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LABOR AND EMPLOYMENT LAWNOTES

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View from the Chair

by Eileen Nowikowski, Chairperson
Labor Relations Law Section

"Sophie, tell it again." And the young girl who witnessed the horrific fire which engulfed the Triangle Shirtwaist Company at the turn of the century, in which over one hundred young women perished, told it again using exactly the same words as in her direct testimony.

Irving Younger, the judge and spellbinding lecturer on trial tactics, recounted the story of Sophie and Max Stoyer, the skillful trial lawyer who represented the owners of the factory and won their acquittal on 400 counts of misdemeanor manslaughter. The factory owners had nailed shut the doors to the fire escapes so the workers, housed in the tenement factory, couldn't go out to smoke. As a result, a multitude of young women were killed, bodies piled up at the barred doors as the workers vainly struggled to get out.

Now, 90 years later, the story repeats in hauntingly identical detail — 25 workers died and 45 more were injured in a poultry processing plant fire in North Carolina where, once again, the owners nailed shut the exit doors to the plant. OSHA and the North Carolina "baby" OSHA notwithstanding, there had not been even a rudimentary safety inspection of the hazardous plant.

For the labor movement, the North Carolina fire is a case history of how much farther we have to go — 90 years later and the alphabet soup of federal labor laws notwithstanding. Recent weeks have brought bleak news for unions: workers perish, unions are decried in a New York Times Op Ed page editorial by one of their own, Thomas Geoghegan, a Chicago labor lawyer and author of **Which Side Are You On: Trying To Be For Labor When It's Flat On Its Back**, and the same edition of the Times featured a front page story — "Unions At a Loss To Reverse Falling Fortunes of Workers." (New York Times, September 2, 1991).

Geoghegan, a Harvard Law grad, calls for rejuvenation and reform of the labor movement. Describing the drop in union membership from 34 to 12% he dolefully ponders:

> It seems at least possible that union labor may disappear (except, of course in baseball, the last field of dreams). A few friends of mine have asked, "Well, what are you going to do? What line of work will you go into?"
>
> New York Times, "Labor Among the Ruins," September 2, 1991, p. 15.

Continued on page 2

OSHA: Where Do We Go From Here?

by James S. Rosenfeld and John P. Hancock, Jr.
Butzel Long

Apparently in response to increasing criticism for the lax enforcement of applicable safety standards of the federal Occupational Safety and Health Act of 1970 ("OSH Act") 29 USC § 651 et seq., and the Michigan Occupational Safety and Health Act ("MIOSH Act"), MCL 408.1001 et seq.; MSA 17.50(1) et seq., legislators and the courts have responded with more severe criminal and civil penalties and a broader scope of criminal prosecution. While increased civil and criminal penalties should act as a deterrent to safety violations, the employer's ability to contest the issuance of warrants in criminal actions may actually inhibit voluntary hazard abatement, another important goal of the process.

This article will review briefly the major recent developments in OSH Act legislation and enforcement. Whether the higher penalties and broader scope of enforcement will achieve greater deterrence or merely increase an employer's ability to combat enforcement is yet to be determined.

Increased Civil Penalties

Effective March 1, 1991, the Omnibus Budget Reconciliation Act of 1990 increased the OSH Act's maximum civil penalties sevenfold. The civil penalty for a willful or repeated violation increased from $10,000 to $70,000. Other types of violations increased from $1,000 to $7,000, including a $7,000 per day maximum for failing to abate a violation. A new statutory minimum was also passed; the floor for willful violations is now $5,000.

Increased Criminal Penalties Contained Within Pending OSH Act Reform Legislation

Both the House and Senate have introduced legislation to revise the OSH Act. S 1622/HR 1360, "The Comprehensive Occupational Safety and Health Reform Act," intends to shift the present focus on inspections and threat of civil fines toward preventative measures. The Act provides for safety and health committees, composed of both employee and employer representatives, to oversee health and safety in the work place. The Act would also give the Occupational Safety and Health Administration ("OSHA") the authority in discrimination cases to order reinstatement and award back pay damages and attorneys' fees.

Continued on page 2

INDEX

STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly newsletter published under the auspices of the Council of the Labor Relations Law Section of the State Bar of Michigan as a service to section members. Views expressed in the articles and case commentaries appearing herein are those of the authors, not the Council, the Section or the State Bar at large. We encourage Section members and others interested in labor and employment law to submit articles and letters to the editor for possible publication. Please send them to the editor at 320 N. Main St., Suite 400, Ann Arbor 48104.

Paul E. Glendon, Editor

VIEW FROM THE CHAIR — *Continued from page 1*

Although I don't share Geoghegan's gloomy predictions, we who toil "on the side of the angels" (as Len Page wryly described union labor lawyers) worry that the one organized group which represents American workers is rapidly losing ground. I like to say that if there were no labor unions, someone would invent them. The need is so great. If not unions, who will represent the workers, who will safeguard their lives and interests in the next century? How many times must history repeat before we learn?

For those who claim that the U.S. cannot compete in the global economy "saddled" with labor unions, Geoghegan has the best rejoinder:

> To me the question is: "How can you compete without them?" It seems that every major economy runs on some kind of social contract or has some kind of labor movement — every one but ours. Germany, France, even flinty South Korea. The one exception is us, America, the Fabulous Invalid, whose economy always seems to be splitting and shaking and coughing. Is that a coincidence? We're the only one that seems to be planning to do it union-free.
>
> New York Times, September 2, 1991.

OSHA: WHERE DO WE GO FROM HERE? — *Continued from page 1*

The legislation also incorporates S 445 which calls for increased maximum criminal fines for willful violations causing death to an employee and authorizes criminal fines for serious bodily injury resulting from willful violations. The maximum criminal sanctions would be increased from six months to ten years imprisonment for the first willful violation that results in death. The penalty for a second violation would increase from one year to twenty years. The maximum criminal fines for willful violations resulting in death, currently $10,000 and $20,000, and for all violations would be controlled by 18 USC § 3571 which allows fines up to $500,000.

In addition, a willful violation causing serious bodily injury but not death would subject a first-time violator to a maximum prison term of five years. Individuals also would no longer be able to use corporate assets to pay the criminal fine if convicted of a safety related occupational crime, and state and local authorities would be expressly authorized to prosecute under state laws.

