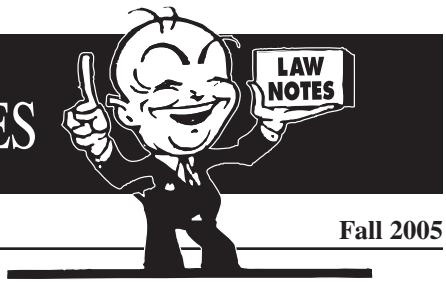
LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES



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SETTLEMENT AGREEMENTS FROM A TO Z (Part 1)

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I. INTRODUCTION

Negotiating and drafting settlement agreements in the context of employment disputes most often focuses on monetary compensation and other forms of consideration. From the employee's perspective, settlement discussions are a highly emotional process directly affecting his or her livelihood and future. For the employer, the process involves a multitude of competing business interests. From either angle, it is crucial that the parties memorialize all material terms of any settlement agreement in writing. This article addresses significant terms and provisions that most often appear in settlement agreements arising out of the employment context.

II. SETTLEMENT AGREEMENT TERMS

The scope of a settlement agreement is determined by the intent of the parties as expressed in the release. *Rinke v. Automotive Moulding Co.,* 226 Mich. App. 432, 435; 573 N.W.2d 344 (1997). If the text of the release is unambiguous, the parties' intentions will be ascertained from the plain meaning of the release's language. *Id.* Therefore, the parties should try to stick to simple, plain English when drafting an agreement.

As indicated by MCR 2.507(H):

> An agreement or consent by the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it is made in open court, or unless evidence of the agreement is in writing subscribed by the party against whom the agreement is offered or by the party's attorney.

A. Release Language, Permissible Scope, and Mutuality

Two of the most significant components in any settlement agreement are the release of all parties and the release of all claims. From the employer's perspective, it is imperative to name all affiliated or parent corporations, managers, employees, *etc.,* even if not named specifically in the underlying claim(s). *See, Colucci v. Eklund,* 240 Mich. App. 432; 613 N.W.2d 402 (2000) (upholding the release of other employees although employees were not parties to the release).

Some things generally cannot be released, including unemployment compensation and workers' compensation claims, as well as the right to file a discrimination charge with the Equal Employment Opportunity Commission or cooperating with the Equal Employment Opportunity Commission. 29 CFR §1625.22(i)(2); *EEOC v. Citicorp Diners Club,* 985 F.2d 1036 (CA 10 1993), and *EEOC v. SunDance Rehabilitation Corp.,* No 1:01 CV 1867, US Dist LEXIS 14318 (ND Ohio, July 26, 2004).

Most often, plaintiff's counsel will attempt to obtain a mutual release. A mutual release emphasizes that the parties are actually and forever done dealing with each other. Further, and of particular importance to individual plaintiffs, mutuality in the release recognizes the dignity of both parties in the process.

B. Consideration

Severance Pay. When an agreement is negotiated prior to an employee's termination and subsequent to litigation, it will generally provide for some sort of severance pay to the employee as consideration for the employee's promises to release the employer and leave his or her employment. Severance pay language ordinarily addresses the following points: (1) the amount of the severance payment; (2) the structure of the payments (one lump sum or smaller sums paid over time); (3) the timing of the payment; and (4) how the payment will be categorized (income, pain and suffering, etc.).

The agreement should also contain a safe harbor provision for the employer in the event a payment is late:

> If the Employer fails to make any of the payments provided for in this letter by the date indicated for such payment, interest on the unpaid amount will become due and owing at the rate of one and one-half (1.5) percent per month until paid.

Accrued Vacation. If applicable, the agreement should provide for a specific amount to be paid for accrued vacation and the time by which such amount should be paid. This is preferable to the agreement simply providing that an undetermined amount of accrued vacation will be paid.

From the plaintiff's perspective, one way to handle vacation pay is for the agreement to provide:

> Your last day of work will be Friday, June 3, 2005. Because of accrued vacation, you will remain on the payroll for all purposes for an additional four weeks until Friday, July 1, 2005.

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STATEMENT OF EDITORIAL POLICY

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

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

SETTLEMENT AGREEMENTS – A TO Z

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Bonus Plans. The parties should consider the effect, if any, of bonus plans. Are there bonus amounts to which the employee has a vested right? What is the past practice or are there any written bonus plans in effect?

Business Expenses. The document should provide what will be done to reimburse the departing employee for valid business expenses, including expenses already incurred and those for which the employee has not yet sought reimbursement.

Commissions. The document should address the status of any commissions the employee claims are due and owing. The document should also clarify whether the employee has claims to any future commissions, and the terms under which such commissions will be paid. Certainly, the employer will want to include a provision confirming it has paid the departing employee for all commissions if that is the case.

Consulting Agreement. In some situations, the parties might enter into an agreement for the ex-employee to provide future services for the employer as an outside consultant. This type of arrangement can be identified in a Settlement Agreement through a provision similar to the following:

> The Employer further agrees to retain Jane Smith as an outside consultant pursuant to the consulting agreement between the parties, a copy of which is attached hereto as Exhibit A.

Disability Insurance. The document might provide for some continuation of disability insurance. At a minimum, the document should specify what insurance continues, under what terms, and at whose expense.

Health Insurance. The document should describe the parties' positions concerning health insurance, even if only to reiterate the plaintiff's COBRA rights. The document might provide for a continuation of health insurance at the expense of the employer:

> The Employer will provide the Employee, beginning May 1, 2005, and at the Employer's expense, 18 months of COBRA continuation coverage under the Employer's medical/health insurance.

Non-Retaliation. In some circumstances, especially with an incumbent employee, the agreement might provide for non-retaliation. Sample non-retaliation language might read as follows:

> The Employer agrees that it will not retaliate against the Employee because of any allegations involved in this Agreement.

Outplacement Assistant. The agreement may also provide for the employee to receive direct payment for the amount that would otherwise be paid by the company for outplacement assistance. The provision may read as follows:

> The Employer will pay to Mr. Smith $10,000.00 for job search counseling and expenses upon signature of this Settlement Agreement and Release.

Pension and 401(k) Plans. The agreement should provide that no vested pension or benefit rights are waived or released. This would prevent an accidental waiver of rights which the employee might reasonably have to some medical insurance benefits as well as 401(k) and pension plan benefits.

"Case settled!"

The following passages are samples of language addressing this topic:

> This agreement does not release or waive: (1) your vested rights and benefits under any pension or welfare benefit plans, (2) any rights you may have under any liability insurance policy, including directors' and officers' liability, or under any policy or practice with respect to indemnification of directors, officers, or employees, and (3) your rights under this letter.
>
> This Agreement shall have no effect on the Employee's vested pension or retirement rights other than making appropriate contributions.

Perquisites. Employers may also want to address certain other "perks" of the job in the settlement agreement:

> The Employer shall provide for you and your surviving wife during your respective lives, and free of charge, complete Country Club memberships, including free dues and other fees for you, your surviving spouse, and your immediate family and maximum three guests, employee discounts and charging privileges, free golf privileges for you, your spouse and immediate family members.
>
> Until July 1, 2006, you will be entitled to an eighteen (18) percent discount on any Company real estate that is for sale and that you wish to purchase.
>
> The Employer agrees to name, by May 1, 2005, the campus ABC building the "John Smith Building," and to continue to bestow that name upon another appropriate building should the ABC building be destroyed.

Other perquisites might include company automobile, cell phones, condo and time-share utilization, fax machine, and temporary office space or other related amenities.

Reinstatement. Under certain circumstances, the agreement might provide for reinstatement of the employee:

> The Employee will return to work on July 1, 2005, in the position of Executive Secretary to the new Financial Vice-President so long as she performs her job duties in a satisfactory manner for ninety days, with the expectation that she would remain in that position as an employee-at-will thereafter. Other than the ninety-day satisfactory performance provision, nothing in this paragraph is intended to reduce, diminish or enhance the employment rights and prerogatives, which the Employee had, if any, prior to July 1, 2005.

Relocation Costs. The document should also specifically describe what, if any, relocation costs are to be paid by the employer.

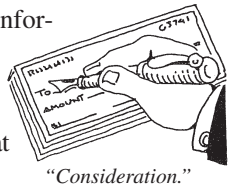
Return of Property. The agreement should also account for and document the return of property from the employee to the employer:

> Employee shall return all Company identification cards, keys, files, customer files, product, financial, marketing, and other business information belonging to the Company, and any other property belonging to the Company that she may have in her possession. This shall include but not be limited to the Company vehicle issued to her. By signing this Agreement, Employee acknowledges and confirms she has returned all property belonging to the company.

Stock Options. The settlement agreement should also describe the present status of all stock options, including the non-existence of certain options. The employer may also, through the settlement document, provide for the extinguishment of certain options, or set a timetable by which others must be exercised.

Unemployment Compensation. If applicable, the agreement may clarify that the employer will not contest or do anything adverse to the employee's unemployment compensation claim. It is helpful if the agreement provides the specific language that the employee will utilize in her claim and the specific language that the employer will provide to the unemployment agency in response to information requests:

> The Employer will provide accurate information regarding your earnings, but otherwise will not do anything, directly or indirectly, to dispute or contest any unemployment compensation claims that you might file.


"Consideration."

C. COBRA

Settlement agreements should describe how COBRA payments will be handled for the employee. Responsibility for COBRA payments is a significant concern to most employees, and the topic is often addressed in settlement agreements:

> Employee has certain rights to continuing health care benefits coverage under COBRA continuation coverage. The Company will pay the cost of COBRA continuation coverage for Employee's health, vision and dental insurance until the end of July 2005, or until Employee accepts full-time employment, whichever occurs first. The Company shall have no further obligation concerning Employees' fringe benefits or other incidents of employment, except to provide Employee with the required COBRA notice of his right to obtain continuing health benefits coverage. It shall be Employee's responsibility to apply for COBRA continuation coverage and, following the Company's period of payment, to pay for the COBRA continuation.

COBRA applies to most employers with twenty or more employees. Qualified beneficiaries usually include spouses and dependent children. 29 USC §1167(3).

(Continued on page 4)

SETTLEMENT AGREEMENTS – A TO Z

(Continued from page 3)

Qualifying events that trigger COBRA's notice provisions include termination of employment for any reason other than gross misconduct. 28 USC §1163.

The maximum coverage period is 18 months for termination or reduction of hours. The maximum coverage period is 36 months for death, divorce, or separation. 24 USC §1162(2)(A).

COBRA permits the court to assess statutory penalties against the plan administrator for failure to comply with the notice requirements. 29 USC §1132(C)(1).

D. Admissions

Settlement agreements often contain clauses in which the employer disclaims any liability for, or admission of the underlying allegations. However, certain claims cannot be waived, such as claims under the Fair Labor Standards Act ("FLSA"). As a result, the parties may want to consider having the employee acknowledge certain factual circumstances:

> Employee acknowledges and confirms that, as of termination date, she has received all compensation from the Employer to which she is entitled, and no additional compensation is due and owing.

A standard non-admission clause might read like one of the following:

> The parties understand that this agreement is to be regarded as a "no-fault" settlement, and, as such, this agreement is not intended and will not be construed to constitute an admission or statement by either party as to the validity or invalidity of any legal or factual contention advanced in this matter. This agreement is not to be cited as evidence of discrimination or as background information in any other case or dispute involving the employer or its employees.

> It is further agreed and acknowledged that the consideration for this Agreement is provided solely to purchase peace and that the Company does not hereby admit any liability on account of any said claims or matters, but expressly denies all of such liability whatsoever.

If there are counterclaims pending against the employee, or the employee is concerned about allegations of wrongdoing, he or she will likely demand a mutual release of claims.

E. Confidentiality and Its Limits

Most employers demand confidentiality provisions in settlement agreements and releases. These provisions may be drawn so narrowly that they prohibit only the settling employee from discussing the settlement amount, or so broadly that the settling employee is prohibited from revealing any information gleaned during the course of his or her employment.

At a minimum, confidentiality provisions should include three components. The first component involves confidentiality of the agreement. The second component should provide for a specific statement that the parties will give if questioned about the claims, (*e.g.,* "the parties have amicably resolved their dispute"). Finally, from the employer's perspective, there should be some penalty assigned for violations of the confidentiality provisions.

The employer should also push to have the employee's spouse and attorney agree to the confidentiality provisions.

From a practical standpoint, it is also important that the confidentiality clause make exceptions for certain disclosures:

> Employee covenants that, at no time prior to the date of the signing of this Agreement, she has reviewed, discussed, or disclosed, orally or in writing, the existence of the Agreement, the negotiations and discussions leading to the Agreement, or any of its terms or conditions with any person, organization or entity other than her spouse, attorney, or tax consultant. Employee further agrees that from the date of signing this Agreement onward, she will keep the existence of this Agreement, the negotiations and discussions leading to this Agreement, and the terms and conditions of this Agreement strictly confidential and, except as may be required by law, will not review, discuss or disclose, orally or in writing, the existence of this Agreement, the negotiations leading to this Agreement, or any of its terms or conditions with any persons, organization, or entity, other than her spouse, attorney, or tax consultant, on the condition that disclosure by such persons shall be deemed a breach of this Agreement. If inquiries arise concerning Employee's dispute with Employer or this Agreement by anyone other than those listed, Employee will simply state "the matter has been resolved" and will make no further comment. If Employee is required by law through subpoena or otherwise to disclose information described in this paragraph, she will immediately contact Employer's Attorney to inform her of that fact and to provide Employer an opportunity to challenge the legal process which Employee believes would result in the disclosure of such information.

> You agree that you will not disclose to others, except your immediate family, attorneys, and tax advisers or officials, the terms of this letter, other than as required by law.

> The Employer agrees that it, its officers, directors, agents, attorneys, and the following named individuals: Jane Doe and John Smith will not disclose the existence or terms of this agreement to any person inside or outside of the Company, other than to those having a material and legitimate business necessity for the information.

