a campus speech" (about 3/5); and "using physical violence to stop a campus speech" (more than 1/3).

That future lawyers, judges, lawmakers, and government officials believe that disruption and intimidation are acceptable forms of "counter-speech"—and that Stanford has not taught them otherwise—is an "utter disgrace"; if not to learn the law, Judge Duncan asks, why go to *law* school.

Duncan calls *Lawless* a "splendid book" about the "corruption" in law schools which, Shapiro says, have "rejected the spirit of open inquiry" and the rule of law. Duncan writes that Shapiro offers "a mixture of outrage, humor, and resignation" and that, "like a good lawyer," Shapiro "methodically makes his case."

Duncan can turn a memorable opinionated phrase. For example, he refers (1) to the Stanford disruptors as "gargoyles" and a "braying mob" whose "obscene, self-righteous, and moronic heckling" made it impossible for him to speak and be heard; (2) to the associate dean's "harangue"—effectively endorsing the disruption—as "pseudo-intellectual bafflegab"; (3) to the law dean's post-event excuse—that the school could not devise a "fair process" to differentiate between students warranting discipline for "disruptive heckling" and those who engaged in "constitutionally-protected non-disruptive protest"—as "nonsense," because video displayed identifiable-individuals' disruptive conduct—"Evidence," Duncan writes, "must not be a required course at Stanford."; (4) to Shapiro's "harrowing examples" of "cancellation, of students and professors alike" for "various thoughtcrimes against the orthodoxies of their elite masters"; (5) to the IDEAA's "indictment" of Shapiro for "Tweetcrime," written in "heavy-breathing academic doublespeak"; and (6) to the "stifling monoculture" that has transformed law schools into "illiberal reeducation camps."

Duncan also alludes to Professor Kingsfield, writing that Shapiro's "blow-by-blow account" of his Georgetown experience reads "like a bureaucratic horror story, as if *The Paper Chase* had been written by Franz Kafka."

Most "depressing" about his experience at Stanford, Duncan writes, is that it "turns out" that "many students" at "one of America's premier law schools"—despite their "sparkling credentials"—"are just plain dumb." More charitably, borrowing Tom Cruise's snark in *A Few Good Men*, it may be they "were sick the day they taught law at law school." Still, Judge Duncan's review is interesting for its eyewitness account, the strength and clarity of his views, and his direct style.

10. *Lawless* and the *zeitgeist*.

Lawless is useful for its portrait of contemporary legal education whether or not you share Shapiro's views about the "institutional rot in academia." In fact, it may be more useful—and more interesting—if you question, or don't share, his views.

Litigators know: there are (at least) two sides to every story. The rule of law requires that ideas be tested by "engines" like fact-discovery, argument and counterargument, cross-examination, and appellate review. Lawyers are skeptical of received wisdom, *ipse dixits*, and orthodoxies. Shapiro complains that law schools have lost sight of the essential values of lawyerly skepticism and informed debate.

Shapiro presents particularized views on questions at the center of both the *zeitgeist* and the rule of law—*e.g.,* about blurred distinctions between words and deeds, free speech and *verboten* speech, the objective and the subjective, intent and effect, and facts and feelings; about whether "offensive" ideas and speakers who present them should be met and refuted with fact and logic or "cancelled" from the "marketplace of ideas"; and about us-versus-them polarization, good-versus-evil dualism, and the demonization of disagreement.

Many of these questions in the *zeitgeist* are examined by lawyer Greg Lukianoff and social psychologist Jonathan Haidt in *The Coddling of the American Mind—How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure* (2018). They identify the social trends and "untruths" underpinning the "unwisdom" and "cognitive distortions" behind much of what is dysfunctional in academia and beyond.

Their analysis helps explain why some "elite" law students might prevent a federal judge from speaking and being heard—allowed and even encouraged by their law schools to decide that free speech protections do not apply to speakers who—*in the disruptors' opinion*—hold painful or socially-abhorrent views, and to decide in their self-proclaimed wisdom that Justice Brandeis got it wrong about sunlight being the best of disinfectants.

Shapiro examines many of the social trends identified in *Coddling* and their effects on legal education. He does this "thinking like a lawyer," based on his "lived experience" and the experience of others, as an "advocate for free speech, constitutionalism, and classical liberal values," and in defense of the rule of law.

Shapiro calls Georgetown "one of the most prestigious law schools in the most credential-focused profession." But discourse is restricted to some extent at schools of all "prestige" levels. Students and faculty most everywhere "walk on egg shells." There is real risk of being ostracized or punished for expressing heterodox opinions, despite the risk being "at odds" with educrats' ubiquitously-professed, unevenly-kept "commitments" to free speech and academic freedom. See FIRE's periodic school-by-school reports on campus free speech and FIRE's *Guide to Free Speech On Campus* (2d ed.), both at thefire.org. This contradiction between words and deeds is one reason why law students are stressed.

Lawless is a cautionary tale for—among others—law-school applicants and students; employers, employees, and their lawyers who engage with speech-codes; and anyone who might consider offering opinions in late-night social media posts.

Whatever your views on free speech and the state of legal education—and even if you couldn't "get in" to Stanford Law—you can get the book at the public library.

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LAW SCHOOLS, A NEW BOOK CALLED *LAWLESS*, AND THE PAPER CHASE IN 2025—STRESS, EXPENSE, ILLIBERALITY, SURGING APPLICATIONS, AND UNCERTAIN PROSPECTS

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11. Law school applications on the rise.

Despite the expense—and the curricular, well-being, and cultural perils—of legal education—and despite the stresses and uncertainties associated with being a lawyer—law school applications are on the rise.

The *WSJ* reports that in 2025 the "number of applicants to the nation's nearly 200 [ABA-accredited] law schools is up 20.5% compared to last year." Michigan Law applications are up 30%—more than 8,900 applications for 320 openings. Georgetown Law got 14,000 applications for its 650 openings. Sara Randazzo, "All Rise! Law Schools Witness Surge in Applications This Year" (March 18, 2025) at A10.

The *WSJ* attributes the surge in applications to the "weakening white collar job market," the perception of law as a "stable career and one more immune to AI advancements than other industries," the "recent public spotlight on the legal system," and perhaps to the elimination of the LSAT's analytical reasoning section, the ostensible logic-measure that was a barrier for some test-takers.

Due to the surging competition, the *WSJ* reports, some prospective law students apply to "dozens" of law schools to improve their chances. Many applicants are placed on "lengthy wait lists." Groucho Marx said in *Duck Soup*: "I'll see my lawyer about this as soon as he graduates from law school."

12. Uncertain prospects.

The *WSJ* quotes a Rutgers Law admissions official who is "worried about the overenrollment in this year's class and the impact that's going to have on these students' futures three years down the line" when there will be "not enough jobs out there."

The Law of Supply and Demand may affect the circumstances of many lawyers, newly-minted and otherwise. The Bureau of Labor Statistics projected lawyer employment "to grow 5 percent from 2023 to 2033, about as fast as the average for all occupations." But, the BLS cautioned, there may be "more price competition" as clients are "expected to cut back on legal expenses by negotiating rates and scrutinizing invoices." And some "routine legal work may be automated or outsourced to low-cost legal providers located overseas." See bls.gov/ooh/legal/lawyers.htm.

The ten-year BLS projection came before the rapid proliferation of AI legal applications; before the 2024 election and DOGE; before *Students for Fair Admissions* and the new scrutiny given DEI programs by government, academia, business, courts, and public opinion; before the uncertain impact of automation and "overseas" outsourcing of legal work; and before law school "overenrollment."

The specter of consequential changes—and the possibility of "not enough legal jobs out there"—might affect lawyer "well-being." As attributed to Yogi Berra (and others): "It's tough to make predictions, especially about the future."

Conclusion

We know that being a lawyer is more than *just* serving truth and justice for high pay, good benefits, personal satisfaction, prestige, client appreciation, and public praise.

We know that practicing law *also* can be stressful in many ways. *We* know, too, that most law schools take at least some "frolics and detours" from their professed missions.

But some prospective law students don't know these things. They still have "skulls full of mush." So, should ABA accreditation standards require *Miranda* warnings to those about to join the paper chase? ■

TELL *LAWNOTES* WHAT YOU THINK ABOUT THE STATE OF LEGAL EDUCATION AND THE LEGAL PROFESSION— AND WHAT IS TO BE DONE

Write a *Lawnotes* article.

What should law schools be doing—and not doing?

What should the Michigan Supreme Court and the State Bar do to improve the justice system, the practice of law, judicial performance, the bar examination, and the "wellness" of lawyers and law students?

What are the Court and Bar now doing that is inefficient or wasteful, or that adds unnecessary burdens to the practice of law, or that is otherwise ill-advised?