Among other provisions, the proposed legislation also requires immediate reports of all work-related fatalities. Serious incidents resulting in the hospitalization of two or more employees would be required to be reported within 24 hours. Each incident would have to be investigated by OSHA. If the investigation revealed that employees were exposed to a condition or practice demonstrating an imminent danger of serious harm or death, the hazard could be tagged, immediate corrective action could be ordered and fines of $10,000-$50,000 per day for refusing to abate the hazard could be imposed.

The House has also reintroduced the Occupational Safety and Health Hazard Victims' Rights Act. The Act, HR 3133, would increase the participation of seriously injured employees and their families in OSHA investigations, citations and settlements.

Shift To Criminal Enforcement Has Costs As Well As Benefits

The pending legislation appears to address the concern that employers may be viewing civil penalties solely as a cost of doing business (notably when the cost of correcting the hazard exceeds the fine). However, the increased criminal sanctions, which necessarily provide employers with the protections afforded under criminal law, have also been perceived as a possible impediment to immediate improvement of work conditions. For instance, obtaining a warrant may become more difficult because a court may require a greater showing of evidence in a criminal case to establish probable cause.

OSHA Director Gerard Scannell, in his testimony before the Senate Committee on Labor and Human Resources Subcommittee on Labor, observed that the increased criminal penalties may result in employers no longer consenting to inspections without a search warrant and perhaps contesting the enforcement of a warrant should one be issued.[1] OSHA's position is that the recent increased civil penalties could

achieve the deterrence and perhaps avoid the negative effect of inhibiting voluntary abatement. Consequently, OSHA's role as a vehicle for criminal prosecution appears to merit close evaluation.

State Courts Broaden Scope of Enforcement

Prosecution for criminal violation under the OSH Act or MIOSH Act does not preclude a separate charge under Michigan's or other states' criminal statutes. Earlier this year the United States Supreme Court denied certiorari to review a New York Court of Appeals decision holding that the OSH Act did not preempt the state from criminal prosecution for criminal conduct. In **People v Pymm**, 561 NYS 2d 687; 563 NE2d 1 (Ct App 1990), **cert den**, 111 S Ct 958; 112 L Ed 2d 1046 (1991), two corporations **and** two of their executive officers were found guilty of reckless endangerment of their employees.

The Michigan Supreme Court, consistent with the New York Court of Appeals decision, in **People v Hegedus**, 432 Mich 598 (1990), held that a voluntary manslaughter prosecution arising out of the death of an employee was not preempted by the OSH Act. The Court upheld the manslaughter charges against the supervisor even though the incident, the poor condition of an undercarriage which allowed exhaust fumes to leak inside a van, appeared to have been caused by conduct that violated OSH Act standards.

The Michigan Court of Appeals has also recognized that corporations themselves, not just individual officers or supervisors, could be susceptible to criminal prosecution under Michigan statute. In **People v General Dynamics Land Systems Division, Inc**, 175 Mich App 701 (1989), **lv den**, 435 Mich 861 (1990), which is still pending in Macomb County Circuit Court, the Michigan Attorney General brought a criminal action against the corporation, itself, and not any specific individual. The action alleged a criminal violation of the MIOSH Act, as well as manslaughter charges against the corporation itself.

While the dismissal of the criminal violation of the MIOSH Act was upheld by the Michigan Court of Appeals, the manslaughter charge against the corporation was reinstated. The Court found that under MCL 750.321; MSA 28.533, a corporation is sufficiently a "person" to be the perpetrator of manslaughter. The Court noted that the penal code, MCL 750.10; MSA 28.200 "defines 'person,' 'accused,' and similar words to include public and private corporations, unless a contrary intention appears." **Id.** at 703

CONCLUSION

In sum, federal legislation and state court rulings indicate that criminal prosecutions may soon be expected to act as major deterrents to health and safety violations in the workplace. Whatever the outcome of the battle in the Michigan legislature regarding the continuation of the Michigan Occupational Safety and Health Administration as reported in **Labor and Employment Lawnotes** (Summer 1991), it appears that an emphasis on criminal prosecutions for such violations will occur.

FOOTNOTE

1. **CCH Employment Safety and Health Guide**, ¶ 10,837, March 19, 1991. The CCH service was the source for much of the information in this article.

Michigan Legislative Update

by Christine Kuzara
Legislative Service Bureau

Despite the fact that the Legislature has been in recess most of the summer, coming in only for brief sessions at approximate two-week intervals, there are some labor-related legislative developments worthy of mention.

Appropriations

A dispute over the budget transfer power of the State Administrative Board is delaying progress by appropriations conference committees, but legislative leaders have agreed to department targets for the 1991-92 state fiscal year.

Although the figures have changed somewhat since the last update, basic priorities have not. Next to the Department of Licensing and Regulation, which will be absorbed by the Department of Commerce, Commerce is still the biggest loser with a 40.3% reduction from the amount appropriated for 1990-91 ($61.4 million from $102.9 million). The Department of Labor trails slightly with a 39% reduction ($39.8 million from $65.3 million).

The significance of these reductions becomes clearer when it is realized that other departments are not seeing their budgets reduced to the same degree. The two other departments that will experience the most significant percentage reductions from this fiscal year are the Departments of Management and Budget and Education, down 20.2% and 13.9%, respectively. The Department of Social Services follows with a 5.3% reduction. In addition, the budgets for ten departments as well as the budgets for Capital Outlay, the Executive Office, the Legislature, Library, Judiciary, Community Colleges, Higher Education, K to 12, School Retirement, and Debt Service will experience an actual percentage increase in the amount appropriated for 1991-92 over 1990-91.

This is not to say that other departments will not be hurting. For the most part, though, if a department will suffer a significant reduction in appropriated money, the reason is because some responsibility borne by that department was transferred by Executive Order to another department. That is not the reason for the sizable cuts in the budgets of the Departments of Commerce and Labor. Major functions of these departments are being abolished and are not being assumed by anyone in state government. A shift in the focus and direction of the Departments of Commerce and Labor is occurring.

Club Discrimination

The first conference committee meeting to consider differences in the Senate and House passed versions of Senate Bill No. 351, the bill which bans discrimination by country clubs and golf clubs in the state, ended without an agreement. Conferees considered where to house the bill's provisions.