Alternative language might read:

> The parties agree to keep the terms of this settlement agreement confidential. For the purposes of this agreement, "confidential" means the facts and issues of the underlying complaint and the terms of this agreement shall not be disseminated, discussed, or commented upon to anyone other than Employer officials having a need to

know in order to implement this agreement. However, the Employee may disclose the terms of this agreement to her immediate family members, tax preparers, taxing officials, attorneys, and as otherwise required by law.

F. Dismissal and Withdrawal of Claims

The agreement should specify that the underlying lawsuit or charge will be dismissed with prejudice by a date certain:

> Employee agrees to direct her attorney to take all steps necessary to enter an Order of Dismissal with prejudice and without any award of costs or attorneys' fees to either side with respect to Employee's claims currently pending against Employer in the Federal District Court for the Eastern District of Michigan. The stipulation to said Order must be in the possession of Employer's counsel prior to any amounts being paid by Employer.

Of course, if there is a stipulation of dismissal pursuant to Federal Rules of Civil Procedure 41, there might not be an order of dismissal.

G. Non-Disparagement

After an employment separation, both parties are often concerned that the other side will make disparaging comments. Aside from the legal protections afforded by defamation claims under State law, the settlement agreement often addresses disparagement issues:

> As a material inducement for Employer to enter into this Agreement, Employee agrees that she will not: (i) make any negative or disparaging comments about Employer, its directors, board members, officers, employees, volunteers, affiliates, attorneys consultants, and agents, and their respective heirs, executors, administrators, successors and assigns; and will not (ii) directly or indirectly, disclose disseminate, or use any confidential information concerning the Employer.

A mutual non-disparagement provision might read as follows:

> Employer and Employee agree that from this time forward they will refrain from making any defamatory or derogatory remarks about the other, or any person associated with or representing the other. Employer and Employee further agree that from this time forward they will not make or repeat any allegation of illegal, immoral, unethical, or improper conduct about the other, unless ordered to do so by a court of competent jurisdiction or otherwise required by law.

H. Neutral References and the Employee's Personnel File

It is not uncommon for a departing employee to request assurances that the employer will provide a neutral reference to future potential employers. Such a reference typically includes a simple verification of the position the employee held and the employee's dates of employment. Failure of an employer to comply with this term may result in the former employee bringing claims for breach of the settlement agreement, defamation, and/or tortious interference with a business relationship:

> Employer, upon written request from Employee, will provider her with a written neutral reference indicating her dates of employment, job title and salary history with Employer.

From the employee's perspective, an attempt should be made to obtain more favorable language than the above. A more desirable provision might read:

> The Employer will refer all inquiries or requests for information regarding you or your employment to the Director of Human Resources, who will not make any disparaging remarks concerning you. The Director of Human Resources will be the only employee or agent of the Company authorized to make any statements concerning your employment with the Company. Any such statements by other employees or agents would be outside the course and scope of their employment.

If asked, the Director of Human Resources will respond, in writing, and will only provide the following information unless otherwise required by law:

> "Employee was a loyal and dedicated employee of Company from (Start Date) until (Separation Date). His title was (Job Title) until he voluntarily resigned in July of 2005 to pursue other endeavors. While Employee was the (Job Title), the organization (succeeded/flourished/etc.).
>
> Employee exceeded his job requirements and was a trusted advisor to many key individuals for the Company during his employment."

In addition, the agreement with the Employee might provide that, if presented with an authorized request, the Director of Human Resources will provide salary information as well:

> At the time Employee resigned, his annual income was roughly (Annual Salary), plus benefits.

The agreement might also provide for the following to occur with the personnel file:

> The Employer will cleanse, purge, and destroy from all its records all documentation concerning or reflecting the Employee's unemployment compensation proceedings. EEOC/MDCR proceedings, and adverse information, including but not limited to probation, monitoring, discipline, and/or involuntary termination. This does not preclude such documentation being kept in a completely separate file at the offices away from the Employer property of the Employer's outside counsel.

Editor's note: Part 2 of Settlement Agreements from A to Z will appear in the Winter issue of *Lawnotes.* ■

GARG UPDATE: MICHIGAN SUPREME COURT STRIKES KEY FOOTNOTE

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Ryan K. Mulally
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After submission of our article "*Garg:* Abolishment of the Continuing Violations Doctrine Under Michigan Law" for publication in the Summer edition of *Lawnotes,* the Michigan Supreme Court denied a request for rehearing in *Garg v. Macomb County Community Mental Health Services,* 472 Mich. 263; 696 N.W.2d 646 (2005), but opted to strike an important footnote from its prior opinion. In footnote 14 of the opinion, the majority had rejected the proposition that acts falling outside the period of limitations, while not independently actionable, could be admissible "as background evidence in support of a timely claim."

Footnote 14 of the *Garg* opinion was interpreted as a basis for establishing a bright-line standard for excluding evidence of conduct occurring outside the applicable limitations period. However, with the elimination of the footnote, it appears that the admission of evidence occurring outside the limitations period remains within the discretion of the trial court based upon the specific circumstances at hand. The balance of the Court's holdings in *Garg* remain intact.

WRITER'S BLOCK?

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

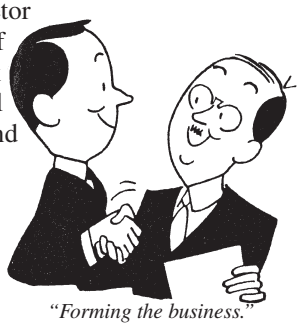
BASIC ENTITY COMPARISONS

Jerry Byrd
Dean & Fulkerson

Whether before or after an entity is started, its basic features, and advantages and disadvantages, should be understood. Some of these are discussed and compared below.

Sole Proprietorship

This is a for profit business, not incorporated, owned by *one individual.* It could have any number of employees and can use any available name. The greatest virtue of a sole proprietorship is its simplicity, which allows the proprietor to avoid many formalities required of other business forms. One drawback is that the sole proprietor has personal liability for the business debts and taxes.



"Forming the business."

Partnerships

A partnership is a for profit business, owned by two or more individuals or entities, referred to as partners. Essentially, there are two types of partnerships, a general partnership and a limited partnership.

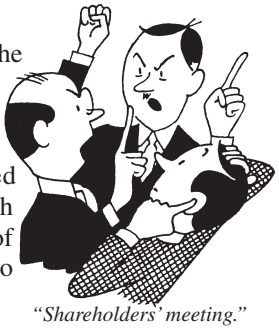
- **General Partnership** — In a general partnership, all partners are general partners, and each general partner has personal liability for partnership debts, can incur obligations on behalf of the partnership, and acts as an agent for the other partners and the partnership. The partners usually share equally in managing the business and dividing the profits and losses, but they may set their own terms (with some restrictions) in a partnership agreement. Tax liability on partnership income is "passed through" to the general partners so that each pays taxes on their share of the profits.
- **Limited Partnership** — In a limited partnership, there are general partners and limited partners. General partners run the business' day-to-day operations and have personal liability for partnership obligations. Limited partners must not participate in the management of the business, and they are not personally liable for partnership debts. Generally, the most a limited partner can lose is the amount they invested in the partnership. The limited partnership is a form that is commonly used to raise money from investors who want limited liability, no management responsibilities, and partnership tax treatment.

Corporations

A corporation is a traditional business entity with shareholders, directors, officers and employees. The owners are the shareholders and they are not personally liable for debts of the corporation. The shareholders elect a board of directors to supervise the corporation, and the board of directors elects the officers (president, vice president, treasurer, etc.) to manage day-to-day matters. Generally, the shareholders, directors, officers and employees do not have liability for the corporate debts. Most corporations are either C corporations, which are regular corporations, or S cor-

porations. A major drawback of the regular C corporation is effectively having its income taxed twice, first on the corporation's income, and then on any dividends paid by the C corporation to its shareholders.

The S corporation, a creature of the Tax Code, has most of the characteristics of the C corporation, but for tax purposes it generally pays no income tax. The S corporation income is passed through to the shareholders, so that each shareholder pays taxes on their share of the profits. There are restrictions as to who may be a shareholder.



"Shareholders' meeting."

Limited Liability Company

In this increasingly popular form of business entity, the owners are not limited in number or type, as are shareholders in an S corporation. While LLC members generally have the kind of limited personal liability associated with a limited partnership, they also have flexibility to participate in the management of the business unless the governing document (articles of organization) provides otherwise. The members may elect one or more managers to run the business if they would prefer not to run it themselves. The earnings of an LLC are passed to the owners, generally in the same way as a partnership, thereby avoiding double taxation.

Assumed Names and d/b/a's

Sometimes people get confused about using assumed names for a business entity. Assumed names are also called d/b/a's ("doing business as"). Using an assumed name does not create a separate entity — it is simply a "nickname" for an entity. Whether the entity is a sole proprietorship, partnership, corporation or limited liability company, it is permitted to use names other than its own principal name, if it timely registers its use of the name with the county and/or state, as applicable.

Trusts

There are numerous kinds of trusts, but in general they can be divided into two categories, revocable and irrevocable. They are especially used to avoid probate, and for income tax and death tax planning. The person responsible for administering a trust is a trustee. The person who establishes the trust is the grantor or settlor. Revocable trusts are changeable at any time prior to death or incapacity. Irrevocable trusts cannot be changed. The more common types of irrevocable trusts include insurance trusts, generation skipping trusts, residential trusts and charitable trusts. ■

COMPARING FEATURES OF DIFFERENT ENTITIES

	General Partnership	Limited Partnership	C Corp.	S Corp.	Trust	Sole Proprietorship	Limited Liability Company (LLC)
FORMATION:							
What is needed in order to start:	Oral or written agreement	Certificate filed with Lansing	Articles of Incorporation filed with Lansing	Articles of Incorporation filed with Lansing	Written Agreement	No Requirements	Articles of Organization filed with Lansing
What governs operations:	Oral or written agreement	Limited Partnership Agreement	By Laws and Minutes	By Laws and Minutes	Written Agreement	No Requirements	Operating Agreement
Measure of ownership:	Certificates of Interest	Certificates of Interest	Stock Certificates	Stock Certificates	Agreement Language	N/A	Certificates of Interest
Minimum number necessary:	2	2	1	1	1	1	1
WHOS WHO:							
Owner is:	General Partner	General Partner/ Limited Partner	Stockholder	Stockholder	Trustee/Beneficiary	Individual	Member
Who makes policy:	General Partner	General Partner	Director	Director	Trustee	Individual	Member or Manager
The executives are:	General Partner	General Partner	Officers (President, Vice President, etc.)	Officers (President, Vice President, etc.)	Trustee	Individual	Member or Manager
LIABILITY FOR ENTITY DEBTS:	Entity – yes General Partner – yes	Entity – yes General Partner – yes Limited Partner – no	Entity – yes Shareholder, Director, Officer, Employee – no	Entity – yes Shareholder, Director, Officer, Employee–no	RT Trustee – yes IRRT Trustee – no Beneficiary – no	Individual	Entity – yes Member – no Manager – no
TAXES:							
Liability for income taxes:	Entity – no General Partner – yes	Entity – no General Partner – yes Limited Partner – no	Entity – yes Shareholder, Director, Officer, Employee – no	Entity – no Shareholder – yes Director, Officer, Employee – no	RT entity – no RT Trustee – yes IRRT entity – yes IRRT Trustee – no Beneficiary – no	Individual	Entity – no Member – yes Manager – no
Federal income tax filings:	1065/K-1	1065/K-1	1120	1120-S/ K-1	1041/K-1	Schedule C on Form 1040	1065/K-1

THE CHANGING WINDS OF E-DISCOVERY: STAYING AFLOAT AFTER *ZUBULAKE*

Adam S. Forman and Charles T. Oxender
Miller, Canfield, Paddock and Stone, P.L.C.

Wake up and smell the megabytes! No longer will attorneys be able to claim that they are "technologically challenged" when engaging in electronic discovery. Perhaps no other case has highlighted the dangers of failing to take adequate steps to preserve and produce emails and other electronic evidence than the series of decisions issued in 2003 and 2004 by Judge Shira A. Scheindlin[1] of the Southern District of New York, in *Zubulake v UBS Warburg LLC*.[2] *Zubulake*, an employment discrimination case, is quickly becoming the seminal decision relied upon by federal district courts for resolution of discovery issues such as the scope of a party's requirement to produce electronic documents, the appropriateness of cost-shifting given the expense of retrieving documents from various storage means versus the potential chilling effect on statutory rights, the duties of both counsel and corporate employees to preserve electronic evidence in the event of a lawsuit, and the appropriate sanctions for violations of discovery concerning electronic documents.[3] *Zubulake* is the proverbial shot across the bow, signaling to members of the bar, that legal proficiency alone will no longer be enough. Proficiency in the now well established, yet constantly changing, world of data storage and retrieval will be an essential tool in the litigator's handbag.

ZUBULAKE'S FACTS

In August 1999, Laura Zubulake (pronounced "lÇke" not "l?ki") was hired by UBS Warburg ("UBS") as the director and senior sales person on its U.S. Asian Equities Sales Desk, earning approximately $650,000 annually. According to Zubulake, she was promised her boss' position if he was promoted. When her boss was subsequently promoted, however, she was passed over. Zubulake's new boss allegedly ridiculed her in front of coworkers, made sexist remarks toward her, excluded her from work-related outings and physically isolated her from other male senior salespersons in the office. Zubulake filed an EEOC gender discrimination charge, and was fired less than two months later. She then filed a federal lawsuit against UBS in February 2002, alleging sex discrimination and retaliation.

ZUBULAKE I

Discovery began when Zubulake served her first request to produce documents, asking for "all documents concerning any communication by or between UBS employees concerning Plaintiff."[4] The parties argued about the scope of the discovery request, but ended up agreeing that UBS would provide responsive emails from five individuals named by Zubulake, that were sent between August 1999 and December 2001. Although UBS had already produced hard copies of 100 pages of emails in its initial disclosures, it objected to producing any emails in response to Zubulake's first document request on the grounds that the cost of reviewing backup tapes to produce the requested emails would be approximately $300,000 and that it would not bear the expense. Zubulake then filed a motion to compel UBS to produce the emails, arguing that the parties' agreement encompassed emails contained in the backup tapes and that UBS was required to produce them pursuant to her discovery request. Zubulake also knew that there were more emails responsive to her document request, as she had already produced approximately 450 pages of emails in her initial disclosures.

