LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

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ERISA BENEFIT CLAIMS

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The Sixth Circuit is one of the busiest of the Circuits in addressing benefit claims cases under ERISA. This outline reviews some of the basic issues in such cases where a claimant seeks to overturn a plan's denial of benefits.

I. THE STANDARD OF REVIEW OF DECISIONS ON BENEFIT CLAIMS

A. Plan Language Initially Determines the Standard of Review.

The standard of review depends on the plan's language granting authority to the decision maker. *Firestone Tire & Rubber Co v Bruch*, 489 US 101, 109 (1989).

De novo review applies, unless the plan grants the administrator authority to make benefits determinations. Where such authority is given by the plan, the decision is reviewed under the more deferential "abuse of discretion" or "arbitrary and capricious" standard. The standard of review, de novo or abuse of discretion, often determines the outcome. The threshold question in any claim arising from denial of benefits in whole or in part is whether and to what extent the plan confers authority on the administrator to decide the claim.

As a general rule, explicit language addressing the administrator's authority to decide the specific matter at issue (such as resolution of factual disputes or determination of eligibility for coverage) is needed before the court will employ arbitrary and capricious review. *Lake v Metropolitan Life Ins Co*, 73 F3d 1372 (6th Cir 1996) (de novo review was required in case involving setoff of Social Security payments against disability benefits because plan provided discretionary authority about who was covered but not about level of benefits payable); *Tiemeyer v Community Mut Ins Co*, 8 F3d 1094 (6th Cir 1993) (plan language generally giving administrator right to "decide" coverage questions did not vest it with discretionary authority to determine whether adopted infants met definition of covered dependent under plan), *cert denied*, 511 US 1005 (1994); *Anderson v Great West Life Assurance Co*, 942 F2d 392 (6th Cir 1991) (holding that plan language might give administrator discretion with respect to some decisions but not others).

B. The "Abuse of Discretion" or "Arbitrary and Capricious" Standard

The abuse of discretion standard is deferential to the claim administrator. However, recent case law suggests a greater willingness by the courts to scrutinize and reverse benefit denials.

Generally, abuse of discretion review requires a "deliberate, principled reasoning process." Some cases also have implied a "substantial evidence" test. *Bennett v Kemper Nat'l Svcs, Inc*, 514 F3d 547 (6th Cir. 2008).

C. Specific Issues Under "Abuse of Discretion" Review

"Cherry Picking" The Medical Evidence. The court will find abuse of discretion where the claims administrator relies selectively on some medical evidence and inexplicably ignores other evidence. *Moon v Unum Provident Corp*, 405 F3d 373, 381 (6th Cir 2005)("selective review of the administrative record"); *Met Life v Conger*, 474 F3d 258, 265 (6th Cir 2007)("cherry picking symptoms . . . and then reverse-engineering a diagnosis")(non-ERISA plan under Federal Long-Term Care Security Act, 5 USC 9001-9009, but using ERISA concepts); *Spangler v Lockheed Martin Energy Systems, Inc*., 313 F3d 356 (6th Cir 2002) (denial of LTD benefits was arbitrary and capricious where the insurer "cherry picked" the claimant's medical file and removed reports of treating physicians from the file given to the plan's consultant).

File Only Review. While a file-only review is permissible, where the plan reserves the right to conduct a physical exam, a file only review may raise questions about the accuracy and thoroughness of the benefits determination. *Bennett v Kemper Nat'l Svcs, Inc* 514 F 3d 547 (6th Cir. 2008).

The "Treating Physician" Rule. Under the "treating physician rule," borrowed from Social Security Disability cases, the opinion of the claimant's treating physician is automatically given greater weight than the plan's consultants. ERISA plans are not required to use the "treating physician rule." *Black and Decker Disability Plan v Nord*, 538 US 822 (2003). *Finazzi v Paul Revere Life Ins Co*, 327 F Supp 2d 790 (WD Mich 2004), acknowledged that the treating physician rule no longer applies, but held that a plan's decision to credit the disability determination of the plan's medical consultants who had not examined the plaintiff over the opinion of the plaintiff's two long-time treating physicians was arbitrary and capricious. *See also, Evans v Unumprovident*, 434 F3d 866 (6th Cir 2006)(plan arbitrarily discounted treating physician's opinion that stress of returning to work would exacerbate claimant's condition).

The Effect of a Social Security Award. A favorable Social Security Disability award is a significant factor in the plaintiff's favor in disability appeals. *Glenn v MetLife*, 461 F3d 660, 666 (6th Cir 2006), *affirmed*, *Metropolitan Life Insurance Co v Glenn*, __ U.S. __ , 2008 U.S. LEXIS 5030 (June 19, 2008); *Darland v Fortis Benefits Ins Co*, 317 F3d 516 (6th Cir 2003); *Calvert v Firstar Fin, Inc*, 409 F3d 286 (6th Cir 2005).

The Sixth Circuit appears to have adopted the "penumbra" concept, which encourages strong deference to a SSA award where the plan encourages or assists application for SSA to obtain benefit offset, bringing case within the "penumbra" judicial estoppel. *Darland v Fortis Benefits Ins Co*, 317 F3d 516 (6th Cir 2003), *citing*, *Ladd v ITT Corp.*, 148 F3d 753 (7th Cir 1998)(Judge Posner stated that while judicial estoppel technically does not apply, the situation falls within its"penumbra"and the SSA determination must be given weight); *Glenn v MetLife*, 461 F3d 660, 667-668 (6th Cir 2006), *affirmed*, *Metropolitan Life Insurance Co v Glenn*, __ U.S. __, 2008 U.S. LEXIS 5030 (June 19, 2008); *Bennett v Kemper Nat'l Svcs, Inc*, 514 F3d 547 (6th Cir. 2008)(claims decision may not ignore, and must discuss, SSD determination)(see conc. opinion

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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.

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by Judge Julian Cook for *contra* view). A court will look to see whether the plan's reviewers give a reason for disagreeing with the SSA determination. A plan administrator's failure or refusal to address a (SSA) determination of total disability can render a claim denial arbitrary and capricious where:

- the plan fiduciary encourages the applicant to apply for Social Security Disability (SSD)
- the fiduciary benefits financially from applicant's receipt of SSD
- the fiduciary fails to explain why it is taking a contrary stance from that of the SSA.
- *Bennett v Kemper Nat'l Svcs, Inc*, 514 F 3d 547 (6th Cir. 2008).