Continued on page 4

MICHIGAN LEGISLATIVE UPDATE —

Continued from page 3

Under the Senate version, public and private country clubs and golf clubs would be considered places of public accommodation under the Elliott-Larsen Civil Rights Act which in Article 3 prohibits discrimination on the basis of religion, race, color, national origin, age, sex, and marital status. Anyone who is discriminated against by a country club or golf club could file a complaint against the club with the Civil Rights Commission and then pursue a civil lawsuit, if necessary.

The House version amends the Michigan Liquor Control Act and provides for the Civil Rights Commission to investigate allegations of discrimination by licensees and report recommendations to the Liquor Control Commission. The Liquor Control Commission would suspend all licenses and permits issued to a licensee at the location where the violation occurred until the Commission determines that the discriminatory practice has ceased or until the licenses and permits have expired.

As a compromise, Senator Pollack (D-Ann Arbor) suggested that the Elliott-Larsen Civil Rights Act be amended, but that it specifically include as a penalty for violation the possible revocation or suspension of a liquor license by the Liquor Control Commission. The conferees seemed close to agreement when Senator Dunaskiss (R-Lake Orion), the original sponsor of the bill and chair of the conference committee, ended the meeting early because of a previous engagement, against Senator Pollack's wishes.

Jury Duty

In late August the House, by a vote of 91 to 0, passed and transmitted to the Senate House Bill No. 4250. Sponsored by Representative Jondahl (D-Okemos), this bill amends the Revised Judicature Act of 1961 and provides penalties for an employer or an employer's agent who requires that an employee who serves on a jury use annual or vacation leave, one or more personal days, or any other form of personal leave time for the time that the employee was absent from work due to jury duty.

MESC/Job Training Merger

Director of Labor Lowell Perry proposed as part of his reorganization efforts that the state's autonomous unemployment program be merged with the Department of Labor's job training programs under an employment services umbrella. "Employment training is the number one priority in the labor area," Mr. Perry said. "What we need is to match training with job opportunities and get the bang for our bucks." He said a possibility would be to put both areas under the supervision of the Bureau of Employment Training which already handles the federally-funded Job Training Partnership Act programs.

The Michigan Employment Security Commission is run by four commissioners appointed by the governor and, while housed in the Department of Labor, operates independently. The plan to shift the services of the MESC has stirred debate within the department and will have to be resolved by the Governor and the Legislature.

Bills Introduced:

SB 403 PREVAILING WAGE (Emmons) Exempts from the act requiring prevailing wages and fringe benefits on state projects the construction of or work on state mental health projects.

SB 459 MIOSHA (Honigman) Requires that state safety and health rules be identical to federal OSHA standards; increases certain civil penalties for violation of the act; provides that civil penalties be assessed and enforced in a manner consistent with federal assessment and enforcement; and provides for the elimination of the levy assessment upon carriers, self-insured employers, and the state accident fund for the funding of the Safety Education and Training (SET) fund under certain circumstances.

Unless Republicans and Democrats reach agreement in September on certain key provisions of this bill, funding for MIOSHA will cease on September 30, 1991, the end of the state fiscal year, and the overseeing of state occupational safety and health matters will revert to the federal government.

HB 4980 MESC (Bankes) Provides for the disallowance of unemployment benefits upon conviction of certain violations of law.

HB 4985 PAYMENT OF WAGES AND FRINGE BENEFITS (Hoffman) Extends the time limit under certain circumstances for the filing of complaints.

HB 5010 REPLACED STRIKERS (Clack) Prohibits private employers from permanently replacing striking employees.

HB 5011 REPLACED STRIKERS (Clack) Prohibits public employers from permanently replacing striking employees.

HB 5016 MESC (Oxender) Requires the Michigan Employment Security Commission to pay with interest contributions or interest erroneously collected by the Commission.

HB 5029 CIVIL RIGHTS (Harrison) Conforms the Michigan Handicappers' Civil Rights Act relative to housing to federal standards.

HB 5030 CIVIL RIGHTS (Harrison) Conforms the Elliott-Larsen Civil Rights Act relative to housing to federal standards.

HB 5058 CIVIL RIGHTS (Dresch) Prohibits under the Elliott-Larsen Civil Rights Act employers, employment agencies, and educational institutions from using group norming method of scoring tests.

Workers' Compensation Note

Due to the existence and work of the Workers' Compensation Law Section, these quarterly updates' do not encompass any legislative activity in the area of workers compensation.

Michigan Supreme Court Update

by David A. Rhem
Varnum, Riddering, Schmidt & Howlett

The Michigan Supreme Court completed a remarkable summer series of **Toussaint** doctrine opinions by issuing decisions in **Rowe v Montgomery Ward**, No. 84848, and **Dumas v Auto Club Insurance Association**, No. 83982. These cases evidence both the court's restriction of the **Toussaint** doctrine when oral statements of job security form the basis of a wrongful discharge claim, and its unwillingness to extend the **Toussaint** analysis beyond the wrongful discharge context. The court also addressed, for the first time, a public employer's collective bargaining obligations regarding "past practices" which "ripen" into terms and conditions of employment. **Amalgamated Transit Union Local 1564. AFL-CIO v Southeastern Michigan Transportation Authority (SEMTA)**, No. 85589.

In **Rowe v Montgomery Ward Co.**, the court confronted an oft-alleged claim of job security in **Toussaint** cases. During the hiring process Rowe was told that she would have a job "as long as" she met her sales quota. Several years later Montgomery Ward issued a series of employee handbooks containing an at-will employment statement. Rowe refused to sign the handbook acknowledgement form containing the at-will statement. Rowe's employment was subsequently terminated for other reasons and she filed a **Toussaint** claim. The court determined that Rowe's **Toussaint** claim was based on the "legitimate expectations" theory, and did not involve an "agreement" of job security. Rowe's refusal to sign the at-will statement therefore did not matter because her assent to the at-will policy was not required to effect the change. (Contrast **Schultz v Montgomery Ward**, 437 Mich. 83 (1991), an "agreement" case.) The court concluded that Rowe could not have maintained any "legitimate expectation" of job security following Montgomery Ward's issuance of the handbooks stating its at-will policy.

The **Rowe** case is noteworthy because it establishes a higher standard to meet by plaintiffs whose **Toussaint** claim is based on oral statements of job security. Oral statements of job security must be "clear and unequivocal" to overcome the at-will presumption. A plaintiff must also show some "objective evidence," such as an employee handbook, to support the alleged oral statements of job security. The "as long as" type of statement is insufficient by itself to get to a jury. The statement made to Rowe was "more akin to stating a policy as opposed to stating an express contract."