You have lots of good ideas and valid complaints. You say so all the time. Put them in writing. Maybe make a difference. Send your article ideas to Lawnotes editor John G. Adam, jgabrieladam @gmail.com.
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THE ADA INTERACTIVE PROCESS: SEPARATING URBAN LEGEND FROM WHAT'S REAL

Elizabeth Favaro and Courtney Moore
Giarmarco, Mullins & Horton, P.C.

Lawyers and non-lawyers alike sometimes misapply the law because they rely not on the law itself, but rather upon someone else's flawed interpretation of the law. This happens in a variety of contexts: websites encouraging litigants to challenge the authority of judges, *United States v Conces*, 507 F3d 1028, 1041 n13 (6th Cir 2007), litigation trends such as boilerplate discovery objections, *Wesley Corp v Zoom TV Prods*, 2018 WL 372700, at *4 (ED Mich), and legal doctrines that change "upon each retelling" to the point that they "become all things to all people." Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm & Mary L Rev 1525, 1670.

In the employment law context, how many of us have advised clients who, whether through discussions with others, internet research, or just false assumptions, operate under wild misunderstandings of the law, and as a result, unknowingly harm their cases before they seek our advice?

It happens frequently enough, particularly when it comes to disability accommodation requests under the Americans With Disabilities Act, that we have developed a list of misconceptions under which clients often operate. But these misconceptions are "urban legends."

Misconceptions abound in the interactive process. Some clients don't know about it, don't participate in it, or if they do participate, they don't do so in a manner that identifies the precise limitations resulting from a disability, and "potential reasonable accommodations that could overcome those limitations." *Capen v Saginaw County*, 103 F4th 457, 465 (6th Cir 2024). Our goal here is to identify some of the "urban legends" our clients share with us, and then separate what is urban legend from what's real.

Urban Legend No. 1: The interactive process is optional.

What's Real: It's mandatory, and the party who fails to participate is likely doomed.

When clients call to discuss accommodation requests, it's common for them to question the interactive process's necessity: "You mean I have to actually talk about this"? We now understand that some clients don't know this process exists, or if they do know about it, they wish to avoid it. There appears to be great fear on the part of both employers and employees of having candid conversations about employee disabilities and what to do about them.

But no matter how uncomfortable such conversations may be, the failure to have them can have serious ramifications. For employers, such failures can leave their organization's fate in a jury's hands. In a recent case, an employer failed to "engage in *any* dialogue" regarding an employee's disability accommodation request, resulting in the Sixth Circuit reversing the trial court's decision granting its motion for summary judgment and remanding the case for trial. *Root v Decorative Paint, Inc*, 2024 WL 4024426, at *6 (6th Cir) (emphasis in original). For employees, a refusal to engage in the interactive process can put their failure to accommodate claims at risk of dismissal. *Brumley v United Parcel Serv, Inc*, 909 F3d 834, 840 (6th Cir 2018).

To be sure, the interactive process isn't a suggestion, and it isn't optional. The law requires it, and the failure to participate in it can be detrimental.

Urban Legend No. 2: The interactive process is a one-time, "check the box" activity.

What's Real: The process is ongoing and requires good faith.

Before employers must accommodate, employees must identify a disability and request an accommodation linked to it. *Wilson v Ohio Dep't of Mental Health*, 2024 WL 3814047, at *3 (6th Cir). But the process doesn't stop there – the parties must keep talking in a good-faith effort to determine if the disability can be accommodated in a reasonable fashion. The key is for employers to legitimately work with employees on solutions. Employers who shut down discussions early, perhaps because they have a specific accommodation in mind that doesn't actually work for an employee's needs, put their companies at risk of an adverse outcome. *E.g., Mosby-Meachem v Memphis Light, Gas & Water Div*, 883 F3d 595, 606 (6th Cir 2018). The law requires employers to have open dialogue with employees, which might include explanations about why a requested accommodation is unreasonable, and often involves offering alternative accommodations. *Rorrer v City of Stow*, 743 F3d 1025, 1045-1046 (6th Cir 2014). In one case, the Sixth Circuit provided examples of an employer's good-faith engagement in the interactive process:

- It sought clarification on the initial accommodation request;
- It discussed different options with the employee other than the one initially proposed to meet both the needs of the business and of the employee; and
- After the employee rejected alternative accommodation proposals, the employer persisted in its efforts to find a solution. *EEOC v Ford Motor Co*, 782 F3d 753, 766 (6th Cir 2015).

At this point, the court explained, it was the employee's turn to propose a reasonable accommodation, but she never did, and summary judgment was affirmed: "Having failed to do so, she doesn't get the chance to try again before a jury." *Id.*

And herein lies a common problem among employees – whether out of frustration or otherwise, they sometimes are the party who courts find is not acting in good faith, which often manifests itself in a complete withdrawal from the process. In the case described above, all the employee had to do was to keep engaging in the process; her early withdrawal was fatal to her claim.

But some employees withdraw before the process even starts, such as those who take offense when asked for proof of a disability. When they let this offense halt their willingness to talk with their employer, it is at their peril:

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THE ADA INTERACTIVE PROCESS: SEPARATING URBAN LEGEND FROM WHAT'S REAL

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It is a critical failure by [the plaintiff] to carry her burden of providing the [defendant] with medical documentation supporting [her] accommodation[s'] necessity" …. And this failure amounts to a voluntary withdrawal that precludes her claim that the [employer] failed to accommodate her. *Wilson, supra,* at *4.

Open, honest communication is essential to successfully navigating the interactive process. It's not only a legal requirement that affects liability, but it's also the way to find a solution that works for both sides.

Urban Legend No. 3: "Magic words" are required to request a disability accommodation.

What's Real: Once the employer has notice of a disability linked to a requested accommodation, the employer must initiate the interactive process.

The interactive process is intended to be informal; employees need not use the words "accommodate" or "disability," *Deister v Auto Club Ins Ass'n*, 647 Fed App'x 652, 657 (6th Cir 2016), and they have flexibility in how they request an accommodation. It is generally sufficient if, contextually, an employer has reason to believe that an employee's physical or mental impairments drove an accommodation request. *Mobley v Miami Valley Hosp*, 603 Fed App'x 405, 413 (6th Cir 2015). Sometimes, it can be inferred that a request is driven by medical restrictions, like in cases involving chronic conditions. *Smith v Henerson*, 376 F3d 529, 535 (6th Cir 2004).

Courts have even construed Family Medical Leave Act requests as accommodation requests under the ADA. In a recent case, a welder submitted FMLA paperwork containing physician support for intermittent leave due to complications from a knee replacement, which the court explained put the employer on notice that an accommodation arising out of a disability was required:

> Defendants knew – or at least should have known – that [plaintiff] requested intermittent FMLA leave because of his serious medical condition. Further, that the requested FMLA leave was intermittent, and that [plaintiff] generally continued to attend work and perform his duties, creates a plausible inference that he required occasional time off to accommodate his disability. Therefore, at this point in the case, it is plausible that [plaintiff's] FMLA request put Defendants on notice that [plaintiff] requested an accommodation under the ADA.
>
> *Penney v Heatec, Inc*, 2024 WL 4350786, at *3 (ED Tenn).

Accommodation requests need not be written or even made to a certain person: a supervisor's knowledge that an employee is disabled and seeks an accommodation due to such disability is sufficient. So, a nurse's repeated calls into supervisors complaining of asthma symptoms and expressing a desire for medical leave was deemed an adequate accommodation request, even though she used no "magic words" and didn't reference the law. *King v Steward Trumbull Mem Hosp*, 30 F4th 551, 564-565 (6th Cir 2022).

But accommodation requests do need to be clear that they arise out of a disability, lest employers have to guess as to whether a request stems from medical necessity, personal preference, or personnel problems. For example, a request for a transfer to a different department, without more, is not sufficient to notify an employer that a disability accommodation is needed. *Hrdlicka v General Motors*, 63 F4th 555, 570 (6th Cir 2023). Commonly referred to as the "linked to" requirement, employees must be clear that a requested accommodation is due to a claimed disability.

The lesson: employers should open a line of communication if there is even an insinuation based on context that a disability accommodation is needed. And employees are better off providing more information, rather than less – the more vague the requested accommodation, and the less indication there is that the accommodation is linked to a disability, the less likely a court is to find support for a failure to accommodate claim.

Urban Legend No. 4: Accommodations should be standardized.

What's Real: There is no one-size fits all approach.

The point of the interactive process is to find an accommodation that fits both parties' needs, i.e., it must be reasonable for both sides. The Equal Employment Opportunity Commission states that "reasonable accommodation" may include making existing facilities readily accessible to and usable by disabled individuals; job restructuring; modified work schedules; reassignment, using alternative equipment or devices; modified training, examinations, or policies; and/or readers or interpreters. 42 USC 12111(9). As the Sixth Circuit has stated, this inquiry "requires employers to act, not based on stereotypes and generalizations about a disability, but based on the actual disability and the effect that disability has on the particular individual's ability to perform the job." *Keith v County of Oakland*, 703 F3d 918, 923 (6th Cir 2013).