D. Conflict of Interest

While plan language initially determines the standard of review, an important factor in establishing that a claim denial was an abuse of discretion is whether the decision maker had a conflict of interest. *Firestone Tire & Rubber Co v Bruch*, 489 US 101, 115 (1989) (noting that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts §187 Comment d (1959)." Less deference is applied to the claim determination where a conflict of interest is present.

A conflict of interest question arises where the entity a claim is also the entity paying the claim. *Killian v Healthsource Provident Adm'rs*, 152 F3d 514 (6th Cir 1998).

Self-funded plan. A self-funded plan can present an obvious conflict of interest situation, since the plan must pay benefits directly from its assets. Less deference where employer bears financial risk and also appoints the claims administrator. *University Hospitals v Emerson Electric Co*, 202 F3d 839 (6th Cir 2000).

Insured plan. Where the insurance carrier determines eligibility and pays benefits, the "apparent conflict of interest" must be addressed by the court. *Glenn v MetLife*, 461 F3d 660, 667-668 (6th Cir 2006), *affirmed*, *Metropolitan Life Insurance Co v Glenn*, __ U.S. __, 2008 U.S. LEXIS 5030 (June 19, 2008); *Darland v Fortis Benefits Ins Co*, 317 F3d 516 (6th Cir 2003) - where insurer administers benefits, peer review panels may be "stacked" against claimant.

Evidence of Conflict of Interest. A structural bias may not be enough. Courts have required a plaintiff to present"significant evidence" that the conflict of interest affected decision making. *Peruzzi v Summa Med Plan*, 137 F3d 431, 433 (6th Cir 1998); *Cooper v Life Insurance Co of North America*, 486 F 3d 157, 165 (6th Cir 2007).

The Effect of a Conflict of Interest. An area of confusion is how a showing of conflict of interest affects the degree of deference by the court. In *Metropolitan Life Insurance Co v Glenn*, __ U.S. __, 2008 U.S. LEXIS 5030 (June 19, 2008)(*affirming Glenn v MetLife*, 461 F3d 660 (6th Cir 2006)), the Supreme Court affirmed a Sixth Circuit ruling that the dual role of an insurance company or employer that pays benefits and decides benefit claims creates a conflict of interest that may diminish the degree of deference under arbitrary and capricious review. The majority left open the question of how much effect such a "structural conflict" should have, holding that various case-specific factors will

control. Such factors may include evidence that the conflict of interest affected the benefit decision; whether the claim administrator has implemented procedures to neutralize the effect of the conflict; or whether other elements (such as those outline in Section C above) were present.

E. Remedy: Reversal or Remand?

Remand is appropriate "where the problem is with the integrity of the plan's decision-making process" *Elliott v Metro. Life Ins. Co.*, 473 F3d 613, 622 (6th Cir 2006) A direct award of benefits is appropriate where entitlement is clearly established. *Cooper v Life Insurance Co of North America*, 486 F3d 157, 171 (6th Cir 2007); *Kalish v Liberty Mut/Liberty Life Assurance Co*, 419 F3d 501, 513 (6th Cir 2005)**.**

II. DISCOVERY IS LIMITED TO THE ADMINISTRATIVE RECORD: *WILKINS*

A. Discovery Is Limited Generally.

In review of claim denials under the deferential "abuse of discretion" standard, evidence is limited to that presented to the plan administrator in the claims review process. A court will "consider only the facts known to the plan administrator at *the time he made his decision.*" *Yeager v Reliance Standard Life Ins Co*, 88 F3d 376, 381 (6th Cir 1996).

The Sixth Circuit, unlike some others, has also limited admissible evidence to what was in the plan's administrative record when de novo review is applied. *Perry v Simplicity Eng Div of Lukens Gen Indus*, 900 F2d 963 (6th Cir 1990).

Based on *Wilkins v Baptist Healthcare Sys*, 150 F3d 609, (6th Cir 1998), federal courts in the Sixth Circuit routinely deny pretrial discovery in cases challenging benefit decisions.

Pre-hearing discovery is limited to circumstances where the court may consider evidence outside of the administrative record, such as where a claimant alleges procedural irregularity, lack of due process, or bias on the part of the plan administrator.

B. Exception: Discovery Permitted To Show Bias.

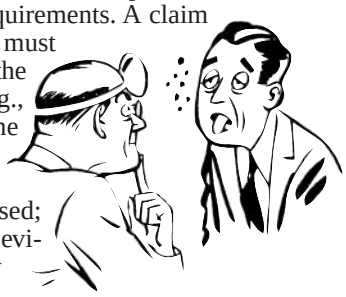
Courts will allow discovery under the exception for proving bias or conflict of interest. See, *Calvert v Firstar Fin, Inc*, 409 F3d 286, 293 n 2 (6th Cir 2005); *Kalish v Liberty Mutual of Boston*, 419 F3d 501, 508 (6th Cir 2005). However, a "mere allegation of bias is insufficient to 'throw open the doors of discovery' in an ERISA case." *Likas v Life Ins Co. of North America*, 222 Fed. Appx. 481, 486 (6th Cir. 2007).

Crider v Life Ins Co of North America, 2008 U S Dist Lexis 6715, *12 (W D Ken 2008), following a thorough discussion, suggests the following standard:

The Court proposes the following approach for consistent resolution of ERISA discovery requests. To prove abuse of discretion in the denial of benefits, a plaintiff must show something more than a conflict of interest or a bias. It is not enough merely to suspect bias in the result. He must also articulate inconsistencies or unsubstantiated conclusions within the decision itself suggesting bias. A plaintiff must demonstrate that the discovery could lead to evidence that, when considered together with other evidence could lead the Court to conclude that the denial of benefits was arbitrary and an abuse of discretion. Therefore, a plaintiff's request for discovery must, at the very least, be premised upon evidence within the administrative record, which raises substantial questions of fairness. Standing alone, the question of fairness need not meet the abuse of discretion standard, but when combined with evidence of bias, it may.