Significantly, the **Rowe** court's analysis also effectively overrules **Dalton v Herbruck Egg Sales Corp.**, 164 Mich. App. 543 (1987) which had held that the co-existence of a progressive disciplinary policy and an at-will statement in an employee handbook required submission of the plaintiff's wrongful discharge claim to a jury.

The court also issued its opinion in a companion **Toussaint** doctrine case, **Dumas v Auto-Owners Insurance**, No. 83982. The 180 Dumas sales representative plaintiffs were separated into three groups. The plaintiffs challenged Auto-Owners' modification of a compensation formula claiming that they had been promised that a seven percent commission on all annual policy renewals would remain in effect "forever." The court determined that none of the three groups of plaintiffs had a valid claim and also specifically refused to extend the "legitimate expectations" prong of the **Toussaint** doctrine beyond the wrongful discharge context.

The first set of Dumas plaintiffs were told about the compensation formula during the hiring process. Since nothing had been said about the duration of the policy, however, the **Dumas** court found that no "express" promises had been made that it would remain in effect "forever." The second group of plaintiffs had been told at or before hiring about the policy and that it would remain in effect "forever." The court applied the Statute of Frauds to eliminate these plaintiffs' claims. The alleged contract — seven percent commission on policies renewed annually — could not be performed within one year, was not in writing, and was therefore void and unenforceable. The third set of plaintiffs were told **after** hiring that the commission formula would remain in effect "forever." The court stated that whether Auto-Owners' statements created contractual obligations depended on the "context and circumstances of the alleged promises." Finding "mutual assent" for the alleged promise lacking as a matter of law, the court upheld the dismissal of these claims. Both **Dumas** and **Rowe** send strong messages to practitioners that **Toussaint** claims based on oral statements are now subject to a tougher standard and will undergo greater scrutiny by the court.

Finally, the court in **Amalgamated Transit Union Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority (SEMTA)**, No. 85589, found sufficient evidence in the record to support the Michigan Employment Relations Commission's (MERC) ruling that SEMTA committed an unfair labor practice by unilaterally changing a "past practice" which had "ripened" into a term and condition of employment. Although SEMTA had the contractual right to discharge probationary employees at any time during the probationary period, it had been applying an established attendance policy to probationary employees. SEMTA's treatment of probationary employees' absences "ripened" into a term and condition of employment which SEMTA could not unilaterally change. The management rights clause was not a "clear and unmistakable" waiver of the union's right to bargain over the change. The court also held that arbitration of this same issue pursuant to the parties' collective bargaining agreement did not preclude the union's assertion of its statutory rights before MERC.

Michigan Court of Appeals Update

by Michael D. McFerren
Sachs, Nunn, Kates, Kadushin,
O'Hare, Helveston and Waldman, P.C.

STATUTE OF LIMITATIONS FOR HYBRID § 301 CLAIM NOT TOLLED BY GRIEVANT'S REQUEST FOR RECONSIDERATION OF UNION'S DECISION NOT TO PURSUE GRIEVANCE.

McCluskey v Womack, 188 Mich App 465 (1991)

This labor law decision arose in the context of a legal malpractice action. The Court affirmed the grant of summary dispositionto the defendant-attorney on the grounds that the six-month statute of limitations expired on plaintiff-grievants' private sector, hybride § 301 claim before the plaintiff retained defendant. The Court found that the request by grievant that his union reconsider its decision not to pursue a grievance does not toll the six-month limitations period where neither the union's collective bargaining agreement nor its constitution provides for an appeal of the union's decision not to pursue a grievance. This private sector decision complements an analogous public sector decision, **Silbert v Lakeview Education Association**, 187 Mich App 21 (1991), where the Court found that the six-month limitation period for hybrid claims under PERA was tolled by plaintiff-grievant's invocation of the union's explicit internal appeal procedure of the union's decision not to pursue a grievance.

The **McCluskey** Court also rejected the plaintiff's claim that the six-month limitations period should be tolled by the union's alleged "fraudulent conduct", where the plaintiff's allegations did not rise to the level of "fraudulent concealment" of plaintiff's claim under **De Haan v Winter**, 258 Mich 293 (1932).

THE SIGNIFICANCE OF THE FOLLOWING **TOUSSAINT** CASES MUST BE EVALUATED IN LIGHT OF THE SUPREME COURT'S RECENT RULINGS IN **ROWE v MONTGOMERY WARD & CO**, MICHIGAN SUPREME COURT NO. 84848 (JULY 31, 1991) AND **DUMAS v AUTO CLUB INSURANCE ASSOCIATION**, MICHIGAN SUPREME COURT NO. 83982 (JULY 31, 1991). SEE MICHIGAN SUPREME COURT UPDATE ABOVE.

EMPLOYEE WHO RELIES ON AN EMPLOYMENT HANDBOOK TO ESTABLISH JUST-CAUSE TERMINATION MUST COMPLY WITH HANDBOOKS' ARBITRATION PROCEDURE.

Zenick v RKA, Inc., 189 Mich App 33 (1991).

The Court found that the defendant-employer's motion for summary disposition should have been granted where an employee failed to pursue an arbitration procedure set forth in the defendant's employee handbook, and the employee relied on the handbook to support his claim of a "just cause" standard for discharge. The majority disregarded the employee's claim that he was unaware of the arbitration procedure because he had never been given the handbook.

It was unclear whether the Court found, as a matter of law, that the plaintiff must in fact have been aware of the arbitration procedure, or whether as a matter of law a plaintiff who relies on part of an employee handbook is bound by its obligations regardless of the employee's knowledge. Judge Wahls dissented.

COMPLETION OF PROBATIONARY PERIOD DOES NOT CREATE BY IMPLICATION A JUST CAUSE STANDARD: NO NEGLIGENT EVALUATION CLAIM.

Kostello v Rockwell Corp., 189 Mich App 241 (1991).

The Court affirmed a grant of summary disposition to the defendant-employer on the grounds that the mere creation of a probationary period does not give rise to the implication that, once the period is over, an employee may be discharged for just cause only. The Court also rejected the "negligent evaluation" theory of **Schipani v Ford Motor Co**, 102 Mich App 606 (1981), finding that where the breach of an alleged duty to evaluate is indistinguishable from the breach of an alleged employment contract, no independent tort claim exists.