Finding the right accommodation is highly individualized, which is why it's a process – it takes time to reach agreement. Employees aren't required to request the perfect accommodation the first time around because they often don't fully understand the needs of the business. This is why the process is interactive – discussions must occur about the nature of the disability, how it affects essential job functions, and appropriate accommodations that won't totally disrupt operations or create financial hardship. For instance, allowing wheelchair-bound employees to sit when they otherwise may be required to stand can work well in some settings, but in others, such an accommodation can be dangerous and create business risk. Talking through these sorts of challenges is imperative to landing in the right place.

A common area of dispute centers on whether an employee's initial proposed accommodation allows for performance of essential job functions. In determining whether a job function is essential, "consideration shall be given to the employer's judgment," and written descriptions of the role's functions that pre-date the dispute "shall be considered evidence of the essential functions of the job." 42 USC 12111(8). The EEOC regulations provide other factors, including the amount of time on the job the employee must spend performing a function, the consequences of not requiring the employee to perform the function, and the past and current experience of other employees who have held the job. 29 CFR 1630.2(n)(3). At its core, the fundamental question is whether a function that the employee cannot perform without a disability accommodation is central to the job. Consider an employee with carpel tunnel syndrome affecting the ability to type: this is likely an essential function of a secretary's job, but it's probably not essential to a shop foreman's job. Particularized attention must be paid to the job's requirements and what accommodations might enable the employee to perform those requirements.

An employee's testimony that a job function is not essential is typically not sufficient by itself, and an employee's failure to identify an accommodation that allows for performance of all essential job functions may render the employee unqualified and the proposed accommodation per se unreasonable. *Ford, supra,* at 762-763. However, a job function is not essential simply because an employer says so, and courts have largely rejected weighing bare statements of the employer too heavily, because doing so defeats the purpose of the interactive process and the "reasonable" standard for accommodations. *Rorrer, supra,* at 1039-1040.

Urban Legend No. 5: The interactive process is confined to accommodation requests from disabled employees.

What's Real: This process is required in other contexts and similar processes are recommended for many other employment issues.

The employment environment is difficult right now. Employees' reported happiness hit an all-time low in 2024, BambooHR, *The Great Gloom's Grip: Employee Happiness Plummets in Q2* (August 14, 2024), and following a lawsuit lull from 2020-2022 due to the COVID-19 pandemic, employers face liability from rising discrimination claims state- and nation-wide.

But it doesn't have to be all gloom and doom. Even in this environment, it is possible not only to prevent employer/employee relationships from falling apart, but to actually improve them. The answer lies in the interactive process, or something close to it. The interactive process is not only required under the ADA, but also under Title VIII of the Civil Rights Act for religious exemption/accommodation requests. 42 USC 3601 *et seq.* But even where not mandated by law, the interactive process provides a framework for discussing a host of issues, including remote work arrangements, changes to time-off policies, and personnel matters.

Perhaps the biggest urban legend of all is that accommodations must make both sides "happy." This isn't what the law requires and neither party should expect perfection. Like all negotiations, open-mindedness and a willingness to accept an outcome that is not exactly what one or both sides wants, but that fairly satisfies the employer's business needs and the employee's personal needs, can pave the way for an amicable resolution. And where a resolution can't be found, the party that can better demonstrate flexibility, good faith, and an earnest effort to fully participate in the interactive process is more likely to succeed in any dispute than the party that simply gave up or, even worse, didn't even try. This is what's real. ■

ADMINISTRATIVE ADJUDICATION: PRE-HEARING CONSIDERATIONS

Bryan Davis, Jr.

Administrative law is an immense subject area which, at its core, refers to those laws that govern the administration and regulation of government agencies. This field of law not only examines the federal and state regulatory frameworks which impact substantial aspects of our daily lives, but the quasi-legislative and judicial authority exercised by government agencies. Given the immensity of the field of administrative law, this article focuses exclusively on state agencies and the exercise of agency authority through administrative adjudication, with this article focusing specifically on pre-hearing considerations.

Authorization and Establishment of Administrative Agencies

The Michigan Constitution of 1963 both authorizes and establishes the creation of administrative agencies, with such agencies falling under the executive branch. Const 1963, art 5, § 2. Pursuant to Article 5, § 2 of the Michigan Constitution, and the Michigan Executive Organization Act of 1965, MCL 16.101 et seq., most state agencies are located within principal departments, with such agencies often being reorganized through executive orders.

Under Michigan's Administrative Procedures Act (MAPA), MCL 24.201 et seq., an agency is broadly defined as any state "department, bureau, division, section, board, commission, trustee, authority, or officer" that is "created by the constitution, statute, or agency action." MCL 24.232. As a brief aside, it is important to note that a distinction exists between federal, state, and local government agencies. Generally, local agencies do not qualify as an "agency" under MAPA and, as such, are not subject to the requirements contained therein.

In discussing administrative agencies at both the federal and state levels, it is important to note that such agencies generally have bestowed upon them only those powers that have been granted through enabling legislation, or otherwise are implicitly bestowed through an agency's exercise of the powers found within such enabling legislation. More specifically, Michigan state agencies have only those powers which the legislature has expressly granted, and with respect to implied powers, such authority will be restricted to that which is necessary to effectuate exercise of expressly granted powers. *Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 574 (2011). These powers can range from the promulgation of rules to administrative adjudication. In this sense, the powers of administrative agencies can encompass both quasi-legislative and judicial attributes.

Given an agency's authority flows from enabling legislation, it is imperative that practitioners review and examine such legislation to ascertain the actual nature and extent of an agency's authority. Beyond this, however, familiarity with MAPA is critical, as such statute guides the general practice and procedures that apply to state agencies.

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ADMINISTRATIVE ADJUDICATION: PRE-HEARING CONSIDERATIONS

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Quasi-Legislative Attributes

With respect to quasi-legislative attributes, it is well understood that administrative rules, promulgated in accordance with MAPA, or applicable law, have the force and effect of law once such rules have been filed with the secretary of state, unless a later date is provided for in the rule. MCL 24.245a(3).

These administrative rules serve an invaluable function with respect to Michigan's regulatory schema, serving to implement or interpret law. Importantly, state agencies are granted with either permissive or mandatory rule promulgation authority granted through their governing statutes. And agency rulemaking, which again exemplifies the quasi-legislative powers exercised by agencies, is governed by provisions within MAPA. See MCL 24.231-24.266. Therein, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies laws enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207.

Here, emphasis is placed on a practitioner's familiarity with both statutes and regulations. While the Michigan Compiled Laws serve as the official codification of state statutes, the Michigan Administrative Code is a compilation of all adopted rules and regulations in effect within the state. Familiarity with both is essential for effective practice within the field of administrative law.

Quasi-Judicial Attributes

Agency adjudication, exemplifying the quasi-judicial powers exercised by agencies, reflects a policy of ensuring regulatory frameworks are uniformly implemented by an agency which possesses the requisite expertise in the applicable subject matter. Stated differently, adjudication generally reflects the process by which agencies render decisions on cases involving a regulated party's compliance with applicable law, accomplished via a formal or informal administrative hearing.

In discussion regarding adjudication, it is important to note that MAPA defines a "contested case" as a proceeding in which "a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). As detailed below, these contested case hearings, or administrative hearings, often provide parties with an opportunity to present evidence and call witnesses, among other things, and generally result in a decision based upon fact and law.

Chapter 4 of MAPA details procedures in contested cases. MCL 24.271-24.288. Beyond this, Part 1 of the Michigan Office of Administrative Hearings and Rules Administrative Hearing Rules (MOAHR Rules) govern the general practice and procedure applicable to administrative hearings conducted by MOAHR, save for those hearings specifically exempted. R 792.10101-792.10137. However, the MOAHR Rules cannot conflict and/or displace a statute which prescribes certain mandated procedures. R 792.10102(2).

Processes and procedures for several agencies are governed by those agencies own specific rules. As such, practice within the administrative realm requires knowledge as to whether an appliable statute and rules provide for a different procedure. Such knowledge can prove especially relevant in the context of pre-hearing considerations, including agency subpoena powers and whether discovery is available and, if so, to what extent.

While not the focus of this article, it is important to note that availability of an administrative remedy will generally preclude immediate judicial action. Stated differently, if an applicable statute provides parties with the right to an administrative hearing capable of resolving the matter, parties are generally foreclosed from prematurely resorting to judicial action. This premise is supported by the doctrines of exhaustion and primary jurisdiction. Generally speaking, exhaustion refers to limitations placed on a court from adjudicating a claim prior to a party having sought relief through the administrative processes. Primary jurisdiction speaks more to jurisdiction being held by both a court and agency, with a court generally deferring to an agency's jurisdiction when confronted with a subject matter wherein the agency's expertise is required. In sum, parties are generally required to proceed through the administrative process before seeking judicial review.