Judge Scheindlin ordered UBS to explain how it retained and preserved old emails in order to determine how to respond to Zubulake's motion. UBS had two storage systems in place to save emails. One system saved internal and external email to backup tapes on a daily, weekly and monthly basis. UBS retained the daily backup tapes for twenty work days, the weekly tapes for one year, and the monthly backup tapes for three years. The other system recorded the external email of registered traders on optical disks. UBS retained those disks indefinitely. After reviewing the backup tapes, UBS identified ninety-four backup tapes that could have emails responsive to Zubulake's request, but again refused to review them to retrieve responsive emails, citing the cost.

Initially, the court found that the requested emails were squarely within the definition of "document" in Rule 34 of the Federal Rule of Civil Procedure. Judge Scheindlin also concluded that the emails were clearly relevant to Zubulake's complaint and, therefore, UBS was required to produce them. The key issue became who should bear the estimated $300,000 cost of producing the emails in the backup tapes. Judge Scheindlin started with the presumption that the responding party is generally responsible for the expenses associated with complying with discovery requests and that cost-shifting should only be considered when electronic discovery imposes an "undue burden or expense" on the responding party. The burden is undue when "it outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[5] Noting that often the review of documents that are electronic is actually easier than the review of paper documents due to the use of search engines, Judge Scheindlin stated that the common default assumption that electronic discovery necessarily involves undue expense or burden was unfounded.

Aiming to create a more workable approach to determining when producing electronic information creates an undue burden on the responding party, Judge Scheindlin identified two separate categories: accessible and inaccessible data. The former category includes data that is relatively easy for a party to review and retrieve such as on-line data (maintained on hard drives), near-line data (including optical disks) and off-line storage/archives (optical or magnetic disks). Backup tapes and erased, fragmented or damaged data are inaccessible data, because there is no easy way to access the information short of reviewing all of the information contained in the tape, or recreating erased, fragmented or damaged data. Using these categories, Judge Scheindlin found that the emails on UBS' optical disks were accessible and not subject to a cost-shifting analysis. The material on the backup drives, on the other hand, was inaccessible and, as such a cost-shifting analysis was appropriate.

Judge Scheindlin then created a modified cost-shifting analysis based on the cost-shifting test adopted in *Rowe Entm't Inc v William Morris Agency, Inc*, 205 FRD 421 (SDNY, 2002). The new test included the following seven factors to determine whether cost-shifting is proper:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[6]

The first and second factors are the most important, because they determine why the information is relevant to the lawsuit. Of secondary importance are factors three, four and five, as each relates to the expense of obtaining the information. Factor six rarely matters, unless the case presented a new or novel issue of law. The least important factor is seven, because it almost always weighs in favor of the party seeking the discovery.

Ultimately, Judge Scheindlin ordered UBS to produce, at its expense, all responsive documents maintained on optical disks. As a sample to determine the relevancy of the emails contained in the ninety-four backup tapes, UBS was also ordered to produce, at its expense, responsive documents from five of the backup disks selected by Zubulake and to document the costs associated with the review and production of the documents. After reviewing the emails that were produced according to the sample, Judge Scheindlin stated that she would conduct a cost-shifting analysis under the seven part test she set forth.

ZUBULAKE III

In *Zubulake III*, Judge Scheindlin reviewed the results of the sample emails produced from the backup tapes to determine whether cost-shifting was appropriate. UBS had determined that there were only seventy-seven backup tapes responsive to the request, instead of the ninety-four it had originally identified. The five selected tapes had been reviewed by an outside agency and yielded 8,433 emails, of which 6,203 were non-duplicative. Of the 6,203 non-duplicative emails UBS claimed that only about 600 were responsive. With respect to the cost to review the five tapes, UBS paid the outside agency approximately $11,525 and its legal representation $7,500 for review and copying. Based on this sample, UBS estimated reviewing the remaining tapes would cost approximately $274,000, a cost it requested that Zubalake incur. This estimate included $166,000 to restore and research the tapes and $108,000 in attorney fees to review the documents.

At the threshold, Judge Scheindlin found that the emails tended to show that there was a dysfunctional environment at UBS, but that none provided direct evidence that Zubulake was the victim of gender discrimination. Nevertheless, she concluded that the emails were relevant to Zubulake's claims and proceeded to apply the seven factor test set forth in *Zubulake I*, above. With respect to the first and second factors, Judge Scheindlin found that the information request was as narrowly tailored as possible to discover relevant information and that many of the emails were only available from the backup tapes, supporting Zubulake's position against cost-shifting. She also found that the cost of production, the third factor, weighed in Zubulake's favor. Although the review was relatively expensive, the case had a potentially high damage award for Zubulake; therefore the cost was not disproportionate to the projected value of the case. Factor four also weighed in Zubulake's favor. Whereas the court recognized that Zubulake's $19 million claim gave her some financial ability to share the costs, the court concluded that UBS "has exponentially more resources available to it than Zubulake."[7] Factor five, the ability to control costs, was neutral because the cost of the restoration was relatively fixed after UBS turned the tapes over to the contractor. Because no crucial novel issue was at stake in the litigation, factor six was also neutral. Finally, factor seven favored cost-shifting, because Zubulake would receive the majority of the benefit of the requested documents.

Taking all of the factors into account, Judge Scheindlin held that cost-shifting was appropriate due to the somewhat speculative nature of the search, but that the cost-shifting should not "chill the rights" of Zubulake. Accordingly, Judge Scheindlin allocated twenty-five percent of the restoration of the emails to Zubulake, leaving UBS to pay the remaining seventy-five percent plus its legal costs associated with the review of the documents.

ZUBULAKE IV

Returning to the discovery saga, Judge Scheindlin issued a fourth opinion concerning the issue of missing evidence. Zubulake had filed a motion for sanctions based on the missing backup tapes and deleted email, which were uncovered during the restoration process. *Zubulake IV*, therefore, concerns the scope of the litigant's duty to preserve electronic documents and the consequences of the failure of that duty.

Beginning with a discussion of the duty to preserve evidence, Judge Scheindlin stated that a party is required to preserve evidence when it knows or should know that the evidence may be relevant to future litigation. In this case, the duty arose, at the latest, on August 16, 2001, when Zubulake filed her EEOC charge. Judge Scheindlin, however, found that many of the relevant emails dated back to April, 2001, when Zubulake's coworkers recognized that she might sue and, as such, the duty to preserve evidence attached at that time.

Judge Scheindlin defined the scope of the company's duty to preserve as follows: "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[8] Generally, this does *not* apply to inaccessible backup tapes, such as those maintained for disaster recovery, but *does* apply to accessible backup tapes, such as those used for information retrieval. There is, however, an exception to the general rule: "If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained in the tapes is not otherwise available."[9] Although Judge Scheindlin found that UBS employees did not comply with its attorney's advice to preserve documents beginning in August 2001, she refused to grant an adverse-inference instruction because Zubulake did not demonstrate that the missing evidence would support her claim. She did, however, require UBS to pay the cost associated with re-deposing certain witnesses to inquire about the missing backup tapes and deleted email.

ZUBULAKE V

Lest there be any doubt about the changes electronic information has on the way attorneys engage in discovery, *Zubulake V* sends the message loud and clear. In this decision, Judge Sheindlin set forth an attorney's obligation to not only ensure that relevant evidence is preserved by giving clients proper instructions, but also to ensure that their clients follow the instructions. The opinion arose from Zubulake's motion to sanction UBS for failing to produce relevant information and tardy production of such material that was discovered during the depositions ordered in *Zubulake IV*.

In the new round of depositions, deponents testified that they were not instructed to produce documents, even though they were instructed to save them and that they had knowledge of additional emails that had been deleted. Zubulake requested an adverse-inference instruction indicating that the jury would be permitted to find that the missing evidence would have been unfavorable to UBS.

(Continued on page 10)

THE CHANGING WINDS OF E-DISCOVERY: STAYING AFLOAT AFTER *ZUBULAKE*

(Continued from page 9)

To determine whether an adverse-inference instruction would be issued, Judge Sheindlin applied the following test: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind' and (3) that the destroyed evidence was 'relevant to the party's claim or defense' such that a reasonable trier of fact could find that it would support that claim or defense."[10] Because the court had determined in *Zubulake IV*, above, that UBS was obligated to preserve the emails as of April 2001, it concluded that UBS acted willfully by not preserving the evidence. Having already found that a number of the other emails were relevant to Zubulake's claim, there was a strong likelihood that the deleted emails were relevant to the claim, and therefore the third element was established.

As a result of the lack of compliance with the preservation of evidence by UBS and the late production of emails, Judge Scheindlin granted Zubulake's request for an adverse-inference instruction, ordered UBS to pay for the costs of further re-depositions concerning the newly discovered emails and ordered UBS to pay costs of the motion. Judge Scheindlin also noted that some of the newly discovered emails seemed to contradict earlier deposition testimony of its employees, resulting in a "self-sanction" against UBS, whose employees may have discredited their testimony.

To guide practitioners in the future, the court issued the following requirements of counsel to ensure that clients comply with their duty to preserve evidence. Counsel must put a "litigation hold" over potentially relevant documents and become "fully familiar" with the client's document retention policies to ensure that clients are preserving relevant evidence. This "will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycle policy" and will involve "communicating with the 'key players' in the litigation, in order to understand how they stored information." Moreover, it is "not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information." Counsel must also take affirmative steps to monitor the client's compliance, including the identification and storage of backup media and ensure that relevant employees are complying with the duty to preserve the information.[11]

PROPOSED AMENDMENT TO RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The issues raised in *Zubulake* have led to proposed amendments to the Federal Rules of Civil Procedure.[12] The proposed amendments address five related areas: (a) early attention to issues relating to electronic discovery, including the form of production, preservation of electronically stored information, and problems of reviewing electronically stored information for privilege; (b) discovery of electronically stored information that is not reasonably accessible; (c) the assertion of privilege after production; (d) the application of Rules 33 and 34 to electronically stored information; and (e) a limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine operation of computer systems. These amendments highlight the issues raised in the *Zubulake* opinions and seek to adapt the Federal Rules of Civil Procedure to new technologies.

CONCLUSION

As a postscript to her series of opinions, Judge Scheindlin issued the following warning to lawyers and their clients:

> The subject of discovery of electronically stored information is rapidly evolving. When this case began more than two years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time.
>
> * * *
>
> Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information.
>
> * * *
>
> It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.[13]

Clearly, the future is now. The exact parameters of electronic discovery rules will, most certainly, be the subject of dispute and debate in the years to come. *Zubulake*, however, serves as a warning to attorneys and clients alike. We are through the looking glass and discovery will never be the same. By the way, for those interested, Zubulake's case went to trial in the spring of 2005. At the conclusion, the jury awarded Zubulake $9.1 million in compensatory damages and $20.1 million in punitive damages on her claims.

— END NOTES —

Authors' note: This article originally appeared in slightly different form in the August 2005 issue of *Laches,* published by the Oakland County Bar Association.

[1]Prior to these decisions, Judge Scheindlin had been developing a reputation as an expert in issues related to retention and storage of electronic documents. *See Shira A. Scheindlin & Jeffrey Rabkin, Electronic Discovery in Federal Civil Litigation, Is Rule 34 Up to the Task?* 41 BC L Rev 327 (2000).

[2]Although the *Zubulake* case produced several opinions, only four concern electronic discovery. They will be identified in this article as follows: *Zubulake I*, 217 FRD 309 (SD NY May 13, 2003); *Zubulake III*, 216 FRD 280 (SD NY July 24, 2003); *Zubulake IV*, 220 FRD 212 (SD NY October 22, 2003); and *Zubulake V*, 2004 WL 1620866 (SD NY July 20, 2004). *Zubulake II* relates to whether Zubulake would be permitted to give deposition transcripts to government regulators and in *Zubulake VI*, the court denied UBS' motion to assert an additional defense. Each of the *Zubulake* opinions is available, at no cost, on the Southern District of New York's website: http://www.nysd.uscourts.gov/, under "Rulings of Interest."

[3]In the short time since the decisions were published, Zubulake has been cited in multiple jurisdictions, including New York - *Xpedior Creditor Trust v Credit Suisse First Boston (USA), Inc*, 309 F Supp2d 459 (SDNY, 2003), *United Parcel Service of America, Inc v The Net, Inc*, 222 FRD 69 (EDNY, 2004), *Cornell Research Foundation, Inc v Hewlett Packard Co*, 223 FRD 55 (NDNY, 2003); California - *Toshiba America Electronic Components, Inc v Superior Court,* 21 CalRptr3d 532 (Cal App 6 Dist, 2004); Texas - *Multitechnology Services, LP v Verizon Southwest f/k/a GTE Southwest Inc*, 2004 WL 1553480 (ND Tex, 2004); Illinois - *Wiginton v CB Richard Ellis, Inc*, 2004 WL 1895122 (ND Ill, 2004); Wisconsin - *Hagemeyer North America, Inc v Gateway Data Sciences Corp*, 222 FRD 594 (ED Wis, 2004); Massachusetts - *Galvin v Gillette Co*, 2005 WL 1476895 (Mass Super, 2005); Delaware - *Chimie v PPG Industries, Inc*, 218 FRD 416 (D Del, 2003); Maryland - *Thompson v US Dept of Housing and Urban Development*, 219 FRD 93 (D Md, 2003); and New Jersey - *Mosaid Technologies Inc v Samsung Electronics Co, Ltd*, 348 F Supp2d 332 (D NJ, 2004).

[4]*Zubulake I* at 312.

[5]*Zubulake I* at 318, *citing* Fed R Civ P 26(b)(2)(iii).

[6]*Zubulake I* at 322.

[7]*Zubulake III* at 288.

[8]*Zubulake IV* at 218.

[9]*Id.*

[10]*Zubulake V* at *21-22.