C. Exception: Discovery Permitted Where Notice Is Insufficient.

Another exception to the rule limiting evidence to what was presented to the plan administrator is when the plan's notice of claim denial fails to meet statutory requirements. A claim denial must be in writing and must include: the specific reason for the denial (beyond generalities, e.g., the information received by the plan is not sufficient to support the claim); the specific plan provisions on which the denial is based; a description of any additional evidence or information necessary for the claimant to perfect the claim; and information regarding steps for appeal. ERISA §503, 29 USC 1133; 29 CFR 2560.503-1(f). Where the denial notice is insufficient, the district court may accept additional evidence that was not submitted to the plan. *Vanderklok v Provident Life & Accident Ins Co*, 956 F2d 610, 616 (6th Cir 1992).



"Invoking 'the treating physician rule.'"

D. Enlarging The Plan's Administrative Record.

Evidence submitted to the plan at the plan's invitation, even if not considered by the plan, may be taken into consideration by the court. *Massachusetts Cas Ins Co v Reynolds*, 113 F3d 1450 (1997), later proceeding, 187 F3d 636 (6th Cir 1999).

A claimant should continue submitting supporting evidence to the plan even after his or her claim has been denied and before suit is filed in order to have a better chance of getting it before a court.

III. LIMITATIONS PERIODS

A. The Breach of Contract Limitations Period for Claim Appeals

ERISA does not contain any specific statutory limitations period for benefit claims cases under §502(a)(1)(B). Court use the most analogous state-law statute of limitations, which is for a breach of contract claim. *Meade v Pension Appeals & Review Comm*, 966 F2d 190 (6th Cir 1992)(applying Ohio's fifteen-year limitations period for breach of contract); *Hebein v Ireco, Inc*, 827 F Supp 1326 (WD Mich 1993) (applying six-year period in claim for severance pay); *Nolan v Aetna Life Ins Co*, 588 F Supp 1375 (ED Mich 1984) (applying six-year period in claim for disability insurance benefits).

B. Limitations Period In The Plan

If the plan specifies a time limit for the filing of a civil action for benefits, courts will enforce it. The plan's limitations period will be enforced as long as it is not unreasonable. *Morrison v Marsh & McClennan Cos*, 439 F3d 295 (6th Cir 2006) (upholding three-year limitations period provided for in SPD and handbook); *Kuretich v Metropolitan Life Ins Co*, No 98-CV-70848-DT, 1998 US Dist LEXIS 21147 (ED Mich 1998) (enforcing plan's three-year limitations period, citing cases); *Lamberts v Priority Health*, 2006 U.S. Dist. LEXIS 19665 (WD Mich 2006) (enforcing the plan's two-year limitations period). In *Northlake Reg'l Med Ctr v Waffle House Sys Employee Benefit Plan*, 160 F3d 1301, 1303 (11th Cir 1998), the court enforced a 90-day limitation contained in plan (*cited in*, *Morrison v Marsh & McClennan Cos*, *supra*, at 302). Therefore, it is extremely important to review the plan, the SPD, and the insurance policy or certificate (as applicable) for any language specifying a time limit for filing a lawsuit to obtain. In *Solien v Raytheon Long Term Disability Plan*, 2008 WL 2323915 (D Ariz

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2008), a court held that a plan's one-year limitations period, while not inherently unreasonable, cannot be applied where the summary plan description did not clearly explain it and no reference to it was made in the denial letter.

IV. ATTORNEYS FEES

A. ERISA Fee Shifting

The ERISA attorney fees provision, §502(g)(1), 29 USC 1132(g)(1), provides for an award of attorney fees to prevailing plaintiffs, as follows: "In any action under this title … by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

Litigation Fees Only. Attorney fees will not be awarded for representation in the administrative appeal of a benefit denial; only fees incurred in connection with litigation may be recovered. *Anderson v P&G*, 220 F3d 449 (6th Cir 2000).

B. Fee Recovery Is Discretionary and Uncertain

Some circuits have adopted a presumption that prevailing participants ordinarily should recover attorney fees, but the Sixth Circuit has not. *First Trust Corp v Bryant*, 410 F3d 842 (6th Cir 2005).

C. The Five Factor Test

A five-factor test is used to determine entitlement to discretionary attorney fees. *Moon v Unum Provident Corp*, 461 F3d 639, 642 (6th Cir 2006). The factors, derived from *Secretary of Dep't of Labor v King*, 775 F2d 666, 669 (6th Cir 1985), are:

1. **Culpability or bad faith.** Courts are reluctant to conclude that an employer or plan was proceeding in bad faith, even where the plan is clearly wrong. *Eg*, *Tiemeyer v Community Mut Ins Co*, 8 F3d 1094, 1102 (6th Cir 1993), *cert denied*, 511 US 1004 (1994); *Foltice v Guardsman Prods*, 98 F3d 933 (6th Cir 1996), *cert denied*, 520 US 1143 (1997). However, if a plan fiduciary abused its discretion by ignoring evidence or acting unreasonably, culpability will be found. *Moon v Unum Provident Corp*, 461 F3d 639, 642 (6th Cir 2006)(overruling denial of fees). This is probably the most important factor, however a showing of bad faith is not a threshold element if the other factors are strong. *Wells v United States Steel & Carnegie Pension Fund*, 76 F3d 731 (6th Cir 1996).
2. **Ability to satisfy an award.** This is almost never a factor because plans have sufficient reserves for administrative purposes to afford an award of reasonable attorney fees.
3. **Deterrent effect of an award.** This factor is often linked to the first. If a court finds that the plan did not proceed in bad faith or otherwise is not culpable, but rather simply made an honest mistake, it is unlikely to find much deterrent effect in punishing the plan administrator with an attorney fees award.
4. **Common benefit.** This factor examines whether the prevailing plaintiff sought to *confer a common benefit on all participants and beneficiaries in the plan or* otherwise benefited fellow participants by resolving a significant question under ERISA. The more idiosyncratic or individualized the fact situation, the less likely it is that fees can be recovered under this factor.
5. **The relative merits.** This factor also connects with the first and appears to require a finding that the plan's position was palpably wrong or unreasonable. ■

THE VIRTUAL BULLETIN BOARD: E-POSTING OF NOTICES TO EMPLOYEES

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The *Nordstrom* Decision

An employer's use of e-mail or intranet to communicate with its employees opens up the possibility of the NLRB seeking an electronic posting of a notice to employees as part of a remedy for an unfair labor practice. Although in *Nordstrom, Inc.*, 347 NLRB No. 28 (2007), the Board denied the Charging Party's request for an intranet posting of the Board's Notice to Employees, because the General Counsel and Charging Party had presented no supporting evidence at the unfair labor practice hearing that the Employer regularly communicated with its employees through the intranet, the Board specifically invited the General Counsel to propose such a modification in appropriate cases and to adduce evidence in the unfair labor practice proceedings which demonstrates that the respondent "customarily communicates with its employees electronically."