An Introduction to Administrative Hearings

In the world of administrative law, both centralized and decentralized administrative hearing systems exist. Michigan has established a centralized administrative hearing system, found within MOAHR, an agency created through Executive Order No. 2019-06, modified by Executive Order 2019-13, and found within the Department of Licensing and Regulatory Affairs. MCL 324.99923. Per MAPA, "[a]n agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases." MCL 24.279.

Under MAPA, a presiding officer is empowered to take actions including but not limited to: "[a]dminister oaths and affirmations;" "[s]ign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;" "[p]rovide for the taking of testimony by deposition," and "[r]egulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents." MCL 24.280(1).

Here, MOAHR is staffed with numerous administrative law judges (ALJs) hearing a wide-array of contested cases, including but not limited to: benefit services, unemployment, licensing, and regulatory actions including but not limited to worker health and safety, environmental, and financial and insurance issues. An "ALJ" is "any person assigned by [MOAHR] to preside over a contested case or other matter, including, but not limited to, a tribal member, hearing officer, presiding officer, referee, or magistrate." R 792.10103(c).

An administrative hearing generally entails a proceeding conducted by an ALJ and, again, pertains to disputes between parties regarding regulatory actions taken by an agency. Such hearings are similar, though certainly not identical, to judicial proceedings. This administrative forum is one which is generally less adversarial in nature than the traditional courtroom setting.

In exercising their authority, ALJs will, among other things, conduct a "full, fair, and impartial hearing;" "avoid unnecessary delay in the disposition of proceedings;" "[p]rovide for the taking of testimony by deposition;" rule on motions filed by the parties, require certain filings by the parties, including legal memoranda, "[g]rant applications for subpoenas and subpoena witnesses and documents to the extent authorized by statute," and; issue proposed orders, proposals for decision, and final orders. R 792.10106(1).

Pre-Hearing Considerations

At the outset, it is well understood that parties generally find themselves involved in an administrative matter due to some regulatory enforcement action which has taken place. Regardless of whether this has come about due to an alleged violation of a health and safety standard, or a permit or licensing denial, there are generally two parties involved in an administrative matter. A "petitioner" refers to the party filing a request for hearing while a "respondent" refers to the party against whom the proceeding has been commenced. R 792.10103(n), (p).

1. Request For and Notice of Hearing

Generally, MOAHR's role in the administrative adjudication process initiates with a Petitioner's request for hearing. See R 792.10112. Such requests for hearing typically follow an alleged violation of the law or the issuance of an administrative complaint. Following a request for hearing, parties in contested cases are provided with a notice of hearing, with such notice detailing 1.) the date, hour, place, and nature of the hearing; 2.) the legal authority and jurisdiction under which the hearing will be held; 3.) reference to the particular sections of the statutes and rules involved, and, generally; 4.) a statement regarding the matters asserted. MCL 24.271(1)-(2); see also R 792.10111.

It is noted that the failure of a party to participate in scheduled proceedings following properly served notice does not prevent an ALJ from conducting proceedings without the absent party. R 792.10134(1). And, in such a situation, an ALJ can issue a default order or other dispositive order. R 792.10134(1). Here, MAPA provides that an agency may not only proceed with a hearing but may render a decision if a party fails to appear in a contested case hearing, following service of notice. MCL 24.272(1).

It is also noted, pursuant to Administrative Hearing Standard No. 2024-1, proceedings, which include prehearing conferences and hearings, "will by default be scheduled to be conducted remotely." AHS 2024-1. This default format remains true unless an ALJ or hearing officer makes a determination "that all or part of a proceeding should be in person," or, a written request is submitted by a party who demonstrates "good cause for why all or part of the proceeding should be in person and the administrative law judge or hearing officer finds the request should be granted because of accessibility limitations, specific evidentiary issues, or other unique circumstances." 2024-1. See R 792.10119(1)-(2) (MOAHR "may schedule a hearing at any location or by remote means," and "[a] party may request a change of venue or means of access, including but not limited to, in person, telephonic, or video."). See also R 792.10121(1) (an ALJ "may conduct all or part of a hearing by telephone, video-conference, or other electronic means.")

2. Notice of Appearance

A notice of hearing may prompt the filing of a notice of appearance with MOAHR. To the extent permitted by law, a party "may appear in person, by an attorney, or by an authorized representative." R 792.10107. Such appearance on behalf of a party generally requires the filing of a notice of appearance, "unless the first appearance is made on the record in a proceeding." R 792.10107. Importantly, parties are required to serve all documents and pleadings on any other party to a proceeding, and, once a notice of appearance is filed or made on the record, documents filed in a proceeding must be served on the individual or individuals listed in the notice of appearance. R 792.10107; 792.10110.

3. Answer

In advance of a hearing, a party served with notice of hearing is entitled to file a written answer prior to the hearing date. MCL 24.272(2). Notably, however, MAPA itself does not impose a requirement that a party file such an answer. Here, the filing of an answer may be more of a strategic decision which a party must make when contemplating the issues at hand and the potential for judicial review.

4. Prehearing Conference

Prehearing conferences may be held to resolve matters in advance of hearing, including but not limited to: issuance of subpoenas, scheduling, motions, "identification and exchange of documentary evidence," admission of evidence, factual and legal issues, as well as any other matter which will promote both the "orderly and prompt conduct of the hearing." R 792.10114(1)-(2). These prehearing conferences may be accompanied by a prehearing order detailing actions taken or to be taken with respect to those matters addressed at the prehearing conference. R 792.10114(5). An initial hearing in an administrative proceeding can be held as either an evidentiary hearing or a prehearing conference, and, upon good cause shown, an ALJ can convert an initial hearing from an evidentiary hearing to a prehearing conference. R 792.10122. Often times, parties may file a motion to convert an evidentiary hearing to a prehearing conference. See R 792.10115.

5. Scheduling Order

Scheduling orders typically detail deadlines which must be complied with by the parties to a given case. Such orders may establish, among other things, hearing dates, dates by which witness and exhibits lists must be filed, and dates by which dispositive motions must be filed. Parties are generally able to request extensions of time limits established in the MOAHR Rules via written motion filed with MOAHR, however, such motion must be generally be filed prior to the expiration of the originally prescribed period. R 792.10105. And such motion shall generally only be granted if good cause is shown or if the parties have stipulated in writing to such motion. R 792.10105.

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ADMINISTRATIVE ADJUDICATION: PRE-HEARING CONSIDERATIONS

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6. Discovery and Depositions

Generally, discovery refers to the gathering of information by the parties to a given case. Under MAPA, "[a]n agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings." MCL 24.274(1). Under MOAHR Rules, discovery in a contested case is generally permitted only if a statute or rule provides as such, or by leave of the ALJ. R 792.10117.

With respect to depositions, MAPA provides that, "[a]n officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules." MCL 24.274(1). And, under MOAHR Rules, witness testimony can be taken by deposition so long as the ALJ has granted permission and all parties are provided with notice. R 792.10128(4). Again, when appropriate, an ALJ is empowered to "[p]rovide for the taking of testimony by deposition." R 792.10106(e).

7. Subpoenas

MAPA explicitly provides that when a party makes a written request within the context of a contested case, an agency, which is authorized by statute to issue subpoenas, shall issue such subpoenas which require the attendance and testimony of witnesses and/or the production of certain evidence. MCL 24.273. When appropriate, an ALJ is empowered to "[g]rant applications for subpoenas and subpoena witnesses and documents to the extent authorized by statute." R 792.10106(m). The issuance of subpoenas may also be addressed within the context of a prehearing conference. R 792.10114(a). Should a party refuse to comply with an issued subpoena, the party "on whose behalf" the subpoena was issued can file a petition in either "the circuit court for Ingham county or for the county in which the agency hearing is held," for an order which requires compliance. MCL 24.273.

8. Motion Practice

As with judicial proceedings, motion practice plays an important role in the administrative hearing context. Motions state requests for action to be taken by an ALJ, however, such motions must state specific grounds upon which the action is sought and must describe the action or order sought. R 792.10115(1). Generally, motions must be filed at least 14 days in advance of the scheduled hearing and responses to such motions are generally to be filed within 7 days following service of such motion. R 792.10115(2)-(3). Should any relief be granted by the ALJ in response to a motion, such relief must be "incorporated in a written order, the proposal for decision, or the final order." R 792.10115(10).

Here, motion practice can include a motion for summary disposition, which, generally, is based on grounds including but not limited to: no genuine issue of material fact existing; a failure to state a claim for which relief can be granted, and; a lack of jurisdiction or standing. R 792.10129(1). In the event an ALJ has final decision authority, such motion can be determined without the ALJ first issuing a proposal for decision. R 792.10129(2). Absent such authority, the judge can issue an "order denying the motion without first issuing a proposal for decision or may issue a proposal for decision granting the motion." R 792.10129(3). With a denial of the motion, or a decision on the motion which does not dispose of the entirety of the case at issue, the parties will proceed to hearing. R 792.10129(4).