[11]*Zubulake V* at *30-31

[12]*See Report of the Civil Rules Advisory Committee*, revised August 3, 2004, http://www.uscourts.gov/rules/newrules6.html. *See also Ronald J. Hedges, A View From The Bench And The Trenches: A Critical Appraisal Of Some Proposed Amendments To The Federal Rules Of Civil Procedure*, 227 FRD 123 (May, 2005).

[13]*Zubulake V* at *49-51. ■

U.S. SUPREME COURT UPDATE

Regan K. Dahle
Nancy G. Itnyre
Butzel Long, P.C.

IRA Assets are Exempt from Bankruptcy Estates

In April 2005 the Supreme court resolved a split among the circuit courts, holding that debtors can exempt certain assets in their individual retirement accounts ("IRA") from their bankruptcy estate. Contrary to the conclusion reached by the Eighth Circuit, the unanimous Court concluded that IRAs confer a right to receive payment on account of age and that IRAs are similar to stock bonus, pension, profit sharing, and annuity plans and contracts. *Rousey v. Jacoway,* 125 S.Ct. 1561 (2005).

The Rousey's, husband and wife debtors in a bankruptcy case, were former employees of Northrup Grumman Corporation. At the time the Rouseys terminated employment with Northrup Grumman, they were required to take lump-sum distributions from the company's ERISA-qualified pension plan. The Rouseys rolled over the pension plan distributions to two IRAs, one in each of their names, and several years later filed a joint bankruptcy petition under Chapter 7. The Rouseys attempted to exempt the IRA assets from their bankruptcy estate under a Bankruptcy Code exemption that provided that a debtor may exempt from his bankruptcy estate his right to receive "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

The bankruptcy trustee argued that the IRA assets could not be exempted because IRAs are neither similar to the plans or contracts enumerated in the statute (e.g., pension or profit sharing plans), which have limited access, nor are amounts distributable from IRAs only for the limited reasons specified in the statute (e.g., age or disability). Rather, the trustee argued, the Rouseys had unlimited access to the funds held in the IRAs, subject only to a ten percent tax penalty, and the IRAs did not limit the Rousey's right to receive payment to payments on account of age or disability, for example. The bankruptcy court, bankruptcy appellate panel, and the Eighth Circuit agreed with the trustee, analogizing IRAs to savings accounts that are readily accessible at any time for any purpose.

The Supreme Court reversed. According to the Supreme Court, the ten percent tax penalty which the Court called "substantial," prevented the Rouseys from having access to the entire balances in their IRAs because ten percent of their IRA funds would effectively be forfeited upon early withdrawal. Because the ten percent penalty would be removed when they attain age 59½, stated the Court, the Rousey's right to the amounts held in their IRAs was a right to payment on account of age, as required by the statute. Additionally, stated the Court, IRAs are similar to the types of plans enumerated in the statute because, like the plans enumerated in the statute, IRAs (a) provide a substitute for wages at a time when the IRA owner is likely to be retired, (b) are required to commence distributions in the calendar year following the year in which the IRA owner attains age 70½, (c) defer taxation until distribution, and (d) are subject to a 50 percent tax penalty on amounts that are not distributed pursuant to the Internal Revenue Code's minimum distribution requirements. Furthermore, stated the Court, the ten percent early distribution penalty mentioned above applied to IRAs as well as to the plans enumerated in the statute.

Accordingly, held the Court, because the Rouseys' IRAs conferred a right to receive payments on account of age and the IRAs were similar to the plans or contracts enumerated in the Bankruptcy Code, the Rouseys were permitted to exempt the IRA assets from their bankruptcy estate.

Pennsylvania District Court to Reconsider its Decision in *AARP V. EEOC*

In light of a recent holding in a United States Supreme Court case, a Pennsylvania district court may reconsider its decision in *AARP v. EEOC,* 2005 U.S. Dist. Lexis 5078 (E.D. Pa. Mar. 30, 2005). According to the Supreme Court, a federal court must defer to an administrative agency's construction of a statute, even if it differs from what the court believes is the best interpretation, if the statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's interpretation of the statute is reasonable. *National Cable & Telecommunications Assoc. v. Brand X Internet Services,* 125 S.Ct. 2688 (2005).

In *AARP v. EEOC,* decided in March of 2005, the Pennsylvania district court permanently enjoined the EEOC from publishing otherwise implementing an exemption to the Age Discrimination in Employment Act ("ADEA") that would permit employers to provide retirees who are age 65 or older, and thus Medicare eligible, with benefits that are inferior to the health benefits provided to retirees who have not yet attained age 65. In drafting the proposed exemption, the EEOC, which has jurisdiction to administer the ADEA, relied upon the ADEA's specific grant of authority to the EEOC to issue "rules and regulations as it may consider necessary or appropriate for carrying out this chapter and . . . establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest."

Relying on *Erie County Retiree Association v. County of Erie,* 220 F.3d 193 (3rd Cir. 2000), in ruling against the EEOC, the district court concluded that Congress intended the ADEA to apply to the same behavior that the EEOC would exempt with its proposed exemption. According to the court, the ADEA and *Erie County* prohibit the practice of coordinating employer-provided retiree health benefits with Medicare eligibility, unless the employer satisfies the equal cost or equal benefit defense, which provides that coordination of employer-provided retiree health benefits with Medicare eligibility would not be prohibited if (a) the cost incurred by the employer for health benefits for retirees over age 65 is equal to the cost incurred by the employer for retirees under age 65 (i.e., equal cost); or (b) the total benefits, including the Medicare benefits, received by retirees over age 65 is equal to the benefits received by retirees under age 65 (i.e., equal benefit). The EEOC appealed the decision to the Third Circuit, the circuit court that decided *Erie County.*

As stated above, in light of *National Cable,* the district court will likely consider whether that case compels it to give effect to the EEOC's interpretation of the ADEA. According to the EEOC, without the exemption, many employers will reduce or eliminate retiree health benefits completely because employers cannot afford to offer health benefits at the same level to all retirees, including those that have attained age 65 and are Medicare eligible. The EEOC maintains that the above quoted ADEA provision grants it the authority to issue the challenged exemption from the general ADEA provisions, because the exemption is "reasonable" and "necessary and proper in the public interest." It remains to be seen whether the Pennsylvania district court and the Third Circuit will agree. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Oh Great and Terrible Arbitrator, it sounds like being an arbitrator is a lot more fun than being a lawyer. How can I get a job like yours? – M.C., Southfield

It is fun. And interesting and rewarding and satisfying too. But there are a few facts about being an arbitrator you should know before you quit your day gig. They tend to come in pairs.

Before you can have any credibility as a neutral, you have to pay your dues as an advocate.

But, if you spend any time working as an advocate, you become tainted and you can never have any credibility as a neutral.

The only people who will hire you when you are new are people who know you.

But people who know you can't hire you because you wouldn't be neutral.

You can't get any cases unless you are on the FMCS or AAA panels.

But you can't get on the panels until you've had some cases.

The only way you are going to get any business it to advertise and solicit.

But advertising and soliciting, while technically legal, are seriously *infra dig*.

If you get a case and make a decision one way or the other, you are going to make someone unhappy.

But if you split the baby, you're likely to make someone unhappy too.

If you write a short opinion, the loser will complain that you didn't explain your reasoning.

But if you write a long opinion, the winner will complain that you are padding.

If you "write for the loser," you will be accused of being patronizing.

But if you don't, you will be accused of being high-handed and imperious.

There will be periods when you have no work. During those periods, you will have lots of time.

But you will have no money.

There will be periods when you have lots of work. During those periods you will have lots of money.

But you will have no time.

The periods of not enough work and too much work will oscillate.

But you will never know where you are in the cycle.

Sometimes cases fall from the sky.

But they disappear as mysteriously as they come.

One day, if you're lucky, you'll get appointed to a "permanent panel."

But another day you will get un-appointed.

If the decision was easy, the parties would already have made it. If you got the case, it's because it's a hard one. With good arguments on both sides.

But there are reasons parties will take a case to arbitration besides the fact that they think they should win. And no one will tell you which ones those are.

People will hold the door for you and laugh at your jokes.

But you will eat your lunch alone.

MICHIGAN SUPREME COURT UPDATE

Kurt M. Graham
Varnum, Riddering, Schmidt & Howlett LLP

The Supreme Court Closes Lid on Untimely Discrimination Claims

In *Garg v Macomb County Cmty Mental Health Services*, 472 Mich 263 (2005), the Court struck down the "continuing violations" doctrine, established by *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505 (1986), stating it is inconsistent with MCL § 600.5805 and MCL § 600.5827. MCL § 600.5805 provides a limitations period of three years to recover damages for injury to a person. MCL § 600.5827 provides that, regardless of when damages result, a claim accrues at the time the wrong that claim is based on is done. The Court found nothing in §§ 600.5805 and 600.5827 that would permit a plaintiff to recover for injuries outside the limitations period and stated that allowing recovery for "continuing violations" was simply extending the limitations period beyond what was expressly established by the Legislature.

Individuals Once Again Liable for Discrimination Claims Under Michigan Law

In *Elezovic v Ford Motor Co,* 472 Mich 408 (2005), the Court overruled *Jager v Nationwide Truck Brothers, Inc*, 252 Mich App 464 (2003) and held that supervisors are subject to individual liability under the Elliott-Larsen Civil Rights Act (ELCRA). In *Elezovic*, the Court rejected several arguments as to why the ELCRA does not provide for individual liability. In doing so, the Court relied on a strict reading of the ELCRA's definition of "employer." The Court found that the language of the statute established the Legislature's intent to make both an employer and individual subject to liability since "employer" is defined as a "person who has 1 or more employees," and includes "an agent of that person."

The *Elezovic* decision also shed some light on what constitutes adequate notice of sexual harassment finding that the Plaintiff's confidential complaints of alleged harassment to two low-level supervisors did not put Ford on notice of the alleged harassment.

Health Care Benefits Paid To Public School Employees Are Not Protected

In *Studier v Michigan Pub Sch Employees' Retirement Bd*, 472 Mich 642 (2005), Plaintiffs, six public school retirees, argued that the co-pay and deductible increases for their health care plan violated Article 1, Section 10 of the U.S. Constitution, and Article 1, Section 10 and Article 9, Section 24 of the Michigan Constitution. The Court held that: (1) health care benefits paid to public school retirees do not constitute "accrued financial benefits" subject to protection from diminishment or impairment by Article 9, Section 24 of the Michigan Constitution, and (2) the Plaintiffs failed to show that the statute which established Plaintiffs' health care benefits, MCL 38.1391(1), created a contractual right for them to receive health care benefits that could not be changed by a subsequent Legislature.

A Negligent Retention Claim Cannot Be Based Upon Workplace Harassment

In *McClements v. Ford Motor Co*., 2005 WL 1763614 (July 26, 2005), the Court held that a common law claim for negligent retention cannot be premised upon on workplace sexual harassment. Plaintiff, an AVI Food Systems employee, worked as a cashier at a Ford assembly plant. She filed suit alleging negligent retention and sexual harassment under the Elliott-Larsen Civil Rights Act (ELCRA) after a Ford superintendent persistently asked her out and allegedly entered the cafeteria after hours, grabbed her from behind, and stuck his tongue in her mouth.

Although Plaintiff did not complain to AVI, or Ford, she argued that Ford negligently retained the superintendent after it learned of his propensity to sexually harass women. The Court concluded that because the ELCRA provides the exclusive remedy for sexual harassment claims, Plaintiff failed to establish her negligent retention claim and it was not necessary for it to inquire into whether Ford had sufficient notice that the superintendent had engaged in sexual harassment.

The Court also rejected Plaintiff's argument that Ford failed to prevent sexual harassment in the workplace. Relying upon *Chiles v Machine Shop, Inc,* 238 Mich App 462 (1999), the Court concluded unless an individual can establish a genuine issue of material fact that an employer affected or controlled the terms, conditions, or privileges of her employment, a non-employee may not bring a claim under ELCRA. The Court dismissed Plaintiff's sexual harassment claim because she failing to make such a showing. ■

MERC CORNER

Ruthanne Okun
Bureau of Employment Relations Director

You may have heard that the "gavel has changed hands" at the Michigan Employment Relations Commission (MERC). By the time this *Lawnotes* reaches your desk, we likely will have a Commission appointed entirely by Governor Jennifer M. Granholm.

For more than 10 years, the Commission included Chair Star Swift and Commissioners Barry Ott and Harry Bishop. In July of 2003, longtime MERC Administrative Law Judge Nora Lynch, who retired from State service in 2002, returned to the labor relations arena and was appointed Commission Chairman. One year later, in June of 2004, Escanaba attorney Nino Green joined the Commission, with the laudable distinction of being its first Upper Peninsula Commissioner. As this publication proceeds to print, we anticipate the imminent appointment of MERC's third member.

It would be difficult to find an attorney more familiar with the Bureau and with public sector labor law in Michigan than Nora Lynch. Chairman Lynch first joined the Bureau when Robert Pisarski was the Bureau Director and Robert Howlett was Commission Chairman, and served as an ALJ for over 25 years. When Judge Lynch retired from the Bureau in November of 2002, she began a labor arbitration practice, which she continues in the private sector at this time. Chairman Lynch is currently on the arbitration rosters for the American Arbitration Association and the Federal Mediation and Conciliation Service. She resides in West Bloomfield with her husband, Mark Rubin, an Administrative Law Judge with the National Labor Relations Board.

Commissioner Nino Green is president and shareholder in the Escanaba law firm of Green, Weisse, Rettig, Rademacher, Clark & Bray P.C., and has extensive experience in labor relations. He is the former executive director of U.P. Legal Services and the current chairman of its successor organization, Legal Services of Northern Michigan. He is MERC's first commissioner from the Upper Peninsula, demonstrating Governor Granholm's strong commitment to inclusiveness by broadening the Commission's representation from across the State. Commissioner Green brings a unique perspective to MERC decision-making, sharing his varied background and experience representing labor organizations and individuals.