The *Nordstrom* majority rejected Member Liebman's suggestion that the standard notice-posting language should be modified to "require intranet posting when the employer communicates with its employees via an intranet." Instead, the majority considered it appropriate to leave the issue to the compliance proceeding as to whether the employer so communicates with its employees. The majority noted that it wanted the benefit of a "concrete fact pattern" and full consideration of all arguments and pragmatic considerations, which would best be handled in an unfair labor practice proceeding, before determining whether the standard notice-posting remedy should be modified to require intranet or other electronic posting.

This was not the first occasion to consider the issue of electronic postings. In *International Business Machines Corp.*, 339 NLRB 966 (2003), the Board observed that its standard order, which requires a respondent to post notices "in conspicuous places including all places where notices to employees customarily are posted" has never been interpreted to require electronic posting, and declined to do so in that case where the issue was not raised in the underlying proceedings.

Commission of ULPs by Electronic Means

The seeking of electronic notice-posting in unfair labor practices cases is not unprecedented where the employer has utilized its e-mail system or intranet in committing an unfair labor practice. For example, in *Public Service Co. of Oklahoma,* 334 NLRB 487, 490-491 (2001), the Employer was found to have unlawfully sent an e-mail to employees during the course of collective bargaining negotiations soliciting them to notify the Employer that they no longer wished to be represented by the Union. The aim was to enable the Employer to obtain a decertification election to remove the Union as collective-bargaining representative. In addition to posting and mailing a traditional notice to employees, the Employer was order by the Board to "disseminate, on the first day of notice

posting as required herein, a copy of this notice in electronic fashion on the same basis and to the same group or class of employees as were sent [the unlawful e-mail]."

Investigation of Employer's Use of Electronic Communication

As a result of the *Nordstrom* decision, Regions have been instructed that they should investigate the issue of electronic posting when investigating the underlying case. Evidence that the Region gathers includes: (1) the existence of an employer intranet and the types of postings included on that site; (2) the existence of an employer e-mail system, any employer use of the system to make broadcast e-mails to groups of employees, and the kinds of subject matter covered in employer e-mails to employees; (3) the number and accessibility of traditional notice-posting areas in the employer's facility, and the degree to which employees work offsite or would otherwise be unlikely to see traditional notices. In any case where the Region is considering the propriety of electronic notice-posting, the Region will seek the employer's position. By the same token, charging parties should make sure the issue is raised with the Region in the appropriate circumstance where an electronic posting might be appropriate and present evidence in support of such a remedy.

In investigating the propriety of electronic postings, the Region seeks affidavit testimony, but efforts will also be made to obtain more probative hard evidence (documentation) of the employer's intranet postings and e-mail usage. If the evidence in a particular case supports such a remedy, Regional Director's will specifically plead it as a requested remedy in the complaint and will adduce relevant evidence at the hearing.

Extent of an Electronic Posting

Ordinarily, a request for an electronic remedy will require the employer to publish the electronic notice in the same manner as it communicates with employees electronically. For instance, if the employer routinely sends broadcast e-mails to employees is should notify all employees of the electronic posting via e-mail with the Board notice attached. The electronic posting would be in addition to the regular manual postings as it would be considered an additional site where employers normally post work-related notices. However, unanswered questions remain such as the extent of an appropriate electronic posting where the employer operates multiple facilities, all privy to the same intranet, and the violations occurred at only one facility.

Board Cases since Nordstrom

Since *Nordstrom,* the Board denied the request of General Counsel for an e-mail distribution of the notice to employees in *Valley Hospital Medical Center,* 351 NLRB No. 88 (2007), because although there was some limited evidence that the Employer has begun posting some of its policies on its intranet, this evidence was insufficient, in the majorities view, to find that it customarily communicates with employees electronically. However, Members Liebman and Walsh, in the minority, were of the view that the language of the Board's standard notice-posting provision, which requires the posting of a remedial notice "in conspicuous places including all places where notices to employees are customarily posted," encompassed distribution of a remedial notice by e-mail if the respondent customarily disseminated notices to its employees electronically. In their mind, whether the Employer did so in this case was an issue they would leave for compliance. Moreover, to the extent there is any uncertainty that the language of the current notice-posting provision encompassed electronic posting, they would revise that language to so state.

Website Postings

The debate has extended beyond e-mail to whether an employer should be required to post a notice on its internet website. Again, the majority in *National Grid USA Service Co.*, 348 NLRB No. 88 (2006), despite the lack of exceptions by the Employer to such an remedy as ordered by the administrative law judge, opined that absent the issue being raised in the underlying proceeding and record evidence that the Employer customarily communicated with its employees electronically, the appropriateness of such a remedy was better left for another day. Continuing her disagreement with her colleagues, Member Liebman observed that, by failing to except to the electronic posting provision, the Employer had effectively conceded that there was a factual predicate for requiring an internet posting. Further, she pointed out that electronic communication with employees is now the norm in many workplaces, including at the Board and most other government agencies, citing *Human Resources: Most Employers Use Intranets to Deliver HR Services, Watson Wyatt Study Finds*, Daily Labor Report No. 42, at A-5 (March 2, 2000). Indeed, the Board and most other government agencies routinely rely on electronic posting to communicate information to their employees. Thus, Member Liebman would find no need to require an evidentiary hearing before the Board rules, as a matter of general policy, that the current posting language encompasses electronic posting where appropriate.