9. Stipulations

Stipulations to facts can aid in streamlining an administrative hearing, as such stipulations can free the parties from dedicating time during hearing to any factual matters which are not being disputed by the parties. Here, stipulations may also benefit the parties by allowing the tribunal to exclusively focus on the aspects of the case which are actually in dispute. Here, MAPA provides that parties in a contested case may stipulate, via writing filed with the agency, to any fact involved in the controversy at hand, with such stipulated facts thereafter being used as evidence at hearing and binding on the parties entering into such stipulations. MCL 24.278(1). The MOAHR Rules generally reiterate the same, however, the rules provide that such stipulations can be entered into via written stipulation or through statements into the record. R 792.10116(1).

10. Hearing by Brief

In those cases where an ALJ determines that a material issue of fact does not exist, "and the questions to be resolved are solely questions of law," the ALJ can direct that the hearing be conducted via submission of briefs, with the ALJ consulting with the parties and subsequently prescribing the time limits for submission of such briefs. R 792.10123(1)-(2). Given this format exists only in those instances in which a material issue of fact does not exist, parties may find that hearing via briefs only is a seldom ventured path.

Conclusion

Administrative adjudication reflects those quasi-judicial powers exerted by administrative agencies. In large part, adjudication serves as an efficient means by which disputes between individuals or entities and agencies can be resolved. While this article focuses on pre-hearing considerations within the administrative realm, it is very much the case that these considerations can have wide-ranging implications for both the eventual hearing between the parties, and post-hearing matters, including but not limited to post-hearing briefs, and, potential appellate matters. While both hearing and post-hearing considerations will be explored in subsequent articles, it is perhaps the case that pre-hearing preparation and planning can yield the greatest long-term benefits to practitioners. ■

NOTE: *The information and opinions provided herein are not intended to constitute legal advice and should not be relied upon as such.*

The views and opinions expressed herein are my own and may not reflect the views and opinions of the Michigan Department of Attorney General nor the Attorney General themselves.

QUANTITY OVER QUALITY: NLRB GC ENDORSES UNILATERAL SETTLEMENTS AND REINS IN REMEDIES

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On May 16, 2025, acting NLRB General Counsel William Cowen issued Memorandum GC 25-06 to provide guidance related to settlement agreements and nonmonetary remedies.

In his memo, Cowen cautions Regions against zealously prosecuting unfair labor practices suggesting that "full effectuation of the Act requires efficiency – that if we attempt to accomplish everything, we risk accomplishing nothing." GC 25-06, p.1 (internal quotes omitted). Similarly, Cowen urges Regions to "be mindful of not allowing our remedial enthusiasm to distract us from achieving a prompt and fair resolution of disputed matters." *Id.* With these two warnings in mind, Cowen outlines parameters for Regions when drafting settlements and restrictions for pursuing make whole relief in unfair labor practice cases.

GC 25-06 provides guidance in five areas related to settlement agreements. Each of the five areas encourage awarding charged parties with favorable settlements to allow the NLRB to quickly dispose of cases and "permit the agency to concentrate its limited resources on other cases by avoiding costly litigation expenses." *Id.*

NLRB settlement agreements often contain default language that provides for the expeditated issuance of NLRB orders in the event of non-compliance of a settlement agreement by a charged party. GC 25-06 suggests that Regions should attempt to include default language in their settlement agreements but that Regions "should not fail to achieve a settlement based only on a party's objection to such a provision." *Id.* at 2. This suggestion renders the inclusion of default language meaningless. If the NLRB will omit default language based on a party's objection then default language will no longer be utilized. Notwithstanding, Cowen's eagerness to scrap default language he concedes that "default language has proven to be effective in ensuring that charged parties and respondents comply with the terms of an agreed upon Settlement." *Id.* Cowen does not explain how eliminating the inclusion of default language will "permit the agency to concentrate its limited resources on other cases by avoiding costly litigation expenses." *Id.* at 1. Cowen acknowledges that default language prevents the NLRB from being "put in a position of having to expend resources litigating a settled issue." *Id.* at 2. Notwithstanding this acknowledgment, Cowen provides no rationale for his decision to abandon the inclusion of default language in settlement agreements.

Cowen also indicates that Region's may include non-admission clauses in settlement agreement in cases "where a Region has yet to engage in substantial trial preparation." *Id.* This position is wholly inconsistent with longstanding NLRB practice and precedent. "Non-admission clauses should be the exception in settlement agreements. A non-admission clause may be incorporated in a formal settlement only if it provides for a court judgment." NLRB Casehandling Manual, Part 1, Section 10130.8.

GC 25-06 explains that "Regional Directors have the discretion to approve unilateral Settlement Agreements which effectuate the Act without prior authorization. GC 25-06, p. 2. The NLRB Casehandling Manual provides that such settlements "must be submitted to the Division of Operations-Management for approval by the General Counsel before they are submitted to the Board." See, Section 10164.7. Unilateral settlements are not settlements. Notwithstanding, unilateral settlements should be the exception, not the rule. Routinely making unilateral settlements with charged parties will result in resolutions that fall short of a sufficient remedy.

GC 25-06 goes on to explain that "Regional Directors have the discretion to approve Settlement Agreements that provide for less than 100 percent of the total amount that could be recovered if the Region fully prevailed on all allegations in the case." *Id.* at 2. Actual make-whole-relief, where a discharged employee is made fully whole for the losses they incurred, restores them to the economic status they would have had but for the unlawful conduct. Cowen indicates that a Regional Director can offer a charged parties a blue-plate special settlement with up to a twenty percent discount on a terminated employee's actual damages without prior approval.

Lastly, Cowen addresses the implications of *Thryv, Inc.* 372 NLRB No. 22 (2022), on expanded remedies. In *Thryv*, the NLRB expanded the scope of remedies for unfair labor practices. In *Thryv,* the NLRB held that "in all cases in which our standard remedy would include an order for make whole relief, the Board will expressly order that the respondent compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice." *Id.* at 6. In GC 25-06, Cowen complains that the majority opinion in *Thryv* "does not provide a discernable standard" for determining what is a direct and foreseeable pecuniary harm. GC 25-06 at 3. Cowen explains that the dissent in *Thryv* provides a standard where "employees should also be made whole for losses indirectly caused by an unfair labor practice where the causal link between the loss and the unfair labor practice is sufficiently clear." *Thryv* at 16. Cowen urges Regional Directors to adopt this standard and "focus on addressing foreseeable harms that are clearly caused by the unfair labor practice." GC 25-06 at 3.

In sum, GC 25-06 encourages Regions to settle unfair labor practice charges even if it means entering into toothless unilateral agreements. The NLRA was not enacted to mandate the NLRB to make settlements for the sake of making settlements.

The NLRA was enacted to encourage collective bargaining and protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 28 U.S.C. §151. GC 25-06 does not do anything to accomplish the goals of the NLRA. ■

UNDERSTANDING PREVAILING WAGE REQUIREMENTS ON STATE PROJECTS

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Prevailing wage laws are designed to level competition among employers and support local employers in an area by protecting locally established wage and benefit standards among employers and workers. The added benefit ensures that workers on publicly funded construction projects are compensated fairly by receiving wages and fringe benefits that match the prevailing rates in their local areas for similar work. In Michigan, Public Act 10 of 2023 reinstated the prevailing wage requirements for state-funded projects.

Act 10 requires every contract executed between a contracting agent and a successful bidder for a state project that involves the employment of construction mechanics must contain a provision requiring payment of prevailing wages. Construction mechanics are defined as workers engaged in the construction, alteration, repair, painting, or decorating of a public building or public work or certain solar, wind, or energy storage facilities. If a project does not involve construction mechanics, prevailing wage rates do not apply, and contractors are not required to submit certified payrolls to the state.

Contractors and subcontractors who intend to bid on prevailing wage projects are required to register annually with the Michigan Department of Labor and Economic Opportunity's (LEO) Wage and Hour Division. The registration process includes the payment of a fee, currently $500. Once a contractor completes registration and payment, they are given access to LCPtracker, the current platform used for submitting certified payroll reports. It is important to note that certified payrolls are required only if prevailing wage applies to the project.

The prevailing wage rates are determined based on collective bargaining agreements or wage agreements between employees and employers. The rates are specific to the locality where the work is being performed to ensure fair market compensation. Contracts that already include federally determined prevailing wages or that use wage schedules matching local union agreements are exempt from Michigan's prevailing wage requirements.