Chairman Lynch's appointment is for a three-year term, which expires on June 30, 2006. Commissioner Green's three-year appointment expires on June 30, 2007. For more information about MERC and the future Commission appointment, visit http://www.michigan/gov/merc.

"PRESENT AT THE CREATION"

In commemoration of the 30th Labor and Employment Law Institute presented by the Institute of Continuing Legal Education, and co-sponsored by the State Bar of Michigan Labor and Employment Law Section and the Federal Mediation and Conciliation Service, two prominent members of the labor bar — who were "present at the creation" of the first ICLE LEL Institute in 1975 — recalled some of the legal milestones of the past four decades. Here, Ted St. Antoine addresses developments in affirmative action, employment at will, comparable worth, union organizing, and arbitration. In the next *Lawnotes,* Ron Helveston will look back on the beginnings of PERA and Act 312.

– Stuart M. Israel, editor

THREE DECADES OF LEGAL DOCTRINES AND DEVELOPMENTS

Theodore J. St. Antoine
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I. INTRODUCTION

Whether I actually participated three decades ago in the inauguration of these splendid annual affairs was, for me, lost in the mists of history. My good friend Sheldon Stark has assured me, however, that the first year's brochure showed I covered "Public Sector Labor Law and Collective Bargaining." Shel seemed less than overwhelmed by the importance of my presentation: "Your contribution seems to have been limited to copying a number of statutes and a four page outline that summarizes major provisions." At least I can now say I was "present at the creation" — even if just barely! And ICLE's records and my own files indicate that you or your predecessors have had to put up with me some fifteen times in all.

What I thought might be both enlightening and rewarding would be to take a look at some of the leading labor and employment law cases that various speakers and I have dealt with over the past thirty years of these annual Institutes. There were times when I predicted a bright future for new legal doctrines that proved a flash in the pan. But other developments you may have first heard analyzed here are still very much with us and the stuff of your daily practice. If I have any overall theme for the years 1976 through 2005, it is the shift of emphasis from traditional labor relations, or union-management, law to individual employee relations law, including employment discrimination. (Private-sector unionization has shrunk some two-thirds in the last 30 years, from over 25% in the late 1970s to about 8% today. The public sector has remained stable around 37%. The private sector was roughly 35% in the 1940s and the 1950s.)

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THREE DECADES OF LEGAL DOCTRINES AND DEVELOPMENTS

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II. 1979: "AFFIRMATIVE ACTION AFTER *BAKKE*"

A. General Principle

In *Regents v. Bakke,* 438 U.S. 265 (1978), the Supreme Court held (5-4) that a state medical school violated Title VI of the 1964 Civil Rights Act by reserving a fixed percentage of places for black applicants for admission, but that it was not a constitutional statutory violation to take race into account as *a factor* in an admissions program in order to preserve diversity in the student body. See also *Grutter v. Bollinger,* 539 U.S. 306 (2003) (5-4) (upholding Michigan Law School's "diversity" admissions program).

B. Affirmative Action in Employment

In general. Affirmative action in employment has often been the subject at these institutes over the years. The decisions have formed a crazy-quilt pattern, depending on the facts.

Private employment. In *Steelworkers v. Weber,* 442 U.S. 192 (1979), the Supreme Court held (5-2) that unions and employers in the *private* sector could take race-conscious steps to "eliminate manifest racial imbalances in traditionally segregated job categories" without violating Title VII of the 1964 Civil Rights Act. At issue was a program reserving 50% of the openings in a craft-training program for blacks until their percentage of craftworkers matched the percentage of blacks in the local labor force. Justice Brennan for the Court emphasized that the Constitution was not implicated since state action was not involved.

Public employment. The Supreme Court concluded in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986), that neither generalized "social discrimination," mere racial imbalance, nor the desire of a public school system to provide black students with minority teacher "role models" constituted a sufficiently compelling governmental interest under the equal protection clause to justify taking race into account in determining layoffs. In *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), the Court held that "strict scrutiny" applied even to supposedly "benign" racial classification by a local government. "Strict scrutiny" calls for both a "compelling governmental interest" and a "narrowly tailored" solution to justify a racial classification. *Id.* at 494-95. But a majority in *Croson* seemed willing to say that a "prima facie" showing of discrimination by private parties in a public contracting program could warrant affirmative remedial steps by the public body. See also *Fullilove v. Klutztnick,* 448 (1980) (6-3) (upholding constitutionality of Federal Public Works Employment Act, setting aside 10% of each federal grant under a short-term program for "minority business enterprises").

III. 1982: "EMPLOYMENT AT WILL" AND "COMPARABLE WORTH"

A. The *Toussaint* Revolution and Counterrevolution

The Dramatic Incursion into Wrongful Discharge. Michigan joined a large body of other states during the 1980s seemed to make major inroads into the traditional American doctrine of employment at will. The State Supreme Court held in *Toussaint v. blue Cross & Blue Shield of Michigan,* 292 N.W.2d 880 (Mich. 1980), that both policy statements in personnel manuals and oral assurances at the time of hiring could be the basis of contract actions against employers for discharging employees without good cause.

The Effective Return to Employment at Will. Disclaimers on employment application forms or in employee handbooks can extinguish contract claims. *See generally Reid v. Sears, Roebuck & Co.,* 790 F.2d 453 (6th Cir. 1986) (applying Michigan law). Employers may revoke previous promises contained in personnel manuals through a reasonable notice to the work force. *In re Certified Question (Bankey v. Storer Broadcasting Co.),* 443 N.W. 2d 112 (Mich. 1989). As a practical matter, binding oral commitments might largely be confined to higher-level jobs, since it has been held that broad assurances of continuing employment are inadequate; some specific bargaining over job security may be required. *Rowe v. Montgomery Ward & Co.,* 473 N.W.2d 268 (Mich. 1991).

B. The Abortive Comparable Worth Movement

The Dreams. Eleanor Holmes Norton, former Chair of EEOC, hailed "comparable worth" as the "women's issue of the 1980s." Some persons believed that this meant that all jobs should be rank-ordered in terms of their intrinsic worth and value to society, and should be compensated accordingly.

The Reality. In *County of Washington v. Gunther,* 452 U.S. 161 (1981), the Supreme Court held (5-4) that Title VII may forbid sex-based wage discrimination even though the discriminates' jobs are not "equal" to higher-paying jobs held by the opposite sex and thus there would be no violation of the Equal Pay Act. Here a public body had engaged in *intentional* sex discrimination by paying female guards only 70% as much as male guards, after a job evaluation determined they should be paid 95% as much. *Gunther* expressly declined to endorse any "comparable worth" theory and the latter has gone nowhere.

Note: Professor Ruth Blumrosen, a leading EEOC consultant, suggested that a starting point for measuring sex- (or race-) based wage differentials could be a comparison of the rates for unskilled, entry-level jobs that are segregated by sex (or race). Blumrosen, "Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964," 12 U. Mich. J.L. Ref. 397 (1979). Her view is that wage differences at that level, which would usually be hard to justify, are likely to be carried forward, proportionately, at higher levels. That is probably as close to a valid comparable worth claim as we might get *E.d., IUE v. Westinghouse Elec. Corp.,* 631 F.2d 1094 (3d Cir. 1980).

IV. 1990: "HANDBILLING, PICKETING AND BOYCOTTING"

A. Consumer Picketing — *Safeco*

In general. Pure consumer picketing, asking customers not to buy a nonunion product being distributed by a secondary or "neutral" party but not appealing to any employees, was the subject of *NLRB v. Retail Clerks Local 1001 [Safeco],* 447 U.S. 607 (1980). The Court held (6-3) that the picketing was forbidden as an unlawful boycott under Section 8(b)(4)(B) of the NLRA where the distributor derived 90% of its income from the sale of the picketed product.

Comment: Scant attention was paid to the constitutional question of free speech which had been at the heart of the earlier consumer picketing case, *NLRB v. Fruit & Vegetable Packers Local 760 [Tree Fruits],* 377 U.S. 58 (1964) (to avoid difficult constitutional question, picketing asking customers not to buy one single nonunion product in a neutral supermarket was held not a forbidden secondary boycott). All the Supreme Court precedents relied on in *Safeco* dealt with appeals for concerted employee action or action by unionized workers presumably subject to group loyalties and discipline. *Safeco* was the first time the Court had ever clearly upheld a ban on peaceful picketing addressed to, and calling for seemingly lawful responses, by individual consumers acting on their own.

B. Consumer Handbilling — *DeBartolo*

In general. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568 (1988), a union had a dispute with a building contractor over its allegedly substandard wages and fringe benefits. The contractor was hired to construct a department store in a shopping mall. The union peacefully distributed hand bills at the entrances of the mall, urging customers not to patronize any of the shops in the mall until all construction was done by contractors paying "fair wages and fringe benefits." The handbills made clear, however, that the union was not seeking a work stoppage by any store employees. The NLRB ruled the consumer handbilling was "coercion" of the secondary employers in violation of Section 8(b)(4)(B) of the NLRA. The Supreme Court held unanimously that the handbilling was qualitatively different from picketing and not unlawful.

Query: What essentially is the constitutional and statutory difference between handbilling and picketing. Is it the "signal" element of picketing? Why could not handbilling be a "signal"? In any event does the "signal" analysis make sense applied to individual customers? Is it the fear element of picketing? Could not the handbiller confront the customer with the same pair of beady eyes? Or suppose the picket signs were draped over the shoulders of elderly men and women (*cf. Tree Fruits*)? Is it the greater visibility and thus presumed greater effectiveness of picketing? Is *that* a fair basis for a distinction?

V. 1993: UNION ACCESS TO EMPLOYER PROPERTY

A. *Lechmere* and Parking Lot Organizing

Majority. In what was described as the only private-sector union-management issue arising under the NLRA to be decided by the Supreme Court in a two-year period, it was held (6-3) in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), that an employer can bar *non*employee union organizers from distributing handbills in the company's parking lot at a shopping center. Justice Thomas, for the majority, adopted a two-step test. *First,* access to the employees must be infeasible, for example, in a remote lumber camp. *Second,* and only then, need one go on to balance the employees' organizational rights against the employer's property rights. Here the union had available mailings, phone calls, home visits, newspaper advertising, and picketing from an adjoining strip of public land.

Dissent. Justices White, Blackman, and Stevens dissented on the grounds that the leading case of *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956) (union has burden of showing no other reasonable means of communication), did not prevent consideration of the "substantial difference between the entirely private parking lot of a secluded manufacturing plant and a shopping center lot which is open to the public without substantial limitation," or the difference between "employees' residences . . . scattered throughout a major metropolitan area" (*Lechmere*) and "employees . . . liv[ing] in a compact area" (*Babcock*).

B. Background and General Comment

Ordinarily an employer's property rights under state common and statutory law trump the employees' organizational rights under the NLRA — and the *non*employees' derivative rights of access. A noted exception was *S & H. Grossinger's,* 156 N.L.R.B. 233 (1965), *enforced as modified,* 372 F.2d 26 (2d Cir. 1967) (denial of union access to company premises violates Section 8(a)(1) if it virtually insulates employees from the efforts of union organizers to reach them). In *Monogram Models, Inc.,* 192 N.L.R.B. 705 (1971), the Board declined to adopt a "big city rule" and a different "small town rule" when applying *Babcock & Wilcox.* The test is "not one or relative convenience, but rather whether the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate" by such conventional methods as mail, telephone, and home visits. In today's world of large plants, shopping malls, and massive office buildings, with employees scattering widely across metropolitan areas at the end of the working day and loath to leave their TV sets or suburban back yards in the evening, what realistically are the union's options for effective communication away from the employer's premises? What sort of empirical data or sociopsychological studies might persuade the Board and the courts that greater union access is a practical necessity for effective organizing?

VI. 2000: "HOT ISSUES IN ARBITRATION"

A. Mandatory Arbitration of Statutory Claims

Union Context. In *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), the Supreme Court held that an arbitrator's adverse decision on a black employee's claim of racial discrimination under a collectively bargaining agreement did not prevent the employee from pursuing the suit in court. The Court reasoned that the arbitrator was only authorized to decide the contractual issue of discrimination and not the statutory issue. But an arbitrator's award may be admitted in evidence in subsequent court proceedings and, if essential procedural safeguards have been observed, may be accorded "great weight." *Id.* at 60 n. 21. Any union-negotiated waiver of employees' statutory right to a judicial forum would have to be "clear and unmistakable." *Wright v. Universal Maritime Serv. Corp.,* 525 U.S. 70, 80-81 (1997).

Nonunion Context. The Supreme Court seemed to take an abrupt turn away from the *Gardner-Denver* approach in *Gilmer v. Interstate v. Johnson Lane Corp.,* 500 U.S. 20 (1991). In *Gilmer* it held that an individual stockbroker employee was bound by a contract with the New York Stock Exchange to arbitrate a claim of age discrimination against his employer. The Court distinguished *Gardner-Denver* on the grounds that in *Gilmer* the arbitrator was authorized to handle statutory as well as contractual disputes. The earlier case was also said to involve a "tension" between union rep-

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THREE DECADES OF LEGAL DOCTRINES AND DEVELOPMENTS

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resentational status and individual employee rights. The Court has since ruled that an individual's agreement to arbitrate employment disputes does not preclude the EEOC from seeking victim-specifiic relief in court, including reinstatement, back pay, and damages. *EEOC v. Waffle House, Inc.* 534 U.S. 279 (2002). For the requirements of a valid predispute arbitration agreement under Michigan law, see *Rembert v. Ryan's Family Steak House,* 596 N.W.2d 208 (Mich. App. 1999), *appeal denied,* 625 N.W.2d 318 (1999).

Note: Several studies show employees prevail more often in arbitration than in court, though the awards are smaller. See, *e.g.,* Lewis L. Maltby, "Private Justice: Employment Arbitration and Civil Rights," *30 Colum. Hum. Rts. L. Rev.* 29, 46, 48, 50 (1998).