Robert G. Howlett Memorial Lecture

co-sponsored by
Varnum, Riddering, Schmidt & Howlett
and
Michigan State University
School of Labor and Industrial Relations

Guest Speaker: Stephen I. Schlossberg, Director of the International Labor Office, Former U.S. Deputy Under-Secretary of Labor during the Reagan Administration and Former General Counsel for the U.A.W.

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Lecture: 4:00 p.m. - 5:00 p.m.
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Discrimination Issues In Arbitration

by Barry C. Brown, Arbitrator

Arbitrators ordinarily do not determine individuals' rights under state or federal anti-discrimination laws. Arbitrators are selected by the parties to a labor agreement to resolve disputes which have arisen under such contracts. They derive their power to interpret such contracts from the contract, not from statutory authority. However, in a submission of a dispute to arbitration the parties may agree to be bound by the arbitrator's interpretation or application of a statute, or the contract itself may require the arbitrator to apply certain laws incorporated by reference into the labor agreement. In such cases the arbitrator is bound to follow the contract and to interpret the referenced law.

Some arbitrators argue that even though a law has not been specifically incorporated into a labor agreement, the arbitrator has the power to consider all external statutes in making his decision. Arbitrator Archibald Cox stated this position:

> The parties to collective bargaining cannot avoid negotiating and carrying out their agreement within the existing legal framework. It is either futile or grossly unjust to make an award directing an employer to take action which the law forbids — futile because if the employer challenges the award the union cannot enforce it; unjust because if the employer complies he subjects himself to punishment by civil authority.
>
> **National Academy of Arbitrators**, 21st meeting 1968 (BNA)

However, the prevalent view about the application of external laws, like civil rights or handicapper legislation, was well expressed by Arbitrator Richard Mittenthal when he said that the arbitrator need not pass on all of the legal rights of the parties but he should determine if sustaining the grievance will require conduct forbidden by law and if it does the grievance should not be sustained. Cox, Bok & Gorman, **Labor Law**, 10th Ed. Foundation Press (1986) p 734.

Thus, arbitrators will often interpret federal or state anti-discrimination laws. Sometimes they do so by indirection, using the civil rights legislation, case law and administrative guidelines when he interprets and applies a broad anti-discrimination clause in a labor agreement.

The federal courts do not discourage the arbitration of employment discrimination claims. In fact, federal judges have taken a strong position favoring arbitration. In the leading case on this issue, **Alexander v Gardner-Denver**, the court stated the following:

> We think . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim **de novo**. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

However, in a footnote, the court in **Alexander** said:

> We adopted no standards as to the weight to be accorded in arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to any employee's Title VII rights, a court may properly accord it great weight. 94 S. Ct. 1011 (1974) at 1025. See also: **Gilmer v Interstate/Johnson Lane Corp.**, 111 S. Ct. 1647 (1991)

Many discrimination claims which come before an arbitrator are not labeled as such. Usually a member of a bargaining unit has protested some discipline which has been meted out or an employee has disputed a denied promotion or a forced retirement, or the like. The claim of discrimination based on race, sex, age, disabjlity, etc. is presented as the alleged wrongful motive of the employer. The discrimination charge is then ancillary to the primary charge of discipline issued without just cause or a claim of a violation of the employee's seniority or other court actual rights. A difficulty often arises when the discrimination claim has not been addressed in the grievance chain but it is added in the arguments before the arbitrator. The union advocate will claim that such argument is not new but it was implicit in the initial complaint and it is the result of a poorly drafted grievance. The employer advocate will assert that this is an entirely different theory and it amounts to a new grievance and therefore the arbitrator should not hear that issue. The outcome will depend on the facts of the case but generally a claim of discriminatory motives will be heard in most grievances even if that topic was not brought out in the original grievance or discussed specifically in the grievance chain.

Also, in some cases, it may appear that the whole arbitration process is a prelude to litigation to follow on some civil rights issue, which can cause problems in the hearing. Can the grievant's attorney in civil rights litigation be present at the arbitration hearing? Can the EEOC investigating officers compel their attendance to evaluate the case or to determine that the hearing is being fairly conducted? The courts have uniformly held that **the parties** determine who can attend their arbitration hearings. Outside attorneys and government agents may be excluded. Sometimes the parties may be wiser to allow such people to attend. The union may defer to the outside attorney and allow that person to represent

Continued on page 8

DISCRIMINATION ISSUES IN ARBITRATION — *Continued from page 7*

the grievant. This could avoid future claims that the union failed to give that member fair representation. Additionally, by allowing a government official to view the proceedings the parties may demonstrate the evenhanded handling of the grievant's case. The arbitrator will abide by the parties' wishes but only **one** spokesperson for each side will be allowed.

There is an advantage for the discharged grievant/plaintiff in having his case first heard in the arbitration forum. The employer must proceed with its proofs to show just cause for the discipline issued. This is to be contrasted with a Title VII or state civil rights action wherein the plaintiff must proceed to show a **prima facie** case of disparate treatment. Further in those situations where there is an employment practice which is facially neutral but which falls more harshly on one group than another, the union will go first but a showing of the disparate impact will shift the burden of proof to the employer to justify its action by a business necessity or a bona fide occupational qualification. In this regard we have recently seen how a safety and health justification was not acceptable to exclude women from certain jobs (**UAW v Johnson Controls, Inc.**, 111 S. Ct. 1196) and how a city's residency requirement may be held to be a discriminatory practice. **United States v City of Warren**, 759 F. Supp 355 (E.D. Mich. 1991).

When a charge of discrimination is raised in the grievance procedure the union has the burden to show that the employer had such bad faith motives and that such conduct violated the labor agreement. The proof must be clear and convincing and not based on rumor, conjecture and surmise. We are dealing with motives here, and intent is always very hard to prove. However, the union must present facts in testimony and documents which establish the employer's discriminatory purpose in its actions. Racial or gender slurs by management personnel to the grievant or at other times and places could establish a frame of mind and a disposition to base employment decisions on race, sex, etc. rather than on objective factors. Statistics showing disparate treatment or impact may also be convincing, especially if there is no rational justification of the facts which are presented in rebuttal by management. Compare: **Gilty v Village of Oak Park**, 919 F. 2d 1247 (CA 7, 1990).