Contractors are responsible for their own compliance and also for ensuring that all of their subcontractors on the project meet the prevailing wage obligations. Contractors are also required to post the applicable wage determinations at the project site to ensure transparency for all workers involved.

Michigan's prevailing wage requirements serve to ensure fair competition and maintain quality standards on publicly funded projects. Contractors working on state projects must be diligent in understanding and following these requirements to maintain compliance. ■

SIXTH CIRCUIT ON DUE PROCESS AND EFAA CLAIMS

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Miller Canfield

Can a public employer's failure to provide a meaningful pretermination hearing unravel an otherwise well-documented termination?

In *Hieber v. Oakland County*, No. 24-1345, 2025 WL 1232901 (6th Cir. Apr. 29, 2025), the U.S. Court of Appeals for the Sixth reminded public employers that skimping on pretermination due process is like serving a half-baked cake—likely to crumble under appellate scrutiny.

David Hieber, a nearly two-decade veteran of Oakland County's Equalization Division, found himself on the wrong end of a hostile work environment complaint in 2021. After a subordinate accused him of fostering a toxic workplace—including alleged DEI survey bashing and union threats—the County launched an internal investigation. The probe culminated in Hieber's paid administrative leave, a six-minute pretermination hearing, and a pink slip. Hieber sued, alleging violations of pre- and post-termination due process, political-affiliation retaliation, age discrimination, and defamation. The district court entered summary judgment for the County and Hieber's supervisor, Kyle Jen, on all counts. But the Sixth Circuit saw things a little differently.

On the pretermination due-process claim, the court called a foul. Hieber, a merit-systems employee with a property interest in his job, was entitled to notice of charges, an explanation of evidence, and a meaningful chance to respond under the U.S. Supreme Court's seminal case governing due process for public employees in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The County's investigatory interview? Too vague, failing to spell out specific charges or evidence. The pretermination hearing? A procedural misstep. HR told Hieber it was "not the time" to plead his case, and the hearing officer doubled down, confirming it was just to inform him of the termination. The Sixth Circuit accordingly reversed summary judgment against the County and Jen (in his official capacity), sending the claim back to a jury to decide if Hieber got a fair shake.

However, Hieber's other claims did not fare as well. His post-termination due-process claim fizzled because he abandoned his appeal to the Personnel Appeal Board—waiving his right to cry foul. The political-affiliation retaliation theory, alleging he was targeted for perceived ties to the controversial Republican Patterson administration, lacked evidence that decisionmakers pegged him as a GOP loyalist. His defamation claim against Jen, based on emails implying Hieber was a safety risk, was not enough to pass muster under Michigan's qualified privilege doctrine. Jen's good-faith safety concerns, backed by employee reports of Hieber's "mentally unstable" vibe, shielded the emails from liability. Finally, Hieber's age discrimination claims under Michigan's ELCRA and § 1983 flopped. Despite HR's "grandmas" and "dead wood" comments, the County's honest belief in Hieber's misconduct—bolstered by a thorough investigation—torpedoed his pretext arguments.

Key Takeaways

1. *Pretermination Hearings Are Not Check-the-Box Exercises*. It remains prudent for employees to receive clear notice, evidence disclosure, and a real chance to respond to the reason(s) why termination (or some other discipline) is on the table. Missteps here can unravel even a well-documented termination. *Loudermill* hearing, also known as a pre-disciplinary hearing, is a required procedure for public employees before they can be terminated or disciplined, such as demoted or suspended. The purpose of the hearing is to ensure the employee has a fair opportunity to address the charges against them before a final decision is made.

2. *Document, Document, Document*. The County's investigation extricated itself from exposure to discrimination and defamation claims. Detailed records and honest belief in misconduct are your best friends.

3. *Be Careful about Emails*. Jen's emails announcing Hieber's administrative leave and termination were deemed protected under Michigan's qualified privilege doctrine, as they were grounded in good-faith safety concerns supported by employee reports of Hieber's troubling behavior. But the emails' implications—that Hieber posed a safety threat—came perilously close to inviting defamation claims due to their directive tone, such as instructing employees to call 911 if Hieber appeared. For practitioners, this serves as a critical reminder: communications should be fact-based, narrowly tailored to the purpose (e.g., ensuring workplace safety or operational continuity), and directed only to those with a legitimate need to know. Vague or inflammatory language risks undermining privilege, exposing employers to liability. To mitigate this, employers should document the basis for their concerns, consult with counsel before sending such communications, and avoid phrasing that could be (mis) misconstrued as defamatory.

Hieber represents an important reminder to public employers: procedural due process is not a mere formality, as it may be a firewall against probing judicial examination.

Can Employee Pre-2022 Sexual Harassment Claims Dodge Arbitration if the Feud Flares Up Later?

Can employee pre-2022 sexual harassment claims dodge arbitration if the feud flares up later? The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA"), signed into law by President Biden on March 3, 2022, allows individuals alleging sexual harassment or assault to file suit in court, invalidating predispute arbitration agreements that may otherwise cover such claims. In *Memmer v. United Wholesale Mortgage, LLC*, No. 24-1144, 2025 WL 1144771 (6th Cir. Apr. 18, 2025), the U.S. Court of Appeals for the Sixth Circuit addressed whether the EFAA applies to sexual harassment claims that accrued before March 2022 but where the dispute arose afterward.

Case Background

Kassandra Memmer sued her former employer, United Wholesale Mortgage (UWM), in 2023, alleging discrimination and sexual harassment during her tenure as a mortgage underwriter from 2019 to 2021. Her claims invoked Title VII, the ADA, the FLSA, and Michigan state laws. UWM sought to compel arbitration based on Memmer's employment agreement, which required arbitration for statutory claims. The district court dismissed Memmer's complaint, upholding the arbitration agreement without addressing her EFAA argument. Memmer appealed, asserting that the EFAA allowed her sexual harassment claims to proceed in court.

Sixth Circuit's Analysis

In a 2-1 decision penned by Judge Moore, the Sixth Circuit reversed and remanded, holding that the EFAA applies to claims that accrue or disputes that arise on or after March 3, 2022. The court interpreted the EFAA's disjunctive "or" as distinguishing "claims" (causes of action accruing when a plaintiff can sue) from "disputes" (controversies when parties become adverse, e.g., via complaints or lawsuits). Following the Third and Eighth Circuits, the court rejected UWM's argument that only claims accruing post-enactment qualify, emphasizing that "dispute" carries a broader meaning.

Memmer's claims likely accrued before July 2021, when she left UWM, but her EEOC charge (April 2022) and lawsuit (April 2023) postdated the EFAA. The court remanded for the district court to determine when the dispute arose and to resolve open EFAA issues, such as whether a single sexual harassment claim keeps the entire case in court.

Key Takeaways

1. Dual EFAA Triggers: The EFAA applies if a claim accrues or a dispute arises on or after March 3, 2022, broadening its reach to pre-2022 claims with post-enactment disputes.

2. Dispute Timing: Assessing when a dispute arises (e.g., via EEOC filings or lawsuits) is fact-specific and critical for EFAA applicability.

3. Unresolved Issues: The scope of EFAA's impact on non-sexual harassment claims and the plausibility threshold for EFAA claims await further clarification in likely subsequent litigation.

Memmer flings open the courtroom for pre-2022 sexual harassment claims if disputes ignite post-EFAA. It would be prudent for employers to reassess their arbitration policies, carving out exceptions for sexual harassment claims or strengthening dispute-resolution processes to mitigate EFAA-driven litigation risks. ■

REVIEW OF MICHIGAN APPELLATE DECISIONS CONCERNING ARBITRATION

Lee Hornberger

This article reviews selected Michigan Supreme Court and published Court of Appeals cases concerning arbitration.

Michigan Supreme Court

Waiver of right to arbitration via case management order

Nexteer Auto Corp v Mando Am Corp.[1] Party waived right to arbitration when it stipulated in case management order that arbitration provision did not apply. In **dissent, Justice Markman** agreed COA correctly held party claiming opposing party had expressly waived contractual right to arbitration **does not need to show it will suffer prejudice** if waiver not enforced. Markman said COA erred by holding defendant expressly waived right to arbitration by **signing case management order** that contained checked box next to statement: "**An agreement to arbitrate this controversy . . . exists . . . [and] is not applicable**." He would have reversed COA on express waiver and remanded for consideration of whether defendant's conduct gave rise to implied waiver, waiver by estoppel, or no waiver. **Lesson: Be careful when checking boxes.**

Not all artwork invoice claims subject to arbitration

Beck v Park West Galleries, Inc,[2] considered whether arbitration clause in invoices for artwork purchases applied to disputes arising from prior purchases when invoices for prior purchases did not refer to arbitration. MSC held that arbitration clause contained in later invoices cannot be applied to disputes arising from prior sales with invoices that did not contain clause. MSC reversed part of COA judgment that extended arbitration clause to parties' prior transactions that did not refer to arbitration. MSC recognized policy favoring arbitration of disputes arising under CBAs but said this does not mean arbitration agreement between parties outside collective bargaining context applies to any dispute arising out of any aspect of their relationship.