Regional Experiences

The General Counsel's Division of Operations-Management reports that since August 2006 when it issued guidelines to Regions analyzing the *Nordstrom* decision, Regions have sought an electronic notice posting in 148 cases (73 of which were in Region 1) and have been successful 48 times (13 times in Region 1). Region 1 routinely seeks this remedy as part of its standard informal settlement agreement in all meritorious cases and only removes it upon objection by the charged party and for good cause shown. This practice has also been recently adopted in Region 13. In total, Regions have sought this remedy in 37 complaints. They have received 3 favorable decisions and have been unsuccessful in 12 cases.

Conclusion

Parties should be alert to situations where the posting of an electronic notice, in addition to a traditional notice to employees, may be an effective means of advising employees of their rights and of a charged party's misfeasance. Don't rely upon the Board to recognize those situations. Instead, be proactive in discussing with employees as a charging party whether their employer or union regularly communicates with them in the workplace by electronic means.

— END NOTE —

*The views expressed are those of the author and do not reflect the official policy or practice of the National Labor Relations Board, although the author has borrowed heavily from memorandum issued by the Office of the General Counsel and Division of Operations-Management that are available to the public. ■

SIXTH CIRCUIT ANNOUNCES BALANCING TEST IN DETERMINING WHETHER AN EMPLOYEE'S DISSEMINATION OF THE EMPLOYER'S CONFIDENTIAL DOCUMENTS IS "PROTECTED ACTIVITY"

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During the course of an employment discrimination lawsuit, confidential company documents are often exchanged between the parties. As is the case with most discovery requests and responses, some documents that are produced or requested end up bearing little to no relevance to the matter. Yet, due to the general tendency of courts to allow wide-ranging discovery, many parties produce more than might be considered necessary in an effort to move the litigation process along. While this approach often keeps parties from being forced to file motions to compel and supplemental discovery requests, the recent decision of *Niswander v. The Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008), gives litigants cause to rethink such a strategy, especially where a company's privacy policy may be applicable.

In *Niswander,* a female claims adjuster for Cincinnati Insurance Company ("Cincinnati") was a member of a class action lawsuit which alleged that the company had discriminated against women in its compensation structure in violation of Title VII of the Civil Rights Act of 1964 as well as the Equal Pay Act. According to the plaintiff, once she opted into the class action, her immediate supervisor began retaliating against her. She claimed that her supervisor was not providing her with the adequate support that she needed to perform her position effectively. She was soon placed on the company's progressive discipline plan due to her alleged poor job performance. Prior to that time, she had never been cited for disciplinary reasons in over seven years of employment. The Plaintiff then filed a charge with the EEOC, alleging that she was being retaliated against due to her participation in the class action lawsuit.

In September of 2005, the plaintiff received two letters from one of the class action attorneys, requesting that she provide "any documents related to (her) employment at CIC which (she had) not already sent in." These letters were prompted by discovery requests made by Cincinnati. It bears mentioning that the class action lawsuit related solely to Cincinnati's alleged disparate pay scale and *not* Cincinnati's retaliation against the plaintiff. In response to these letters, the plaintiff provided her attorney with copies of emails that she believed established her retaliation claim. She also sent copies of certain company documents that contained insurance policyholder information. The Plaintiff claimed that reviewing these documents typically "jogged" her memory regarding other instances of retaliation. She later admitted at her disposition that none of the documents produced to her attorney supported the equal pay claim.

Once Cincinnati received these documents from opposing counsel, they discovered that the plaintiff had disclosed personal information of policyholders, in direct contravention of the company's privacy policy. On December 5, 2005, the plaintiff received a termination letter explaining that the company had "learned that (she) took confidential and proprietary documents, including documents from claim files, containing private and confidential information about insureds and claimants without permission for uses unrelated and unnecessary to the performance of (her) employment by CIC, in knowing violation of various company policies." Six months later, the plaintiff filed her complaint alleging that she was terminated for participating in the class action lawsuit. Cincinnati filed a motion for summary judgment, which the District Court granted, determining that the plaintiff had not engaged in "protected activity."

On appeal, the plaintiff argued that her production of documents to her attorney was evidence that she was participating in protected activity. The Sixth Circuit opinion highlighted an important distinction between an employee participating in a Title VII claim versus an employee opposing conduct which she believed to be in violation of Title VII. Where participation is at issue, an employee is generally protected from retaliation. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989). Typically, the reasonableness of an employee's participation is not questioned. However, when an employee is simply opposing an employer's actions, such opposition is normally subject to an analysis of whether the employee's conduct was reasonable. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000).

Unfortunately for the plaintiff, the fact that none of the documents produced to her attorney related to her class action lawsuit, combined with her admission that she had no documentary evidence supporting the equal pay claim, proved fatal to her argument that she was "participating" rather than "opposing." The kiss of death for the plaintiff was the Court of Appeals' decision that "she herself did not believe that the documents were relevant to the (class action) lawsuit." The Court of Appeals went on to say that "(i)f the documents that Niswander had given to her lawyers had been directly (or even indirectly) relevant to the EPA claims raised in the (class action) lawsuit, her delivery of those documents would clearly constitute participation in the lawsuit." The majority opined that to conclude the plaintiff was participating in a Title VII proceeding "would provide employees with near-immunity for their actions in connection with antidiscrimination lawsuits, protecting them from disciplinary action even when they knowingly provide irrelevant, confidential information solely to jog their memory regarding instances of alleged retaliation."

The Court of Appeals went on to determine whether the plaintiff's conduct could be considered "opposition." As noted above, when opposition is involved, rather than participation, an employee must act reasonably. If it is determined that the opposi-

tion is not "reasonable," an employee's actions are not considered protected activity. The Sixth Circuit adopted a balancing test, used by several other circuits, in assessing whether an employee's opposition has been reasonable. The factors of this test are:

1. how the documents were obtained;
2. to whom the documents were produced;
3. the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct;
4. why the documents were produced, including whether the production was in direct response to a discovery request;
5. the scope of the employer's privacy policy; and
6. the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

After considering these factors, the Court determined that the plaintiff had not acted reasonably. Therefore, she could not establish that she had engaged in protected activity, meaning she was unable to present a prima facie case of Title VII retaliation. The Court of Appeals opined that, even had the plaintiff established a prima facie case, her violation of the company's privacy policy would have served as a legitimate, nondiscriminatory reason for her termination in rebuttal to her prima facie case.