The union's case may be materially strengthened by statistical proof that certain employee policies represented disparate treatment or resulted in a disparate impact. However, there are many problems in gaining the kind of proof necessary to establish unlawful discrimination in an arbitration hearing. First, many times the advocate for the union is not an attorney and this may affect the technical quality of the evidence generated. Secondly, the arbitrator in most instances has no subpoena power and there is no discovery process in most arbitration procedures. The needed facts are in the employer's possession and often management is less than cooperative in providing such data. Finally, in some cases the union may have been a part of the discriminatory process and thus the union's advocate will not wish to present documents which show its active or unwitting role in the alleged disparate treatment. An expert witness on disparate impact proofs and statistical analysis might know what to ask for and how to sort out the data to make a case; therefore unions sometimes retain such individuals in disparate impact grievances.

In a discipline case the employer's proofs will often relate to the reasonableness of the rule allegedly violated by the grievant and to the evenhandedness of management's administration of the relevant rule. Management will also try to dispel any suspicion that the punishment was motivated by any prohibited bias or that there was an unlawful discrimination in the uniformity of dispensing punishment for rule violations. When it is the union's turn to cross-examine witnesses or to present its case, it will attempt to prove discrimination and to show the reasons offered by management are pretextual. It will challenge the employer's purported good faith motives, try to show bias or at least create doubts about the real reasons for what was done, and attempt to prove the grievant was singled out and the punishment was disproportionate and unfair because of his/her minority, gender or disabled status.

In grievances concerning alleged contract violations the union presents its case first and here the advocate will seek to show that the supervisor's real reason to promote a junior employee or to deny a contract benefit, etc. was race, sex, or other prohibited criteria. As previously stated the union must do more than make inferences and give unsupported conclusions. Often showing an apparently unfair or arbitrary result will force the employer to dispel the conclusion that the supervisors involved had ulterior motives for their actions. Thus, in promotion, transfer, sick leave, reinstatement, work assignment, and similar cases, the showing of a prima facie case of disparate treatment will throw the burden of proof back to the employer.

The discrimination cases in which arbitration is the least effective remedial method are those in which the application of the principle of seniority is challenged by an under-represented group. Blacks and women have found that arbitrators regularly enforce the contract language and they continue the past practices of the parties. Challenges of such elements representing the status quo may be best done in the courts. Additionally, the grievance procedure is not the proper forum to challenge hiring practices because labor agreements rarely deal with hiring and most often the selection of new personnel is a right reserved exclusively to management.

SPECIFIC APPLICATIONS

This arbitrator has seen an increase in the number of sexual harassment arbitration caes in the last four years. In recent years employers have been required by statute to provide a work environment free of offensive and intimidating sexual references and advances (42 USC 200 (e) (2) (a) (1) (1981). Thus, employees have more often been fired for

Continued on page 9

DISCRIMINATION ISSUES IN ARBITRATION — *Continued from page 8*

violating the employer's rules against sexual harassment and such cases are frequently appealed to arbitration. Other similar grievances arise when women complain that their male supervisor has subjected them to sexual harassment, by word or deed, or withheld job entitlements because sexual favors were not granted. Defense efforts to show that the woman "welcomed" her male co-worker's advances may be seen by other female union members as a forfeiture of **their** rights to a workplace free of such harassment. Often there is a gender split of witnesses who tell radically different stories about what was accepted "shop talk" and what was considered to be accepted "kidding around" in the work place. See **Meritor Savings Bank v Vinson**, 477 US 57 (1986).

A variety of charges may demonstrate a hostile environment for women employees because of sexual harassment by their male co-workers. The fact that a woman had tolerated harassing comments or prior improper conduct does not mean that they were welcome. Certainly, a period of forebearance does not prevent the victim from later raising a complaint. A woman may welcome one man's advances while similar conduct by another is clearly unwelcome and actionable as sexual harassment. The employer has a duty to take action when such misconduct is brought to its attention. An arbitrator's award which ignores EEOC guidelines in this area is subject to reversal by the federal courts. **Newsday, Inc. v Long Island Typographical Union**, 915 F.2d 840 (CA 2 1991).

Arbitrators will note that a new "reasonable woman" test is being fashioned by the courts as a standard to determine if there has been sexual harassment or if the employer has allowed a "hostile work environment" to exist. Previously arbitrators and courts would consider if a reasonable "person" would justifiably have been offended by the complained of conduct. **Tampa Electric Co.**, 88 LA 971 (Vause, 1986); **Rabidue v Osceola Refining Co.**, 805 F 2d 611 (CA 6 1986). Now the victim's perspective is tested by a gender-oriented criteria to decide whether she was unlawfully harassed at work, and a single incident of sexual harassment may be sufficient evidence to get a case before a jury. **Radtke v Everett**, 189 Mich App 346 (1991). Compare: Monat & Gomez, **"Sexual Harassment: The impact of Meritor Savings Bank v Vinson on Grievances and Arbitration Decisions"** 41 ARB J. 24 (1986).

Most other gender-related cases have to do with employment policies and practices which tend to prevent women from holding jobs previously held by only men. The difficulty in these disputes is the wide gulf in philosophies. The union and the grievant most frequently will argue that only a basic threshold of qualification need be established because all minimally qualified employees will produce similar results on the job. The employers will counter this vehemently by stating that they should be allowed to select the **best** qualified candidate because if they do so the top applicant's job performance will be far superior. An arbitrator must hear such polarized arguments and determine which best conforms to the contract language under the facts in a particular case. **Heublein Inc.**, 84 LA 836 (Tait, 1985).

In the area of handicapper rights the case law is new and still developing. As stated earlier, arbitration rarely involves hiring issues, so handicapped people who file grievances are already employees who are disabled and have grieved to be assigned according to their impaired abilities or in spite of their disability, often upon returning to work after medical or worker compensation leaves. **Potomac Electric Power Co.**, 87-1 ARB 8147 (Harkless, 1986). Most handicapper cases involve what is a reasonable accommodation and/or what is an unsafe condition on a job held by an employee with limited physical or mental ability. **U.S. Steel Corp.**, 82 LA 913 (Dybeck, 1984).

Contract provisions often limit the number and the duration of incumbents on light duty jobs. The Americans with Disability Act (ADA) has added a new dimension to such considerations (42 USC 12101 et seq). Some aspects of the ADA will not take effect immediately but its definitions differ from those used by the Michigan Department of Civil Rights. For example a disabled person is defined as one who is qualified to perform the essential functions of a position with or without reasonable accommodation. The term reasonable accommodation may include job restructuring, altering facilities or changing work schedules. The new test for an undue hardship in making accommodations may be difficult for employees to satisfy.