Arbitrator can hear claims arising after referral to arbitration

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc,[3] reversed COA and reinstated Circuit Court order denying defendants' motion to vacate award and confirming award. Dissent in 303619 (May 31, 2012), said stipulated order intended arbitration include claims beyond those pending because it allowed further discovery, **gave arbitrator Circuit Court powers**, and award would represent full and final resolution. Claims not pending at time order entered not outside scope of arbitrator's powers. **Lesson: Order to arbitrate language important.**

Parental pre-injury waivers and arbitration

Woodman ex rel Woodman v Kera LLC,[4] five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, held parental pre-injury waiver unenforceable under common law.

MK v Auburnfly.[5] Parental indemnification agreement violated public policy as found in *Woodman*.

In 2011, Legislature enacted **MCL 700.5109** which states:

> (1) Before a minor participates in recreational activity, a parent or guardian of the minor may release a person from liability for economic or noneconomic damages for personal injury sustained by the minor during the specific recreational activity for which the release is provided.
>
> (2) **This section only applies to a recreational activity sponsored or organized by a nongovernmental, nonprofit organization.** … .

***Ex parte* submission to employment arbitration panel inappropriate**

Gates v USA Jet Airlines, Inc,[6] vacated award and remanded case to Circuit Court because one of parties submitted to arbitration panel ***ex parte* submission in violation of arbitration rules**. Submission may have violated MRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and 3.5(b) (prohibiting *ex parte* communication regarding pending matter). **Lesson: Do not do *ex parte* submissions in arbitration.**

Failure to tape record DRAA hearing

Kirby v Vance[7] in lieu of granting leave, reversed COA (278731) and held DRAA arbitrator exceeded authority when arbitrator **failed to adequately tape record arbitration proceedings**. Circuit Court erred when it failed to remedy arbitrator's error by conducting its own evidentiary hearing. Supreme Court remanded for entry of order vacating award and ordering another arbitration before same arbitrator. **Lesson: Make sure recorder working.**

Formal hearing format not required in DRAA arbitration

Miller v Miller.[8] DRAA does not require formal hearing concerning property issues similar to that which occurs in regular trial proceedings.

Michigan Court of Appeals

COA reverses Circuit Court order asking question of arbitrator in prior case

Mahir D Elder, MD, PC v Deborah Gordon, PLC.[9] Plaintiff sued former employer for wrongful termination and received large monetary award from arbitration proceeding. Award stated plaintiff should receive compensation as calculated by Chart B, but award then listed lower monetary amount in Chart A. Plaintiff's attorney did not notice discrepancy and confirmed award. Prior case was then dismissed. When plaintiff sued his attorney for legal malpractice, Circuit Court decided to send question to arbitrator to determine whether arbitrator meant to award plaintiff amount stated in award. Plaintiff appealed. COA reversed. **"After you have reviewed the materials, please confirm whether you intended to award Dr. Elder $5,516,907 in back pay, front pay and exemplary damages, or some other amount?"** MCL 691.1694(4) precludes "any statement, conduct, decision, or ruling occurring during the arbitration proceeding." This prohibits compelling arbitrators from giving evidence as a witness regarding statements, conduct, decisions, or rulings that it may have made during arbitration proceeding. **Lesson: Read award carefully.**

Pre-dispute arbitration agreement in legal malpractice case

Tinsley v Yatooma[10] involved pre-dispute arbitration provision in legal malpractice case. COA held under MRPC 1.8(h)(1) and EO R-23 arbitration provision enforceable because client consulted with independent counsel. COA: "**We suggest contemplation by the State Bar of Michigan and our Supreme Court of an addition to or amendment of MRPC 1.8 to specifically address arbitration clauses in attorney-client agreements**."

Rules of Professional Conduct Rule 1.19, effective Sep 1, 2022, says,

Rule 1.19. Lawyer-Client Representation Agreements: Arb Provisions

A lawyer shall not enter into agreement for legal services with client requiring that any dispute between lawyer & client be subject to arb unless client provides informed consent in writing to arb provision, which is based on being

(a) reasonably informed in writing regarding scope & advantages & disadvantages of arb provision, or

(b) independently represented in making agreement.

Lesson: Study RPC Rule 1.19 before entering into arbitration agreement with client.

DRAA award partially vacated

Eppel v Eppel.[11] COA held arbitrator deviated from plain language of **Uniform Spousal Support Attachment** by including profit from ASV shares. **Deviation substantial error that resulted in substantially different outcome.** Deviation readily apparent on face of award.

Pre-arbitration hearing email submission of exhibits

Fette v Peters Constr Co.[12] Michigan Arbitration Act[13] controlled; not Uniform Arbitration Act.[14] Record did not support plaintiffs' contention arbitrator considered **exhibits defendant electronically shared before hearing** in making award determination. Even if award against great weight of evidence or not supported by substantial evidence, COA precluded from vacating award. Allowing parties to electronically submit evidence prior to hearing did not affect plaintiffs' ability to present evidence they desired. **Lesson: Consider ramifications of emailing exhibits to arbitrator and whether exhibits are in evidence or not.**

Pre-award lawsuit concerning arbitrator selection

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc.,[15] reflects viewpoint no part of arbitration more important than selecting arbitrator. AAA did not appoint panel member who had specialized qualifications required in agreement. Plaintiff sued to enforce requirements. Circuit Court ruled in favor of defendant and AAA. COA in split decision reversed. Issue was whether plaintiff could bring pre-award lawsuit concerning arbitrator selection. Majority said courts usually will not entertain pre-award objections to selection. But, when suit is brought to enforce essential provisions of agreement concerning selection, courts will enforce mandates. When such provision is central, Federal Arbitration Act[16] provides it should be enforced by courts prior to arbitration hearing. Party may petition court before award if (1) arbitration agreement specifies qualifications arbitrator must possess and (2) arbitration administrator fails to appoint arbitrator who meets these qualifications. Court may issue order requiring arbitration proceedings conform to arbitration agreement. Majority awarded plaintiff Circuit Court and COA costs and attorney fees.

Judge Jansen dissent said party cannot obtain judicial review of qualifications of arbitrators pre-award.

Offsetting decision-maker biases can arguably create neutral tribunal

White v State Farm Fire and Cas Co.[17] discussed whether MCL 500.2833(1)(m) **appraiser who receives contingency fee** for appraisal is sufficiently neutral. COA said courts have upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create effectively neutral tribunal by building in offsetting biases.

Complaint must be filed to obtain award confirmation

Jaguar Trading Limited Partnership v Presler.[18] Complaint must be filed to obtain confirmation of award. Having failed to invoke Circuit Court jurisdiction under Michigan Arbitration Act by filing complaint, plaintiff not entitled to confirmation.

(Continued on page 22)

REVIEW OF MICHIGAN APPELLATE DECISIONS CONCERNING ARBITRATION

(Continued from page 21)

Issue was whether plaintiff, as party seeking confirmation under MCR 3.602(I) and MAA was required to file complaint to invoke Circuit Court jurisdiction. COA held, because no action pending, plaintiff required to file complaint. Since plaintiff timely filed award with court clerk, matter remanded so plaintiff could file complaint in Circuit Court.

COA affirms Circuit Court that motion to vacate not timely filed

Vyletel-Rivard v Rivard.[19] Defendant challenged Circuit Court denying motion to vacate DRAA award. COA affirmed because motion to vacate not timely filed. On March 28, 2008, defendant filed motion to vacate "awards" of November 13 and December 7, 2007. Party has 21 days to file motion to vacate in DRAA case. **Lesson: Time periods are important. Ramifications of filing second post-award errors and omissions motion.**

COA approves probate arbitration

In split decision, ***In re Nestorovski Estate***[20] held probate proceedings not inherently unarbitrable.

—END NOTES—

[1] 500 Mich 955; 891 NW2d 474, 153413 (2017), lv den from 314 Mich App 391; 886 NW2d 906 (2016).

[2] 499 Mich 40; 878 NW2d 804 (2016), partially reversed COA 319463 (2015).

[3] 493 Mich 933, 825 NW2d 580 (2013).

[4] 486 Mich 228; 785 NW2d 1 (2010).

[5] ___ Mich App ___, 364577 (Dec 17, 2024).

[6] 482 Mich 1005; 756 NW2d 83 (2008),

[7] 481 Mich 889; 749 NW2d 741 (2008),

[8] 474 Mich 27; 707 NW2d 341 (2005).

[9] 343 Mich App 388, 359225 (Sep 22, 2022).

[10] 333 Mich App 257, 349354 (Aug 13, 2020), lv den.

[11] 322 Mich App 562 (2018).

[12] 310 Mich App 535; 871 NW2d 877 (2015).