Although it appears that the Sixth Circuit reached the proper result in this case, based upon the plaintiff's production of sensitive, private documents that did nothing more than "jog her memory," it is important to not read too deeply into the ultimate decision in *Niswander.* Had the plaintiff simply provided documents supporting her retaliation claim to the attorneys pursuing her equal pay action, it would seem unfair to place the burden on a non-legally trained employee to make the distinction between disparate treatment and retaliation. Most employees who are subjected to discrimination in the workplace do not make a distinction between the two. They simply understand that improper conduct may have occurred and try to assist their attorney in prosecuting the claim. To require an employee to differentiate between documents that support a disparate treatment claim as opposed to a retaliation claim is too high of a burden to be placed on a lay person. As with the plaintiff in *Niswander,* most plaintiffs are instructed by their attorneys to provide all documents relating to their employment. Granted, the *Niswander* plaintiff went beyond this request, providing documents with no relation to her claim. However, one can envision a much less clear cut situation.

Employee-side attorneys should take special note of this decision, especially when requesting documents from their clients. Issuing broad requests for your client to provide all documents relating to his or her employment could expose the employee to an adverse employment action based upon the violation of a company privacy policy. Both attorneys and clients alike should carefully review the employer's privacy and disclosure guidelines before participating in discovery. ■

GETTING MORE THAN THEY ASKED FOR – *NATIONAL PRIDE AT WORK v. GOVERNOR OF MICHIGAN*

Saraphoena B. Koffron

Within a span of eight days, the Michigan and California Supreme Courts delivered the yin and the yang of State constitution-related decisions affecting same-sex couples. The California Supreme Court, in *In re Marriage Cases*, held that the California Family Code's designation of marriage as a union "between a man and a woman" unconstitutionally violated the equal protection clause of the California Constitution.[1] Across time-zones, the Michigan Supreme Court delivered an opposite opinion, *National Pride at Work, Inc v Governor of Michigan*[2], prohibiting the extension of health-insurance benefits by public employers to same-sex domestic partners.

Charged with interpreting the Michigan Constitution's 2004 "Marriage Amendment" as it relates to public sector employment contracts, the Court found the amendment's language unambiguous. Following a short policy statement, the Marriage Amendment states "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purposes."[3] To the dismay of the dissenting justice and the *amicus curiae* supporting the plaintiffs, the majority considered only what it deemed the plain meaning of the terms contained therein, excluding all extrinsic evidence. Proposed (or previously implemented) benefit plans of the University of Michigan, the Office of State Employees, the United Auto Workers, and the City of Kalamazoo served as the primary subjects of the Court's analysis.

In identifying five interpretive subjects of the amendment, the Court analyzed whether marriages and domestic partnerships are "similar;" whether public employers "recognize" domestic partnerships by providing health-insurance benefits to same-sex partners; whether the choice of two people living together as domestic partners constitutes an "agreement;" whether the "for any purpose" language includes the provision of fringe benefits; and whether health-insurance benefits are a "benefit of marriage." Justice Kelly wrote the dissent, arguing against the majority's textualist approach.

The Court compared individual eligibility factors within the public employers' benefit plans to the practical aspects of marriage and Michigan's legislative code. Similarities abounded in that the plans required partners to be of a certain sex, excluded partners closely related by blood, contained a residency requirement, had a minimum age requirement, and required relationship exclusivity. The Court concluded, "although marriages and domestic partnerships are by no means identical, they are similar." Without narrowing the scope of its application, or pin-pointing which aspect of the plans are most suspect, it is unclear whether the extension of benefits to persons based not on gender, but on residency, age, and exclusivity (i.e. opposite sex cohabitants) would also be contrary to the Marriage Amendment.

After using nine pages to analyze "similar union," the Court lost no time evaluating the remaining four segments in a mere five pages. Relying on Webster's dictionary, the Court stated that an employer is attaching legal consequence to (i.e. "recognizing") a relationship by providing health benefits based on the nature of the relationship between a public employee and a qualified individual.

(Continued on page 8)

GETTING MORE THAN THEY ASKED FOR – *NATIONAL PRIDE AT WORK v. GOVERNOR OF MICHIGAN*

(Continued from page 7)

In evaluating whether the plans recognized an agreement other than that "of one man and one woman in marriage," the Court broadly described how employees' enter into agreements not only by signing domestic partnership agreements, but also by making the decision to live together or agreeing to be jointly responsible for basic living expenses.

"For any purpose" was described by the Court as punctuating the intent of Michiganians, and stated that it "obviously includes for the purpose of providing health-insurance benefits."[4] Further, the Court dispensed with Plaintiffs' arguments that the provision of health insurance benefits is a not a "benefit of marriage"[5] by stating that "one can argue that they are a benefit of marriage, as demonstrated by the fact that a significant number of people obtain such benefits from their spouses' employers while they would be unable to obtain such benefits if they were not married."[6] Though *National Pride* does not address benefits provided by private employers to same-sex domestic partners and is limited to public sector employment contracts,[7] the slippery slope created by this dicta is obvious to practitioners.

While not considered by the Court, external circumstances shrouded this case in controversy. Stemming from not only the actual subject of same-sex unions but also from the lack of intra-governmental solidarity, many popular and current issues were involved such as the importance of polling and the use of questionable ballot campaign tactics. In a war-time election year, where the national pulse is keenly monitoring political statements and legislatures are trying their best to quickly pass bills, *National Pride* serves as a parable for reactionary voting where citizens are given more than they asked for.

— END NOTES —

[1] *In re Marriage Cases*, 43 Cal. 4th 757, 857, 183 P.3d 384 (Cal., 2008).

[2] *National Pride at Work v. Governor of Michigan*, 481 Mich. 56, 748 NW2d 524 (2008).

[3] Const 1963, art 1.3, §25.

[4] *National Pride*, 481 Mich. at 77.

[5] *National Pride*, 481 Mich. at 77-80.

[6] *National Pride*, 481 Mich. at 79, *fn* 18.

[7] *National Pride*, 481 Mich. at 62, *fn* 1. ■

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.