B. JUDICIAL REVIEW AND PUBLIC POLICY

In General. In recent years the hottest issue concerning judicial review of arbitration decisions was raised by the readiness of the lower courts to vacate awards on the grounds they violated some alleged "public policy." The Supreme Court has consistently sustained arbitrators' rulings in the absence of a violation of positive law or of "some explicit public policy" that is "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 766 (1983).

Examples: In *Paperworkers v. Misco,* 484 U.S. 29 (1987), the Supreme Court reversed a court of appeals that had refused on public policy grounds to enforce an arbitrator's reinstatement of an employee whose job was operating a dangerous paper-cutting machine, and whose car had been found to contain marijuana while in the company parking lot. In *Eastern Associated Coal Corp. v. UMW District 17,* 531 U.S. 57 (2000), the Court upheld an arbitrator's conditional reinstatement of a truck driver who had twice tested positive for marijuana. The Court pointed out in the latter case that the relevant federal statute and Department of Transportation regulations contained both antidrug, *and* rehabilitation provisions for safety-sensitive positions and nothing that would specifically prohibit the dischargee's reemployment.

Test: If the employer (or the employer in conjunction with the union) has the lawful authority to take unilaterally the action directed by the arbitrator, such as reinstatement of a wrongdoing employee, the arbitral award should be sustained against public policy claims. The arbitrator is the parties' surrogate, their designated spokesperson in reading and applying the contract. What the parties are entitled to say or do on their own, the arbitrator is entitled to say or order without violating public policy. The Supreme Court in effect accepted this approach in *Eastern Associated Coal, supra,* at 62. See also Frank H. Easterbrook, "Arbitration, Contract, and Public Policy." in National Academy of Arbitrators, *Proceedings of the 44th Annual Meeting* 65, 70-77 (Gladys W. Gruenberg ed. 1992). ■

EASTERN DISTRICT UPDATE

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Granting FMLA Leave Might Estop Employer From Denying Subsequent, Identically Supported Requests For Leave

In *Love v. County of Wayne,* 2005 WL 1529603 (ED Mich, 2005), Judge Steeh ruled that a jury should decide whether an employer was equitably estopped from rejecting an FMLA leave request premised on medical documentation the employer previously deemed sufficient. A jury could conclude that the employer, in effect, misrepresented that the documentation was sufficient when it accepted it the first time, and then failed to provide the plaintiff sufficient time to cure the deficiency when it rejected the same documentation the second time. On the other hand, reasonable jurors could conclude that the employer forwarned the plaintiff that her documentation lacked required detail.

Terminating a Retired Employee's Temporary Employment Assignment is Not Adverse Employment Action

Judge Borman ruled in *Reynolds v. Lear Corp.,* 2005 WL 1684127 (ED Mich, 2005), that retired employee who periodically returned to perform temporary work assignments sustained no adverse employment action when the last assignment ended by its terms. Adverse action and constructive discharge findings were also rejected because the employer gave the plaintiff a legitimate offer of continued employment. "[P]resenting an employee with legitimate options for continued employment precludes a finding of constructive discharge, even if the offer of employment is for a less prestigious position."

Post-Employment Treatment Cannot Sustain FMLA's "Continuing Treatment" Provision

Judge Steeh ruled in *Stanford v. Blue Cross Blue Shield of Michigan,* 2005 WL 1345455 (ED Mich, 2005), that plaintiff failed to meet the "continuing treatment' criteria for FMLA coverage because she was treated for her condition only one time during her employment. Her second treatment occurred after she was terminated for unscheduled absenteeism.

Blogger Liable for Violating Confidentiality Clause

In *American Communications Network, Inc. v. Steuben Associates,* 2005 WL 1355070, Magistrate Morgan recommended that a former employee who published disparaging information about his former employer on the Internet be found liable for violating the confidentiality clause in a settlement agreement. Liability was proper even if the employer published the information first because, "there is no provision in the confidentiality provision that a breach by a party relieves the other party of the duty to maintain confidentiality." Also, the truth or falsity of the information is irrelevant, since the settlement agreement prevented disclosure of "any" information.

Just Cause Provision Does Not Create Expectation That Duties and Title Will Remain the Same

Judge Cleland ruled in *Ziem v. Zehnder,* 2005 WL 1563329 (ED Mich, 2005), that a public employer's merit rule, which provides that "demotion" will not occur absent just cause, does not create a property interest in, or a reasonable expectation that the employee will maintain, specific titles or job duties. Consequently, the merit

rule did not require the employer to extend procedural or substantive Due Process before transferring the plaintiff to a different, but identically paying position within the same department.

Supervisor Rudeness Can Establish Discriminatory Animus, Not Adverse Employment Action

Judge O'Meara ruled in *Speer v. Home Depot USA, Inc.,* 2005 WL 1027589 (ED Mich, 2005), that the plaintiff's testimony that her supervisor became "rude and cold" after she rejected his sexual advances, combined with evidence of pretext, raised a material factual question whether discriminatory animus motivated the plaintiff's discharge.

In *Tolbert v. Potter,* 2005 WL 1348986 (ED Mich, 2005), however, Judge Edmunds ruled that a supervisor's "rude and intimidating" conduct could not sustain the adverse employment action element of the plaintiff's prima facie case. Moreover, allegations that the employer revised the plaintiff's route, watched her closely, required her to undergo numerous fitness for duty examinations and made rude, derogatory and "intimidating" comments toward her were taken together, not severe or pervasive enough to sustain a retaliatory harassment claim.

Successful Grievance Estops Discrimination Suit

Judge Edmunds ruled in *Collins v. Snow,* 2005 WL 1342979 (ED Mich, 2005), that the plaintiff's decision to prosecute his discrimination claim through a contractual grievance procedure estopped him from filing an identical complaint with the EEOC. "Plaintiff initially elected to pursue this matter through the negotiated grievance process. He is thus bound by that irrevocable election of remedies and cannot now pursue the sex discrimination claims asserted in this subsequent action."

Reinstating and Transferring The Terminated Harassee Was Part of a Reasonable Response to Supervisor Harassment

Despite a bevy of racially derogatory comments by the plaintiff's one-time supervisor, Judge Zatkoff dismissed the plaintiff's racial discrimination and harassment claims in *Scales v. Bob Evans Restaurant, Inc.* 2005 WL 1701908 (ED Mich, 2005), because the employer reasonably responded to complaints and imposed no adverse employment action. The employer responded to the plaintiff's first complaint, which came three days after his termination, by immediately reinstating him and transferring him to a different location, away from the alleged harasser. When the plaintiff provided more detail about the harassment, the harasser apologized to the plaintiff and was disciplined. The employer also rescinded the potentially harassment-related write-ups the harassing supervisor placed in the plaintiff's file. Although the transfer resulted in a slightly longer commute to work, it was not materially adverse because the plaintiff did not object to it and sustained no loss in pay, benefits, job responsibilities or title. The plaintiff's constructive discharge claim was belied by the fact that management explicitly informed him that there was no desire to terminate him and, other than requiring him to continue performing his job well, imposed no unusual threats or ultimatums.

A RIF Can Effect Just One Employee/Same Class Inference Is Relevant, Not Conclusive

Judge Steeh ruled at the summary judgment stage that the employer in *Hess v. Canteen Vending Service,* 2005 WL 1684144 (ED Mich, 2005), established its RIF defense even though the plaintiff, the oldest employee in the Detroit office, was the only individual laid off. Evidence showed that the employer lost its largest customer and a significant amount of business, that the plaintiff was not replaced, and that the plaintiff's duties were distributed among two preexisting employees. A non-decisionmaker's statement that he was surprised the plaintiff returned to work after medical leave instead of retiring, which was made at least 15 months before plaintiff's termination, was a "stray remark" and "too vague and temporally remote to constitute evidence of age discrimination."

Similarly, because the plaintiff was not replaced and her duties were assumed by an existing employee, Judge Zatkoff used the RIF construct to evaluate the African-American plaintiff's race discrimination claim in *Simpson v. UAW Local 6000,* 2005 WL 1593444 (ED Mich, 2005). Judge Zatkoff also ruled that the plaintiff's claim was belied, in part, by the fact that the board members who recommended the adverse employment action were also African-American. "Although the Supreme Court has rejected a 'conclusive presumption' that an employer will not discriminate against members of his or her own race, the fact that two African-Americans helped orchestrate the RIF is certainly relevant to Plaintiff's claim that the RIF was nothing more than a ruse to eliminate African-Americans." Judge Zatkoff also reasoned that an affidavit stating that a board member who supported the plaintiff's termination had opposed the layoff of another African-American employee because she thought the layoff was racially motivated tended to belie, not support, the plaintiff's pretext argument. "If Defendant Ettinger was so sensitive to the plight of Ms. Myles that she told her the Board action eliminating her position was racially motivated, it seems highly unlikely that she would be in favor of [the alleged adverse employment action against the plaintiff] if that decision was also based on race."

Complaint About Harassment is Protected Speech, Despite "Private Motive"

Judge Lawson rules in *Schroeder v. City of Vassar,* 371 F Supp 2d 882 (ED Mich, 2005), that a "private motive" will not disqualify speech from satisfying the "public concern" element of a First Amendment retaliation claim. Consequently, a public employee's allegation that a female co-worker violated the city's sexual harassment by making lewd comments — a statement on a matter of public concern — can support a First Amendment retaliation claim even though the statement was designed as a defense to harassment allegations that had been levied against him.

Employer Might Be Vicariously Liable for Intentionally Inflicted Conduct

In *EEOC v. Wolverine Bronze Co.,* 2005 WL 1047299 (ED Mich, 2005), Judge Steeh granted the intervening plaintiff's motion to sue his former employer for intentional infliction of emotional distress. The plaintiff could establish that his former employer is vicariously liable for the racially-motivated alleged conduct of a part owner, a plant foreman, the plaintiff's direct supervisor and some coworkers. This was particularly true where the employer took no corrective action in response to the plaintiff's complaints and where plaintiff alleged, *inter alia,* that a part-owner: "told Plaintiff he was surprised he would complain about racial harassment after lending him money;" "told Plaintiff that as long as Kowalke and Wutkie were not signing his paychecks, he was not to worry about their conduct;" "told Plaintiff nobody was 'shackled' there and if he did not like it he could leave;" "told Plaintiff that the police did not question him about his dark tinted windows because he was not 'the wrong color;'" "told Plaintiff he should not speak with other employees if Plaintiff was only going to complain about racial slurs and harassment;" "followed Plaintiff around the plant, throwing metal bolts at him, and kicking or tripping Plaintiff while he was trying to work," and; "pulled a plastic garbage bag over Plaintiff's head and torso, telling him 'We were going to have a blanket party for you.'"

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EASTERN DISTRICT UPDATE

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Employer's Business Judgment May Be Questioned if the Unsuccessful Candidate had Vastly More Experience

Evidence that the plaintiff performed well before taking FMLA leave, that the plaintiff's job was the only one eliminated in a so-called RIF, and an allegation that a decisionmaker told the plaintiff that her new position would be "less stressful" presented triable FMLA interference and retaliation claims, according to Judge Steeh's ruling in *House v. LA-Z-Boy, Inc.,* 2005 WL 1529685 (ED Mich, 2005). Further, because the issue in a failure-to-promote case is the candidates' respective "qualification for the job, not their similar situations," the plaintiff is not obliged to show that the successful candidate was similarly situated. Finally, there are cases where the employer's "business judgment" is so lacking in merit that its genuineness can be questioned. Such was the case where the plaintiff had vastly more experience than the successful candidate and there were questions about the successful candidate's supervisory capability.

Employer's "Diversity" Policy Will Not Sustain a "Reverse Discrimination" Claim Absent Proof that Illegal "Quotas" Were Used

In *Blossom v. Ford Motor Co.,* 2005 WL 1529735 (ED Mich, 2005), Judge Cohn ruled that evidence showing that the employer encourages workplace "diversity" is, by itself, insufficient to sustain a "reverse" discrimination claim. Plaintiffs must go further, and show that the employer utilized illegal "diversity quotas."

Racial Slurs Were Neither Direct Evidence Nor Adverse Employment Action

Judge Feikens ruled in *Alfara v. Dana Container, Inc.,* 2005 WL 1459167 (ED Mich, 2005), that the plaintiff's "self-serving" testimony that two supervisors said he was "nothing but a f-ing spic and wetback" is not direct evidence or race and national origin discrimination. The testimony was unsupported by other evidence and contradicted by the supervisors' "equally plausible" testimony. Moreover, "racial slurs and comments" are "not employment actions" capable of sustaining the adverse employment action element of a circumstantial evidence case.

Arbitrator Authorized to Reinstate Discharged Employee

Judge Lawson ruled in *National Association of Broadcast Employees and Technicians v. Meredity Corp.,* 2005 WL 1606582 (ED Mich, 2005), that a labor arbitrator had authority to reinstate an employee who was terminated without "just cause." Particularly where work rules do not mandate discharge under specific circumstances or forbid arbitrators from reinstating employees, an arbitrator's authority to interpret a "just cause" provision is not negated by express work rules or employer policies. Moreover, absent an indication that the parties agreed upon "an expanded standard of review of arbitral decisions: contractual language making an arbitrator's award "subject to judicial review by either party" does not authorize courts to evaluate the merits of the arbitrator's just cause determination.

Causation Is Not Lightly Inferred

Judge Feikens ruled in *Dixon v. Gonzalez,* 2005 WL 1678018 (ED Mich, 2005), that a plaintiff cannot prove retaliation simply by showing that he sustained adverse employment action ten years after engaging in protected activity.

This holds true even if the adverse action occurred shortly after the protected activity, according to Judge Edmunds' ruling in *Scott v. Total Rental Care, Inc.,* 2005 WL 1680677 (ED Mich, 2005). The plaintiff must go further and show that she was fired because of the protected activity, which cannot be done absent evidence that the employer was aware of it. Judge Edmunds also ruled that the plaintiff's public policy discharge claim was preempted by the WPA, even though the WPA claim was factually unsustainable. "Contrary to Plaintiff's arguments here, the test is not whether the plaintiff can successfully prove the elements of her WPA claim. Rather, it is whether the alleged underlying conduct, if proven falls within the protection of the WPA."