[13] MCL 600.5001 et seq.

[14] MCL 691.1681 et seq.

[15] 304 Mich App 46; 850 NW2d 408 (2014). This case discussed at Esshaki, "Judicial Intervention in Arbitration Proceedings Pre-Award," Michigan Bar Journal (June 2023), p. 30.

http://www.michbar.org/file/barjournal/article/documents/pdf4article2627.pdf?_gl=1*3ciwoh*_ga*MTUyMDE4NjA3OC4xNjA0NjE0ODY2*_ga_JVJ5HJZB9V*MTY4MzgxNTY0MC43NzAuMS4xNjgzODE1NjU1LjAuMC4w

[16] 9 USC 1, et seq.

[17] 293 Mich App 419; 809 NW2d 637 (2011).

[18] 289 Mich App 319; 808 NW2d 495 (2010).

[19] 286 Mich App 13; 777 NW2d 722 (2009); lv gtd 486 Mich 938; 782 NW2d 502 (2010), stip dism ___ Mich ___ (2010).

[20] 283 Mich App 177; 769 NW2d 720 (2009). ■

MERC NEWS

Sidney McBride
Bureau Director, Bureau of Employment Relations

A. Electronic Progress Continues at MERC

The agency now offers electronic voting (e-voting) as an option for MERC conducted representation elections in addition to the standard mail and in-person voting methods. This new option utilizes the bargaining unit members' email addresses (personal or work) rather than mailing addresses for receiving the MERC issued election notices and electronic ballots (e-ballots). The submitted e-ballots are recorded in the system and unreported during the open voting period. Once the ballot timeline ends, no more e-ballots can be submitted by unit members. During the vote count event, the MERC Elections Officer will generate a results report which signals the system to tally the e-ballots and create a certified report of the totals. Ballot submissions by individual voters are confidential and untraceable. The balloting timeframe for e-voting is currently set at 7 calendar days starting on Wednesday or Thursday; however, this default voting period can be shortened or lengthened as part of the teleconference discussions with the Elections Officer.

If you are interested in using the MERC e-voting method as part of your representation election, please indicate in your filed election petition or response, or raise the issue with the MERC Election Officer. Also, as a pilot effort, any bargaining unit interested in this agency conducting their contract ratification vote using MERC e-voting—email the agency at merc-mediation@michigan.gov or berinfo@michigan.gov.

B. What's Next With Private Sector Labor Relations Cases in MI

Recent changes at the federal level have drastically impacted the operations of our sister labor relations agencies, the National Labor Relations Board (NLRB) and the Federal Mediation and Conciliation Service (FMCS). Since their inception in 1935 (NLRB) and 1947 (FMCS), these federal agencies have provided the primary avenue for private sector employees, unions and employers to enforce protections authorized under the National Labor Relations Act (NLRA). Collectively, these two federal agencies have provided services in most public sector workplaces that were analogous to those that MERC provides in public sector workplaces throughout Michigan. At issue today is the impact on MERC from these federal changes.

In general, the federal level changes in 2025 have severely hindered the ability of our federal counterparts to promptly address private sector party filings involving unfair labor practice charges, representation and unit clarification (election) petitions and mediation requests on contract negotiations, contract grievances and work stoppages matters. This service "hiccup" has rendered both questions and confusion on what areas, if any, can MERC be relied upon for relief.

1. MERC Mediation: Under this state's Labor Relations and Mediation Act, this agency can provide mediation assistance to employers and labor organizations in public and private sector workplaces, including private sector

workplaces that fall outside of MERC's jurisdiction for ULPs and Electios matters. The MERC e-File system and filing forms are available on the agency's website, www.michigan.gov/merc. Filings should be submitted via MERC e-File or by email to the designated email filing address-- merc-mediation@michigan.gov. To assist with expedited scheduling of mediation sessions, we encourage parties to utilize virtual mediation as much as possible. We are in the process of creating an online mediation filing form for contract bargaining cases to expedite the filing of the bargaining notice that is required by state and federal statute.

2. MERC ULP and Elections:

This agency's Labor Relations Division handles the processing of all unfair labor practice (ULP) charges, representation petitions and unit clarification petitions (elections cases). MERC's authority for these cases falls under the Public Employment Relations Act (PERA) for public sector cases and the LMA for private sector cases. However, Section 14 of the NLRB limits this agency's authority under the state statute to address ULP and elections disputes in private sector workplaces. In a nutshell, the NLRB must first decline jurisdiction on a private sector ULP or elections matter before MERC can exercise jurisdiction under the LMA. (Refer to NLRB Section 14). As such, private sector parties seeking MERC assistance for any ULP, Representation or Unit Clarification Petition MUST first seek a determination from the NLRB Region on whether it will decline to exercise jurisdiction in that private sector matter. If the deferral is granted, the party should file with MERC via the MERC eFile system or email to the designated email filing address--- merc-ulps@michigan.gov. All cases filed with MERC --- public sector or private sector will follow the established processing methods used by this agency which may not be identical to those used at the NLRB or FMCS.

3. MERC Collateral Services and More:

- Training and Outreach-- The agency offers various training modules to interested unions and labor organizations in both public and private sector workplaces. The training modules are listed on the MERC website. These trainings and outreach services are presented virtually although participants may connect virtually after assembling in-person among themselves in one or more group settings. Training requests should be emailed to ber-info@michigan.gov.

- Grievance Arbitrator Appointments—Unions or Employers (public and private sector) interested in obtaining a qualified grievance arbitrator may utilize MERC appointment services. Details on the specific steps in the process are available from the agency's website. These requests should be submitted electronically via the MERC e-File system or email to merc-grievancearb@michigan.gov. The appointment service is provided at no cost. Once the appointment is made, this agency has no further involvement or obligation in the partiers' grievance arbitration process.

All the above information is available using the various links contained on the agency's website, www.michigan.gov/merc. Should you have any questions, feel free to email--- berinfo@michigan.gov or the appropriate filing email address. ■

SUPREME COURT ELIMINATES ADDITIONAL BURDEN PLACED ON MAJORITY GROUPS UNDER TITLE VII

Blake C. Padget
Butzel Long, PC

Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin. The text of Title VII draws no distinction between employees of majority and minority groups. Several circuits, including the Sixth Circuit, have imposed an additional burden on Title VII plaintiffs who are members of the majority group (sometimes called "reverse discrimination").

In unanimous opinion by Justice Jackson, the Supreme Court in *Ames v. Ohio Department of Youth Services*, 605 U. S. ____ (2025), eliminated any additional burdens placed on majority group plaintiffs under Title VII.

The facts of the case that led to the Supreme Court decision are simple. Marlean Ames worked for the Ohio Department of Youth Services for more than twenty years. She and two other heterosexual applicants applied for a promotion, but the Department of Youth Services hired a gay employee that neither applied nor interviewed for the position. Ms. Ames was later replaced in her existing role by a gay employee that did not apply for the position and was demoted. Ames sued under Title VII alleging her employer discriminated against her because she is heterosexual.

The district court dismissed her claim under Rule 56 and Sixth Circuit affirmed, stating that Ames failed to present evidence of "background circumstances" showing she worked for a unique employer that discriminates against the majority group. This evidence of the "background circumstances" is in addition to the standard *prima facie* case under the burden shifting framework under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973). Judge Kethledge concurred but expressed disagreement with the background circumstances rule.

The issue is whether majority-group plaintiffs can be subject to a different evidentiary burden than minority-group plaintiffs?

In a short opinion, the Supreme Court ruled that the burdens must be the same, stating that Title VII does not draw any distinction between employees of majority groups and employees of minority groups. "The Sixth Circuit has implemented a rule that requires certain Title VII plaintiffs—those who are members of majority groups—to satisfy a heightened evidentiary standard in order to carry their burden under the first step of the *McDonnell Douglas* framework. We conclude that Title VII does not impose such a heightened standard on majority group plaintiffs." Op. at 11.

Going forward, *Ames* will make it easier for plaintiffs in reverse discrimination cases to establish a *prima facie* case. Just as employers do when making decisions with minority group employees, employers should review their decisions to ensure that majority group employees are not treated differently than similarly-situated individuals. ■

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INSIDE *LAWNOTES*

Kayak Summer

- Shel Stark writes about the development, adoption, and approval for use of Michigan's Model Civil Jury Instructions for employment cases.

- Stuart Israel writes about "well-being" perils in the legal profession, a new book about legal education called *Lawless*–The Misdirection of America's Elites, and the paper chase in 2025.

- Separating urban legend from what's real about the ADA interactive process in an article by Elizabeth Favaro and Courtney Moore.

- Mark Cousens writes that the Teacher Tenure Act should be amended to eliminate the "arbitrary and capricious" standard and restore the "just cause" standard for discipline.

- Learn about new NLRB General Counsel Memorandum in an article by Ben King.

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