ERISA COVERS DEFINED CONTRIBUTION PENSION PLANS – SURPRISE, SURPRISE!

Larry Gagnon
Gagnon Law Office

Prior to passage of the Employee Retirement Income Security Act ("ERISA"), there was a great deal of heterogeneity in employee benefit plans - including pension plans and health and welfare plans. ERISA was intended to codify fiduciary responsibility and potential liability and a greater degree of "fairness" for employees and retirees. More importantly, ERISA sought to inject uniformity into benefit plan law. Such uniformity ensured that participants in one kind of pension plan would be provided the same statutory safeguards as participants in another kind of pension plan. Of this fact, I was positive. But a recent Court of Appeals decision involving Jim LaRue[1] reminded me that being positive of a "fact" does not make it true.

Jim LaRue participated in the 401(k) plan ("the Plan") sponsored and administered by his employer – DeWolff, Boberg & Associates, Inc ("DeWolff"). The Plan permitted participants to periodically shift their plan account assets among certain specific investment options. LaRue's complaint alleged that, in 2001 and 2002, he directed DeWolff to make certain changes in his Plan account investments and those directions were never carried out. LaRue alleged that the failure to carry out his instructions constituted a breach of fiduciary duty and that his "interest in the plan ha[d] been depleted by approximately $150,000.00"[2] as a result of such breach.

The district court concluded that the complaint did not request a form of relief available under ERISA and it therefore granted defendant's motion for judgment on the pleadings. The Fourth Circuit affirmed in an opinion joined by all 3 judges, finding that the relevant section of ERISA provides remedies only for entire plans - NOT FOR INDIVIDUALS! Evidently, 401(k) plan participants and participants of other similar plans were not among the class of beneficiaries contemplated by Congress.

When I first read of the Fourth Circuit's decision in *LaRue*, I was shocked. I predicted, with utmost certainty, that: (i) the Supreme Court would unanimously overrule the Fourth Circuit; and (ii) its decision would be based on the unambiguous language of ERISA. So confident was I that I offered attractive odds to anyone willing to bet. That I was only half right was a humbling reminder of the power of stare decisis.

The fact that a court of appeals determined that ERISA could not provide relief in this situation made me question my entire understanding of ERISA. I have always contended that one must understand the legislative intent in order to correctly interpret any statutory language. Try as it may, no legislative body can fashion language so clear that it is not subject to misunderstanding.

Prior to my discovery of the Fourth Circuit's opinion in *LaRue*, I had no doubt that I had a solid understanding of Congressional intent with respect to most of ERISA. If the language of the applicable ERISA section could be construed to preclude

relief to LaRue, I was confident that Congress did not intend such a result. So, I was curious to discover the exact ERISA language relied on by the Fourth Circuit.

LaRue's complaint was based on the interworking of two ERISA sections. Section 502(a)(2) provides that a civil action may be brought by a participant "for appropriate relief under section 409".[3] LaRue was clearly a "participant" and his complaint sought to commence a "civil action". Thus, Section 502(a)(2) was certainly not problematic for LaRue.

Section 409(a) states, in relevant part, that: "Any … fiduciary … who breaches any of the … duties imposed … by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach …".[4] But LaRue's complaint alleged that a fiduciary had breached an ERISA imposed duty resulting in a loss to LaRue's plan account approximating $150,000. Clearly, Section 409(a) does not appear problematic for LaRue.

So, on what language could the Fourth Circuit possibly rely? The short answer is that the Fourth Circuit did not rely on any ERISA language. Instead, it gave undue weight to the doctrine of stare decisis and misapplied the 1985 Supreme Court *Russell* decision.[5]

Russell represents a classic example of a very reasonable decision containing altogether too broad language and thus giving birth to a horrible precedent. Russell sued her health plan fiduciary relying on the same two ERISA sections discussed above. Russell sought consequential damages allegedly arising from a delay in the processing of her claim for health benefits (which benefits were ultimately fully paid).

The Supreme Court could have quickly dispatched Russell by pointing out that Section 409 contemplates a remedy involving payment from the fiduciary to the plan. Because Russell sought consequential damages neither her plan account nor any other plan account had ever suffered, her requested relief clearly fell outside any strict construction of Section 409. For reasons unknown and now certainly unknowable, the Supreme Court went well beyond ERISA's language in opining that "[a] fair contextual reading of the statutes makes it abundantly clear that its draftsmen were primarily concerned … *with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary***."**[6] (Emphasis added and hereafter referred to as the "Entire Plan Clause".)

Of course, there is nothing in ERISA supporting the Entire Plan Clause and, as discussed above, there were no facts in *Russell* requiring creation of that Clause. Faced with the Entire Plan Clause in *Russell*, it is not too surprising that the Fourth Circuit fell victim to the doctrine of stare decisis.

As I predicted, the Supreme Court unanimously overruled the Fourth Circuit.[7] But, much to my surprise, the majority again unnecessarily went well beyond ERISA's language. Instead of admitting that the Entire Plan Clause was erroneous *ab initio*, the Court mooted the clause by explaining that while defined benefit plans were normal in 1985, the "… landscape has changed. Defined contribution plans dominate the retirement plan scene today. In contrast, when ERISA was enacted, and when *Russell* was decided, the defined benefit plan was the norm of American pension practice."[8] Of course, defined benefit plans (unlike defined contribution plans) do not have individual accounts; so any investment error in defined benefit plans affects all participants. Similarly, an investment error affecting all participants in a defined contribution plan would be unusual indeed.

A concurring opinion, sponsored by only two Justices, clearly, correctly and simply distinguished *Russell* based on Section 409's language regarding repayment to the plan. (As discussed above, Section 409's remedy is repayment to the plan. Unlike LaRue, Russell sought consequential damages paid directly to her rather than some repayment to the plan.) This well-written opinion was authored by the Justice with whom I most frequently disagree and concurred in by the Justice second in that criterion – Justices Thomas and Scalia, respectively (and respectfully). You just never know.

My predictions regarding *LaRue* were 50% correct – not too impressive. Humbled though I am, I now predict that Justice Thomas' concurring opinion will dominate the majority's next decision dealing with Section 409 and a defined contribution plan. However, in view of *LaRue*, the betting odds are new – i.e. much less favorable to any taker.[9]

— END NOTES —

[1] *LaRue v DeWolff, Boberg & Associates*, 450 F3d 570 (CA 4, 2006).