Employers in recent years have become much more reliant on facially objective factors in making personnel decisions. This practice has been recently challenged because of its disparate impact on some employees. Often any derogatory material in an employee's personnel file is advocated as an impartial and relevant matter when determining who is best qualified for a promotion. This has prompted more grievances and often more arbitration cases in which an employee challenges written reprimands or customer complaints which have been placed in that employee's personnel file. The employer has the burden to prove the relationship between the selection criteria and eventual job performance. The arbitrator must sort out these divergent views to determine if an unsuccessful candidate was unjustly and arbitrarily denied a promotion. **Phillips Consumer Electronics Co.**, 88-2 ARB 8513 (Nolan, 1988).

Selection criteria used in promotions or transfers are often the topic of grievances. The issues in dispute are the relevancy of certain factors and the evenhandedness of application. Often tests of on-the-job skills are used for specialized, higher-paying assignments. The persons excluded from temporary assignments to such jobs will often claim that favoritism, sex bias, or racial bias was the real basis of their exclusion. If a **prima facie** disparate impact is shown then it is up to the employer to justify such selections. The employer can defeat grievances regarding tough entrance requirements at a lower level job if progression to the higher

Continued on page 10

DISCRIMINATION ISSUES IN ARBITRATION — *Continued from page 9*

skilled assignments is consistently automatic, but always must show how its legitimate purposes are served by the selection device used. **Wards Cove Packing Co. v Antonio**, 109 S. Ct. 2115 (1989).

Under compulsory interest arbitration statutes covering certain public safety employees (in Michigan, 1969 P.A. 312), arbitrators may be charged with determining new contract language in such cases, they have the unusual opportunity of legislating contract language. In this capacity an arbitrator may be faced with affirmative actions issues or determining if a residency requirement or a seniority-based promotion system has an unlawful disparate motive or impact. (Compare: **City of Toledo, Ohio**, 87-1 ARB 8123 (Feldman, 1986)).

Recent Cases in the 6th Circuit Court of Appeals and Michigan Federal District Courts

by Mark T. Nelson and Robert A. Boonin
Butzel Long

EARLY GM RETIREES MAY HAVE A CONTRACT CLAIM FOR HEALTH CARE BENEFITS.

Sprague v General Motors Corp., Civil Action No. 90-CV-70010, E.D. Mich., July 29, 1991 (Feikens, J.)

One hundred-thirteen plaintiffs representing 84,000 salaried General Motors retirees and their spouses brought a class action against GM seeking basic health care coverage for their lifetimes and their surviving spouses' lifetimes at no cost to the retirees. The group of retirees consisted of both "general retirees" and "early retirees." Plaintiffs based their claims upon a provision found in the retirement plan summary booklets provided by GM which stated:

> Your [the retiree's] health care coverage will be provided at GM's expense for your lifetime.

These same summary booklets also contained provisions similar to the following:

> GM Health care coverages have been changed from time to time through the years and are subject to change in future.

GM changed its retirement plan in 1988 reducing or eliminating certain items that GM's health care previously covered. Plaintiffs alleged the following causes of action against GM: a) the 1988 changes in the health plan violated ERISA §§ 402, 502(a)(1)(B) and 502(a)(3); b) the 1988 changes constituted a breach of GM's fiduciary duties under ERISA § 404; c) the 1988 changes constituted a breach of contract; and d) equitable or promissory estoppel precluded GM from enacting such changes.

The Court granted GM's motion for summary judgment as it pertained to "general retirees," but not as it pertained to "early retirees." The Court also denied Plaintiffs' motion for summary judgment with respect to the early retirees. Applying the Sixth Circuit holding in **Mutso v American General Corp.**, 861 F.2d 897, 900 (6th Cir. 1988), the district court held that GM did not create a "private design" to vest a certain level of health care upon retirement, because the summary booklets set forth GM's right to modify the health care coverage it provided. The district court put little weight on the 1974 booklet that did not contain the clause stating GM's right to modify the plan. Thus, the district court held that GM's 1988 changes did not violate ERISA, because the medical benefits never vested in the retirees.

The District Court, citing **Adams v Avondale Industr., Inc.**, 905 F.2d 943, 947 (6th Cir. 1990), granted GM's motion for summary judgment pertaining to plaintiffs' breach of a fiduciary duty claim because "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan."

On the breach of contract claim, the District Court held that the early retirees did state a cause of action for breach of contract. The Court reasoned that a bilateral contract may exist between GM and the early retirees because the early retirees had agreed to release GM from liability for certain causes of action (**e.g.**, age discrimination) in exchange for a particular level of health care coverage and thus GM may have agreed to vest medical benefits in the early retirees. GM argued that ERISA preempted the early retirees from stating such a claim. Plaintiffs contended that early retirement agreements are enforceable bilateral contracts under ERISA, citing **Firestone Tire and Rubber Co. v Buch**, 489 U.S. 101 (1989). However, the Court denied plaintiffs' motion for summary judgment on this issue because general issues of material fact still existed (**e.g.**, terms of contract). The general retirees had no such contract with GM, and thus their health care benefits did not vest upon retirement. The District Court did not address plaintiffs' equitable estoppel claim. The following questions of law were certified to the Sixth Circuit for resolution:

a. Did the District Court properly find, as a matter of law, that benefits under GM's health care plan for salaried retirees did not vest upon retirement?

b. If so, can early salaried retirees of GM state a cause of action under ERISA to enforce claimed vested care benefits evidenced by bilateral contracts?

FAILURE TO MEET EMPLOYER'S PERFORMANCE EXPECTATIONS IS FATAL TO PLAINTIFF'S ABILITY TO ESTABLISH PRIMA FACIE CASE OF DISCRIMINATION.

Ang v Proctor & Gamble, Co., 932 F.2d 540 (6th Cir. 1991).

Plaintiff, an Indonesian, brought suit alleging that his termination was because of his race and national origin, and

Continued on page 11

RECENT CASES IN THE 6TH CIRCUIT COURT OF APPEALS AND MICHIGAN FEDERAL DISTRICT COURTS — *Continued from page 10*

in retaliation for his raising a concern that his exclusion on committees was discriminatory. Plaintiff had been employed by Proctor & Gamble for 14 years and had received numerous marginal evaluations which included concerns that his cultural background interfered with his performance. Toward the end of his tenure he was repeatedly counselled about his abuse of the Company's special electronic mail system, and engaged in numerous time consuming and what were deemed petty disputes with management and co-workers. Defendant's motion for summary judgment was granted as to the race and retaliation claims, and after hearing, the national origin claim was also dismissed. Plaintiff appealed these rulings.