In addition, Judge Cleland granted summary judgment to the employer in *Smith v. ACO, Inc.,* 368 F Supp 2d 721 (ED Mich, 2005), because the employer decided to terminate plaintiff shortly before he successfully requested and took FMLA leave. Such evidence defeats the causation element as a matter of law, and is not undermined by either temporal proximity or the fact that the plaintiff was not terminated until the day he returned from leave. Judge Cleland reasoned that "[u]nder the facts presented in this case, the employer was in a proverbial 'catch 22.' Once Plaintiff informed it that he was injured and once he requested FMLA leave, the Defendant's determination [to terminate plaintiff for various performance problems] could not be executed without falling close in time to Plaintiff's FMLA leave request. No matter when the decision to release Plaintiff was executed, it almost certainly would be called into doubt by Plaintiff. Defendant's choices included discharging Plaintiff as planned on the same day he requested FMLA leave or delaying the execution of his firing for at least some period of time. In either event, firing Defendant was certain to take place after he had requested FMLA. As such, the employer's decision in this context does not permit an inference that its three employees are lying about the timing of Plaintiff's discharge."

Sexual References, Jokes, Come-ons, Compliments and Shoulder Massages Were Not Severe Enough to Sustain Harassment or Constructive Discharge Theories

Judge Fiekens ruled in *Myers v. Todd's Hydorseeding & Landscaping, LLC,* 368 F Supp 2d 808 (ED Mich, 2005), that the following incidents, which occurred over an 18-month period, combined with a supervisor's alleged request for sex were neither severe not pervasive enough to sustain a sexual harassment claim under Title VII: "(1) references in Plaintiff's presence to 'big boobs,' 'panty lines,' and 'G-strings' as part of sexual statements or jokes; (2) reference in Plaintiff's presence to the size of genitals as part of a sexual joke; (3) touching of Plaintiff on the shoulders by employee Mike Butler; (4) three comments made by [the Plaintiff's manager]: 'you have aged well,' 'you are very pretty,' and 'you have a nice figure;' (5) [the manager's] directions to Plaintiff to call him from her home, and his directions to take a call in a conference room instead of at her desk; (6) massaging the shoulders of another female employee in Plaintiff's sight; and (7) [the manager] asking another employee to come to his house when his girlfriend was away." Judge Fiekens reasoned that the alleged incidents were less severe than the circumstances alleged in *Morris v. Oldham County Fiscal Ct.,* 201 F3d 784 (CA 6, 2004), which were deemed insufficient to sustain a harassment claim.

Judge Fiekens also dismissed the plaintiff's constructive discharge theory, and hence her disparate treatment claim, because a single request for sex by the plaintiff's supervisor would not make a reasonable person feel that continued employment was intolerable. The request was not a *quid pro quo* proposition, was not repeated after the plaintiff said no, and the plaintiff quit before giving the employer an opportunity to take corrective action.

Disagreeing With White Decisionmakes Does Not Establish Pretext

Judge Gadola ruled in *Somerville v. William Beaumont Hospital,* 2005 WL 1389254 (ED Mich, 2005), that the African-American plaintiff could not establish pretext simply by disagreeing with the basis of his termination and showing that all the decisionmakers were white. ■

COURT DISMISSES TWO FMLA CLAIMS; WHISTLEBLOWER PROTECTION ACT AND TITLE VII CLAIMS BARRED AS UNTIMELY; AND EMPLOYEE'S FREE SPEECH CLAIM DISMISSED WHERE HE VIOLATED EMPLOYER'S VIOLENCE IN THE WORKPLACE POLICY

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

Pretty v American Axle and Manufacturing Holdings, Inc., No. 1:04-CV-535 (June 17, 2005), Quist, J. Plaintiff, a former employee, alleged he was terminated and retaliated against in violation of the Family and Medical Leave Act (FMLA). Plaintiff presented his employer with a doctor's not indicating he was unable to work from May 18, 2002 until June 3, 2002. Plaintiff did not request FMLA leave nor seek sickness and accident benefits under his collective bargaining agreement. The Employer sent him a letter that if he failed to return to work within five (5) days, he would be terminated. Plaintiff never responded to the letter nor returned to work and was terminated.

In ruling upon Employer's Motion for Summary Judgment, the Court held because Plaintiff never gave sufficient notice alerting his leave qualified for FMLA (i.e., for serious health condition), did not provide sufficient information of the nature of his illness, nor was he in the hospital or under continuous care of a medical provider, he was not entitled to FMLA leave. Accordingly, the claim was dismissed.

Hite v. Norfolk Southern Railway Company, NO. 1:04-CV-860 (June 9, 2005), Enslen, J. Defendant filed a Motion for Summary Judgment arguing Plaintiff's Whistleblowers Protection Act claim was barred by the statute of limitations which requires the filing of a complaint within 90 days of the adverse action. Plaintiff filed the complaint approximately six (6) months after termination from employment. In applying state law, the Court held the Michigan Supreme Court has adopted a strict approach to limitations periods and rejected a continuing violations theory. Because Plaintiff's cause of action arose at the time of the notice of the discharge, and not at a later date when the notice came to fruition, Plaintiff's complaint was dismissed as untimely.

Chrisman v. Rapid-Line, Inc., NO. 1:04-CV-509 (June 21, 2005) Quist, J. Plaintiff sued her former employer alleging violation of the Family and Medical Leave Act (FMLA) when it failed to reinstate her to her previous or an equivalent position following an extended leave of absence due to depression. The Court granted the Defendant's Motion for Summary Judgment because as of the termination date, Plaintiff had exhausted her twelve weeks of FMLA leave or, in the alternative, based upon Plaintiff's testimony, she was not medically cleared to return to work until approximately four weeks after her FMLA leave would have been exhausted.

Johnson v. City of Battle Creek, NO. 4:04-cv-38 (May 10, 2005), J. Scoville. The remaining claims in Plaintiff's Fourth Amended Complaint alleged a violation of: (1) §1983 for abridgment of plaintiff's free speech; (2) §1983 conspiracy claim for abridgement of plaintiff's free speech rights; (3) §1981 claim for wrongful discharge based upon race; and (4) pendant state law claims for failure to conduct a fair and just investigation.

An employee reported Plaintiff threatened him with a violent comment to the effect of "a trespasser might just get shot in his posterior." The Defendant employer conducted an investigation of this comment which violated Defendant's violence in the workplace policy. During the course of the investigation, Plaintiff made false statements in violation of the city ordinance and tried to coerce a witness to change his story regarding the charges. Plaintiff was terminated and replaced with a black male.

With respect to Plaintiff's First Amendment claim, Plaintiff claimed Defendant's violence in the workplace policy, which prohibited verbal threats against coworkers, was a prior restraint of speech and overbroad. The Court found there was no prior restraint which requires speech to be conditioned upon the prior approval of public officials. In the instant matter, there was a post-publication disciplinary procedure in place for certain threatening conduct and as such, the jurisprudence governing prior restraints was inapplicable. Likewise, workplace threats are forms of "fighting words" that are not protected speech.

Further, the Court stated the threshold question in determining whether a discharge is retaliatory is whether the employee's speech may be characterized as speech on a matter of public concern. If it meets this test, the Court will then employ a balancing test to determine whether the free speech interests outweigh the efficiency interest of the government as an employer. Because the Plaintiff's comment regarding shooting a trespasser on his private premises was not a matter of public concern was not protected speech.

Likewise, Plaintiff could not establish a prima facie case of race discrimination under §1981 because he was not replaced by someone outside of his protected class (African-American). Even though Plaintiff alleged his replacement was not qualified for the job, Plaintiff did not cite any authority that this fact established his claim.

Hodge v. Consolidated Rail Corp., No. 5:03-CV-92 (June 14, 2005), Bell, J. Plaintiff's Amended Complaint alleged race discrimination under Title VII. During his employment, Plaintiff pled guilty to larceny and served a 90-day jail sentence. Although Plaintiff was initially terminated for such conduct, he was conditionally reinstated. However, Plaintiff never responded to the offer of conditional reinstatement and was terminated.

Plaintiff subsequently filed a charge with the EEOC more than 300 days after having conversations with the NAACP that he believed the union discriminated against him based upon race when it failed to properly represent him in a grievance against the employer. Because Plaintiff believed in 2000 that the union was dilatory in its representation, and filed an EEOC complaint two years later in July 2002, his EEOC charge was untimely.

Further, because Plaintiff failed to show the union failed to assist him in challenging his termination (and had actually caused him to be reinstated after serving his jail sentence) and Plaintiff could not show he was treated differently than any similarly situated employee, the race discrimination claim was dismissed. ■

MERC UPDATE

Michael M. Shoudy
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Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 10 Decisions and Orders in a variety of cases. A brief summary of 4 of those cases follows. Of the 10 cases, 8 were unfair labor practice hearings and 2 were unit clarification hearings. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

UNFAIR LABOR PRACTICES

City of Royal Oak (Police Department)

Case No. C00 B-034 (March 17, 2005)

The Administrative Law Judge (ALJ) issued a Decision and Recommended Order finding that Charging Party, the Royal Oak Police Officers Association, waived its right to bargain with Respondent, City of Royal Oak, over its decision to make certain special assignments pursuant to the parties' collective bargaining agreement. Additionally, the ALJ found that Respondent violated the duty to bargain when it refused to bargain over the effects of making these special assignments to Charging Party's members. Both parties filed timely exceptions with the Commission.

Charging Party represents a bargaining unit of non-supervisory police officers and police dispatchers. The issue arose when Respondent made several changes in assignments. The Commission considered the following exceptions:

1. Respondent's exception to the inclusion of eligibility requirements and selection procedures as subjects to be addressed in effects bargaining;
2. Charging Party's exception to limiting bargaining to effects bargaining; and
3. Charging Party's exception that the removal of Officer Karyn Risch from the Narcotics Enforcement Team (NET) position and the assignment of a command officer to that position did not violate PERA.

First, the Commission noted that Respondent had not excepted to the ALJ's conclusion that it had a duty to bargain over the effects of its decision to assign Charging Party's members to certain special assignments. Respondent took exception with the ALJ's alleged inclusion of eligibility requirements and selection procedures as effects that were required to be bargained. The Commission held that the ALJ's Recommended

Order contained no specific language concerning the subjects that constituted the effects over which Respondent must bargain. Because such direction to the parties would be premature, the Commission declined to decide the scope of the effects bargaining at this time.

Second, the Commission concluded that Charging Party conceded that it was only seeking the right to bargain over the effects of the decision based on language in its Post-Hearing Brief and its representations to the ALJ. Based on this, the Commission declined to overrule the ALJ's conclusion that Charging Party had waived its right to bargain the decision to assign this work.

Third, the Commission found that there was insufficient evidence to demonstrate the removal of Officer Risch from her NET assignment was based on union animus. However, the Commission found that Respondent violated Risch's right to engage in protected activity when the Chief disparaged her use of the grievance process, sought to persuade her to withdraw her grievance, and sought to have her denounce her allegiance to Charging Party. The Commission found this conduct violated Section 10(1)(a) of PERA.

Frenchtown Charter Township

Case Nos. CU02 B-009 and C02 B-014 (May 3, 2005)

The Administrative Law Judge (ALJ) issued a Decision and Recommended Order finding that a proposal by the Frenchtown Professional Firefighters (Union) for the creation of new bargaining unit positions by the Frenchtown Charter Township (Employer) was a permissive subject of bargaining and therefore violated the Union's duty to bargain in good faith when the Union presented this proposal to the Act 312 panel. In a separate charge, the Union alleged that the Employer repudiated its agreement to submit these issues to the Act 312 panel. The ALJ recommended dismissal of the Union's charge. The Union filed timely exceptions to the ALJ's Decision and Recommended Order.

In its exceptions, the Union alleges that its proposal to establish new positions along with wage rates and promotional criteria constituted a mandatory subject of bargaining. In addition, the Union asserted that the Employer unlawfully repudiated its agreement with the Union to submit these issues to the Act 312 panel.

The Commission agreed with the ALJ that an employer has an inherent managerial right to create new positions. Therefore, the Union's proposal regarding the creation of new positions was a permissive subject of bargaining. By submitting this proposal to the Act 312 panel, the Union committed an unfair labor practice.

Additionally, the Commission agreed with the ALJ that parties cannot confer jurisdiction on an Act 312 panel. Jurisdiction under Act 312 has been established by the Legislature. The Michigan Supreme Court has affirmed that an Act 312 panel can only compel agreement as to mandatory subjects of bargaining. The Commission held an agreement to expand the jurisdiction of the Act 312 panel constitutes an impermissible intrusion upon the legislative prerogative. Therefore, the dismissal of the Union's repudiation charge was upheld.

Saginaw Township

Case Nos. C02 A-003, C02 A-010, and CU02 E-029 (May 3, 2005)

The Administrative Law Judge (ALJ) issued a Decision and Recommended Order finding that Saginaw Township (Employer) violated rights guaranteed under Section 9 of PERA. The ALJ further found that the Police Officers Association of Michigan (Union) had not violated its duty to bargain by making secret tape recordings of grievance meetings. The Employer filed timely exceptions to the ALJ's Decision and Recommended Order.

During a September 7, 2001 meeting, Chief of Police Stephen Renico told representatives of the Union that he had thoughts of killing them and burying their bodies, as was done to Hoffa. During a December 12, 2001 meeting, Chief Renico used profane and threatening language in stating what he would do if a grievance

involving standby pay was filed. During a December 18, 2001 meeting, Chief Renico said that if overtime became an issue, he would limit the number of officers on vacation to one per shift. He also said he would put one of the grievant's proponents on a "short leash." In response to the filing of the grievance, Chief Renico issued a memo requiring all Union representatives to obtain his permission before conducting Union business during working hours.

The Commission held that Chief Renico's conduct and statements, as demonstrated during the September 7, December 12, and December 18 meetings and the January 4th memo, were threatening and coercive and interfered with rights guaranteed under Section 9 of PERA. Although certain latitude is granted for offensive or critical remarks, an employer cannot threaten employees or retaliate against them for pursuing a grievance.