The Court held that the Section 1981 race claim was properly dismissed because Section 1981 only applies to making and enforcing contracts. It also found that the lower court properly dismissed plaintiff's Title VII race discrimination and retaliatory discharge claims. When plaintiff filed his EEOC Charge, he only identified "national origin" as the type of discrimination involved. By failing to identify race or retaliation on the Charge, the Court held that plaintiff essentially failed to exhaust the administrative remedy. As to the retaliation issue, the Court also stressed that the incident occurred prior to the filing of the EEOC Charge. Significant to the Court was the fact that plaintiff had the assistance of counsel when he filed his EEOC Charge.

Finally, the Court affirmed the lower court's dismissal of plaintiff's national origin claim. The Court held that plaintiff did not satisfy the elements of a **prima facie** case because he failed to meet his employer's expectations. Plaintiff's constant criticisms of management, refusal to cease abusing the electronic mail system, unduly requiring management to deal with his grievances and personal problems and poor evaluations all established that his work was unsatisfactory to his employer. The business judgment resulting in this conclusion is not subject to review, and even if the direct evidence of discrimination would make out a **prima facie** case, the employer had the same legitimate reasons for its action. The Court also noted that there was no evidence to support plaintiff's claim that he was terminated because of his language difficulties.

UNION SIGNATORY CLAUSES HELD TO BE UNFAIR LABOR PRACTICE.

General Truck Drivers, Chauffeurs, Warehousemen and Helpers of America, Local 957 v NLRB, 934 F.2d 732 (6th Cir. 1991).

A highway construction contractor was covered by a multi-employer collective bargaining agreement which defined "on-site work" as including the hauling of waste from one project to another. The contract also had a provision requiring all on-site work to be performed by or subcontracted to employers who are parties to an agreement with the union. The contractor in this case utilized non-signatory owner-operators to haul torn-up asphalt to a recycling center. The union sought to prohibit this action under the above provisions. In response, the employer filed an 8(e) Charge with the NLRB contending that the effort was contrary to the statutory proscription against union signatory clauses. The NLRB found that the union was acting contrary to law, and the union appealed to the Sixth Circuit.

The Court of Appeals affirmed and held that, contrary to the union's claims, the clause requiring the paving contractor to only give subcontracting work to signatories of the agreement was a generally proscribed "union signatory clause" as opposed to a permissible "work preservation clause." The next issue, therefore, was whether the signatory clause fell within the Section 8(e) construction proviso allowing such limitations to the extent they pertain to on-site work. Since the truckers only spent ten percent of their time on the job site, the Court held that the proviso did not apply. Therefore, the NLRB's Order was enforced.

MERC Update

by Kathryn A. VanDagens
White, Beekman, Przybylowicz, Schneider & Baird, P.C.

Fraser Public Schools, MERC Case No. R90 K-254 (June 14, 1991).

A union's ballot party held during the time period after mail ballots were sent to employees and before they were to be returned did not interfere with the employees expressing a free untrammeled vote as to whether or not they wish to be represented. By the time the ballot party was held, the majority of employees had already returned the ballots, and at the party there was no mention of the ballots and voting was not discussed.

However, MERC admonished all persons involved with MERC mail ballots relative to representation elections that meetings of employees called by either party to the election where the mail ballots of the employees are present are fraught with the possibility of causing MERC to overturn the election should there be any evidence of coercion or interference that should make the result suspect. However, the facts in this case did not indicate such interference.

Kent County -and- Kent County Sheriff, MERC Case No. C88 G-185 (June 20, 1991).

An employer is not required to turn over to the union copies of disciplinary reports. Relying on its earlier decision of **Michigan State University**, 1986 MERC Lab Op 409, MERC held that the information requested by the union in this case fell within the confidentiality exception defined in that decision. In **Michigan State University**, MERC held that

Continued on page 12

MERC UPDATE — *Continued from page 11*

requested information relating to union members is presumed to be relevant and should, therefore, generally be turned over to the union representative. However, exceptions exist for confidential information or information readily available to the union from other sources.

Here, MERC held that internal investigations conducted for the purpose of determining whether or not there was employee misconduct fall within the confidential information exception and the employer is not required to turn them over to the union.

Residential Systems Co, MERC Case No. C88 C-68 (June 27, 1991).

The employer committed an unfair labor practice when the five strongest supporters of a union were terminated, compelled to resign or transferred immediately after testifying at an NLRB hearing on behalf of the union. MERC overturned the Administrative Law Judge's decision finding no violation after reviewing the reasons proffered by the employer for actions taken against the individual employees. It analyzed the case as a mixed motive or pretextual one and found that the employer's controlling motive was to eliminate the principal union supporters. MERC ordered the employer to cease and desist from its discriminatory action and to make whole all employees who were found to have been discriminated against.

One employee resigned her position because she believed she would be terminated. MERC found, however, that there was insufficient evidence that the employer's actions rose to the level of constructive discharge so it did not order a remedy requiring her reinstatement. However, it did find, with respect to the same employee, that, withholding a letter of recommendation necessary for her to obtain subsequent employment was discriminatory and ordered a remedy for that action.

City of Detroit (Fire Department), MERC Case No. C88 E-96 (July 24, 1991).

The employer failed to bargain in good faith when it authorized a payroll deduction for an independent organization to which some employees belonged without bargaining with Charging Party. MERC found it unnecessary to determine whether the deductions for the independent organization were "dues" or "donations" to a charitable organization. In either case, a payroll deduction is a benefit to an employee which is not required by law and, as such, must be bargained with the exclusive bargaining representative prior to being provided to employees. Additionally, MERC upheld the Administrative Law Judge's finding that the employer had bypassed the exclusive representative and dealt with the independent organization on this matter. It did not matter whether the independent organization met the definition of or sought to function as a labor organization within the meaning of PERA.

MERC ordered the Respondent to rescind all payroll deductions on behalf of the independent organization, to give notice to the Charging Party before soliciting or making any payroll deductions from the wages of its employees and to post notices. MERC refused to refund the funds collected pursuant to the payroll deduction or to award attorney fees.

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