Turning to the secret tape recordings, the Commission disagreed with the ALJ that secret recordings of grievance discussions were not an unfair labor practice. The Commission noted that the unilateral recording of collective bargaining sessions is an unfair labor practice. The NLRB has indicated that insisting to impasse on the use of a recording device during a grievance meeting also violates the duty to bargain in good faith. Relying on the rationale of the NLRB, the Commission concluded that grievance meetings are an integral part of the collective bargaining process and are subject to PERA's requirement of good faith bargaining. Engaging in secret tape recordings of grievance meetings interferes with the bargaining process and is the equivalent of bargaining to impasse on a permissive subject. Therefore, the Commission held that the Union breached its duty to bargain in good faith by secretly tape recording grievance meetings.

UNIT CLARIFICATION

Genesee County Community Mental Health Services

Case No. UC03 C-13 (May 3,2005).

Teamsters Local 214 (Petitioner) filed a petition seeking to clarify its bargaining unit of non-supervisory employees by adding the newly created position of facilitator. The Employer opposed the petition, contending that the facilitator position did not share a community of interest with the Petitioner's bargaining unit and that the position was more akin to the unrepresented positions of general supervisor and unit supervisor. However, the Employer did not contend that the facilitator position was supervisory.

At the time of the hearing, Petitioner's bargaining unit was comprised of numerous positions with professional licenses and master's level degrees or higher. Employees who were not represented in Petitioner's unit were represented by AFSCME or not represented at all.

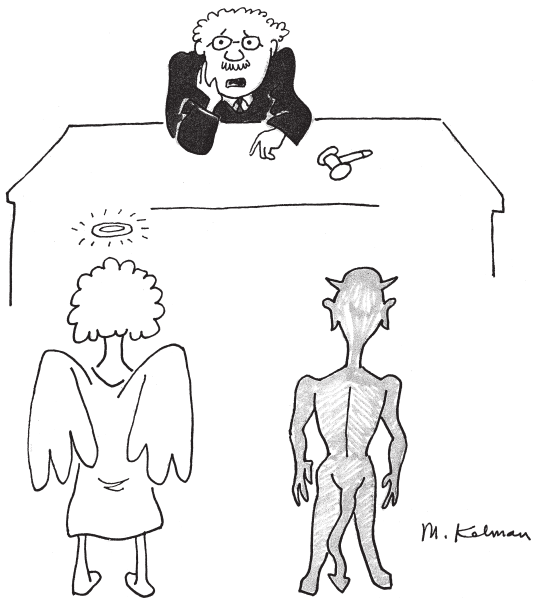
The facilitator position was created to assist with the mental health component of the Safe Schools/Healthy Students project. The facilitators are responsible for assessing mental health needs of children by identifying ways for children to access mental health services through the Employer's programs or through private mental health service providers. The facilitator must ensure that the program is in compliance with standards set by the Michigan Department of Community Health. To qualify for the facilitator position, the applicant must have a master's degree in clinical psychology or social work and three years of experience in providing mental health services to children, families, and/or adults. The position is salaried and exempt from overtime pay.

In establishing a community of interest, Petitioner pointed to the two unit positions of clinical coordinator and clinical liaison as being similar to the facilitator. Both positions require a master's degree and knowledge of the Mental Health Code and related rules and regulations. The Employer considers both of these positions exempt from overtime pay.

The Employer pointed to two non-union positions, the general supervisor position and the unit supervisor position, as being similar to the facilitator position because the three positions are involved in program development and implementation. The general supervisor position and the unit supervisor position both direct and supervise the work of assigned staff.

The Commission noted in making unit determinations its policy is to require, whenever possible, comprehensive units in order to avoid fragmentation and the eventual formation of residual units. The fact that employees have different job duties or functions in a bargaining unit does not necessarily mean that they lack a community of interest. As the Commission noted, "[t]he touchstone of an appropriate bargaining unit is a common interest of all of its members in the terms and conditions of their employment that warrants inclusion in a single bargaining unit and the choosing of a bargaining agent." Based on these principles, the Commission found that the position of facilitator and the positions offered by Petitioner were sufficiently similar in skills, education, training, and job duties to establish a community of interest. The alleged differences were too minor to destroy the community of interest between the facilitator and the bargaining unit. Therefore, Petitioner's bargaining unit was clarified to include the position of facilitator. ■

KELMAN'S CARTOON



"This is a very difficult case. I can't tell you how much I've agonized over my decision.

MIOSHA UPDATE

Richard P. Gartner
Assistant Attorney General
State of Michigan

ELECTROCUTION/FATALITY

Doublejack Electric Company, Inc. v. Bureau of Safety and Regulation, No. 2003-1238

This case illustrates the dangers that arise every day in the workplace. The employer is an electrical contractor who performs installations, repairs and maintenance work. It had a contract to perform electrical work at the Oakland County Court Complex in Pontiac. On the morning of September 9, 2002, two employees of the employer were assigned to repair several light poles in the parking lot at the court complex. Both employees were licensed journeyman electricians. One employee went up about 25 feet in a bucket on a boom truck and replaced the bulb in the light pole which was not working. After the bulb was replaced and continued not to light up, the other employee took off an access cover plate at the base of the pole and pulled out the fuse holders. While laying on his side on wet grass, he worked on the energized fuse holders with his bare hands. He then came into contact with an unprotected portion of the 277 volt electric circuit and was electrocuted. The power to the light pole had not been turned off and the deceased did not use any protective equipment such as gloves or an insulating blanket.

MIOSHA cited the employer for failing to have a "competent person" ascertain "by inquiry, observation, or instruments" whether it was safe to work on any part of the electric power circuit and for failing to provide its employees with protective equipment such as gloves or blankets to guard against electrical shock hazards. The employer argued that the two licensed journeyman electricians were "competent persons" and that the second citation should have been vacated on the grounds of unpreventible employee misconduct. The administrative law judge ruled that each employee was a "competent person" under Rule 408.41717(5) but neither one had made the necessary checks before working on the fuse holders with the electric power on. The ALJ also held that Doublejack Electric Company had failed to satisfy all the elements of the employee misconduct offense. The ALJ found that the employer had failed to take steps to supervise the daily work of its employees and failed to take steps to discover whether its employees were complying with safety rules. On September 2, 2004, the Board of Health and Safety Compliance and Appeals issued an order affirming the decision of the administrative law judge.

INDEPENDENT CONTRACTOR

Bureau of Safety and Regulation v. Hughes Design & Build US., LLC, No. 2000-852

This matter involved a fatality which occurred when an employee fell from a basket placed on the forks of a forklift at the worksite of another employer. The deceased was attempting to insert additional screws in plywood attached to the side and top of a metal rack that had earlier been installed. MIOSHA cited the employer for four violations of the Construction Safety Standards. The employer filed a motion to dismiss on the grounds that it was not the employer of the deceased. The employer argued that the deceased was an independent contractor and that all the citations should be dismissed. The administrative law judge ruled that the deceased was an employee of Hughes Design and Build — US., LLC. Under Section 5(1) of the MIOSHA Act, MCL 408.1005, an "employee" is defined as "a person permitted to work by an employer." The term "employer" under Section 5(2) of the MIOSHA Act, MCL 408.1005, "means an individual or organization . . . which employs 1 or more persons." The administrative law judge determined that the deceased was "permitted" to work by the employer because it paid for his work, and had the power to hire, fire and direct the work of the employee. The ALJ relied on the fact that the MIOSHA Act is remedial legislation and is intended to be liberally construed to accomplish its statutory purpose. The ALJ also noted that the MIOSHA Act was intended to afford all persons permitted to work by an employer a work environment free of recognized hazards. In addition, the administrative law judge considered the well-known economic reality test. Later, the parties settled the involved citations.

EMPLOYER HISTORY

L. D'Agostini & sons v. Bureau of Safety and Regulation, No. 2002-806 **Ingham County Circuit Court No. 03-2076-AA**

This case raises the question whether MIOSHA has the authority to increase the classification of a citation from "serious" to "willful-serious" based on the employer's history of repeatedly violating a safety rule involving the excavation of trenches. In March 2001, L. D'Agostini & sons was cited by MIOSHA for digging a trench which was not dug at the required angle and there was no shoring, plates or a trench box in the excavation. also, the employer was cited for three other violations of the Construction Safety Standards. The MIOSHA safety officer who conducted the inspection originally recommended a serious violation for the failure to maintain the proper angle of repose within the excavation. Upon further review, MIOSHA discovered that the employer had been cited on nine prior occasions in Michigan since 1990 for the same exact safety rule violation. MIOSHA, therefore, determined that the employer's work practices demonstrated plain indifference to the safety rule and increased the classification of the involved citation from serious to willful-serious. The citation also came with a $14,000 penalty. The employer contended that its history of prior violations of the safety rule alone did not constitute deliberate or plain indifference. The employer also claimed that there is no legal precedent to support the actions of MIOSHA.

The administrative law judge upheld the involved citation and concluded that the employer's repeated violation of the safety rule involving trench excavations reflected "a plain indifference to compliance with the requirements" of the safety rule. The Board of Health and Safety Compliance and Appeals affirmed. On appeal, the Ingham County Circuit Court also affirmed. The Court held that the Board "committed no error in determining that the employer's excavation of a non-conforming trench for the tenth time in twelve years was a willful and serious violation. . . ." An application for leave to appeal is presently pending in the Court of Appeals. ■

VIEW FROM THE CHAIR

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

THANKS

By the time this is published I will be ex-officio. According to *Black's,* I am now "without any other warrant or appointment than that resulting from the holding of a particular office." I can't say I really know what that means. To the best of my recollection, I've never been ex-officio of anything. I can say that it has been a privilege to serve as chairperson and to make a small contribution to the Section.

Financially the Section remains sound. We have a healthy fund balance that allows the Section to continue to provide the high quality programs and activities that the Council believes benefit Section members. More importantly, the Section is in very capable hands going forward. Our new Chair Deb Gordon has brought energy and innovation to the Council. She was the driving force behind the popular mini-seminars that have been held in recent years. Good humor and a willingness to tackle whatever needs to get done are among the qualities that Vice Chair Mike Lee has brought to the Council. Dave Calzone's contributions first as a Council member and now as a Section officer range from his intellectual insights at educational programs to chauffeuring mid-winter meeting speakers. And incoming Treasurer Dan Bretz has been a tireless volunteer both organizing and participating in Section functions. I certainly appreciate all the hard work of all of the Council members, not only involving specific projects and programs, like the mid-winter meeting but, more generally, for their sage advice and counsel on the various issues that the Council must deal with. All of the Council members — Kathy Bogas, Darcie Brault, Jeff Donahue, Kiffi Ford, Stan Moore, Brent Rector, David Rhem, Dan Swanson, Kathryn VanDagens, Richard Whiteman and George Wirth — deserve many thanks for the time, thought and energy they devote to the Section. And several persons who are not Council members continue to make valuable contributions: Dave Kotzian, our Listserv administrator who persevered over the invading forces of rampant commercialism and Stuart Israel, whose adherence to the highest standards of journalism (the publication of my musings excepted) is matched only by his talent in cajoling busy practitioners into submitting articles in a reasonably timely fashion. *Lawnotes* Assistant Editor John Adam deserves our thanks as well. And Dave Khorey, soon to be ex-ex-officio, has continued to participate in Council activities where his experience has been invaluable.

Beyond offering thanks to the officers and Council members and other worthy hangers-on, I would be remiss if I did not express my appreciation to the members of my firm for facilitating my participation in the Council over the last several years. In any firm professional demands have a way of intruding on extra curricular activities. But in a relatively small firm of five lawyers, where out of town travel is a constant, the willingness of others to take that trip to Peoria so I could attend a Council meeting or some other Section function did not go unnoticed. Gordon Gregory, a former Section Chair and Distinguished Service Award recipient, Mark Heinen, Scott Brooks and Rachel Helton have made my participation on the Council infinitely easier.

I have truly enjoyed my involvement in the Section over more years than I sometimes want to think about. My children, now adults, still recall fondly the mid-winter meetings poolside at Weber's. I certainly plan to remain active in Section activities. Professionally I continue to appreciate the opportunity both to get to know and to practice law with what our distinguished colleague George Roumell referred to, at the last mid-winter meeting, as the "elite of the Bar" — labor and employment lawyers. I will countenance no dissent from that authoritative declaration. The ability of members of our Section to fight tooth and nail for our clients without any consequent loss of respect and camaraderie is noteworthy and commendable. Long may that remain one of the defining characteristics of Section members. I will no what I can to reach for that standard. Meanwhile, I urge you to stay active in the Section, communicate your ideas and contribute your talents to Section activities, and, as Mark Twain once observed: "Always do right. This will gratify some people and astonish the rest."

INSIDE *LAWNOTES*

- Kiffi Ford and Lee Hornberger explicate settlement agreements (part 1).
- Jerry Byrd presents a primer on business organizations.
- Tim Howlett and Ryan Mulally revisit *Garg* and the case of the missing footnote.
- Adam Forman and Charles Oxender elucidate the state of the evolution of electronic discovery.
- Barry Goldman reveals that the life of an arbitrator isn't *all* fame, glory, and big money.
- Ted St. Antoine looks at the evolution of the law since ICLE inaugurated the annual labor and employment law institutes 30 years ago.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MIOSHA, MDCR and EEOC news, websites to visit, a cartoon by Maurice Kelman, and more.
- Authors Jerry Byrd, Regan K. Dahle, Kiffi Y. Ford, Adam S. Forman, Richard P. Gartner, Barry Goldman, Kurt M. Graham, Lee Hornberger, Timothy H. Howlett, Nancy G. Itnyre, Stuart M. Israel, Maurice Kelman, James M. Moore, Ryan K. Mulally, Ruthanne Okun, Charles T. Oxender, Heather G. Ptasznik, Michael M. Shoudy, Theodore J. St. Antoine, Jeffrey A. Steele, and more.

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