[2] *LaRue*, 450 F3d at 572.

[3] 29 USC 1132(a)(2).

[4] 29 USC 1109(a).

[5] *Massachusetts Mutual Life Ins Co v Russell*, 473 US 134 (1985).

[6] *Russell*, 473 US at 142.

[7] *LaRue v DeWolff, Boberg & Associates*, No. 06-856 (2008).

[8] *LaRue*, slip op. at 6.

[9] Comments welcome: L.gagnon12@comcast.net ■

LOOKING FOR *Lawnotes* Contributors!

Lawnotes is looking for contributions of interest to Labor and Employment Law Section members.

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

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

LAW AND POETRY

Stuart M. Israel
Martens, Ice, Klass, Legghio & Israel, P.C.

On a sunny June day, passing in the law office hallway, I remarked to a co-worker: "And what is so rare as a day in June?" She looked at me as if I was speaking Japanese. "Huh?" she said.

Of course, as you erudite readers know, I was merely commenting on the nice weather, quoting from James Russell Lowell's "The Vision of Sir Launfal."

I took a scientific survey. Five of six well-educated law office workers never heard of Lowell or his one-line tribute to summer weather. And the one who recognized my literary allusion was, like me, of a certain age. So, I concluded, poetry is dead, replaced in the modern public school curriculum by sex education, *I, Rigoberta Menchú*, and self-esteem.

I confess, I am not much of a poetry aficionado. I never saw a poem that was as lovely as, say, a tree. Still, I am a product of the Detroit public schools. Back in the day, in my neighborhood, you knew your poetry if you knew what was good for you. You couldn't last in high school unless you could parse Keats' "Ode on A Grecian Urn," master the rhythms of Poe's "The Bells," suffer Shakespeare's sonnets, wax philosophical on Frost's "The Road Not Taken," and comprehend — however fleetingly — iambic pentameter.

Indeed, my high school class motto was from a poem, William Ernest Henley's "Invictus" ("I am the master of my fate; I am the captain of my soul."). Those were the days. Show me a high school motto today that comes from a poem *and* has a semi-colon.

So, despite Rumpole of the Bailey's affinity for Wordsworth and Lewis Carroll ("O frabjous day! Callooh! Callay!"), it seemed that the law business had little use for poetry. Next time I would be more pedestrian in my hallway conversation, limiting myself to something like: "Nice day, if it doesn't rain."

That same June the mail brought me the Spring 2008 issue of *Litigation*, the quarterly journal of the American Bar Association Section of Litigation. I read it, even though, as far as I am concerned, June is summer, not spring. Anyway, on page 57 I discovered "Poet's Corner." An "editor's note" explained: "This is the first of what we hope will be a recurring offering of poetry by lawyers or about legal themes."

What followed was a poem by lawyer Lee Robinson titled "The Rules of Evidence." I'm not sure exactly what Ms. Robinson was going for — she did bring me back to those foggy days in English class — but she proved by a preponderance that the reports of poetry's death were greatly exaggerated. Although poetry may be gone from the public school classroom, we litigators can keep it alive and still retain our machismo. Indeed, *Litigation* hopes to publish more legal poetry. As Alexander Pope wrote: "Hope springs eternal in the human breast."

I resolved on that June day to write poetry of my own. I would be the author, so I would understand all the symbolism and hidden meaning without the need for *Cliffs Notes*. Also, I could keep the poems succinct. None of that book-length Walt Whitman stuff. Succinct is good. You can work a full billable day, go home for dinner, read a few succinct poems and cleanse your soul, and still have time to watch The Ultimate Fighter on Spike TV. That's balance.

Succinct being a key characteristic of my planned poetry, I settled on my style: haiku. Haiku is a kind of Japanese poetry. I was no stranger to haiku. Years ago I lived in Hawaii and was a devotee of the late Rap Replinger, who authored and recited haiku in pidgin inflection, finely melding centuries of Japanese literary tradition with the modern sensibilities of Waikiki comedy clubs. For example:

Home From The Fields

Someone has painted my door.

A stranger sings in my bathroom.

Whoops! Wrong house.

Haiku, like many Japanese art forms, have a number of conventions about which books have been written. One universal convention is brevity. A typical haiku is only 17 syllables. Haiku is so succinct that the singular and plural are both haiku. Often a haiku is set in a season of the year and evokes a single, meaningful, Zen moment. For example, oft-quoted haiku master Matsuo Bashō (1644-1694) wrote:

First winter rain —

Even the monkey

Seems to want a raincoat. [1]

Now that's a downpour, right there. Even the monkey wants a raincoat. Bashō was no Rap Replinger, but he knew what he was doing.

I needed to define the boundaries of my new art. I would adopt the 17-syllable tradition. I would write in English, not the traditional Japanese. I have two reasons for this. First, when Japanese haiku are translated into English, they often lose a syllable or two, like the Bashō haiku about the wet monkey. Second, I don't know Japanese. Besides, this isn't the 1970s. American haiku is now as good or better than Japanese haiku.

Also, I would retain the 5-7-5 syllable configuration and the three-line convention of traditional English haiku. Modern masters like Rap Replinger can step across the boundaries of convention — and go with 7-7-3, or 5-5-7, or 7-5-5, or two lines instead of three — but I would be a purist. Seventeen syllables, 5-7-5, three lines.

Traditional haiku, as noted, are usually about seasons and nature. That's not for me. I learned my nature lesson when I remarked on the rarity of June days. Instead, I would write about what I know: law. I learned from no less a literary source than Wikipedia that another form of Japanese poetry — called senryu, related to haiku — addresses not the seasons and nature, but, rather, irony, satire, humor, and human foibles. This works for me. When your experience is with the law, your experience is full of irony, satire, humor, and human foibles. It also is full of more organic ingredients. Anyway, I'm calling my poetry legal haiku, even if Wikipedia-educated literary critics might says it's really senryu.

So, I have defined my art: legal haiku. It is succinct. It is evocative. And it leaves time for Spike TV. I will be a purist: 17 syllables, three lines, the 5-7-5 configuration. I will adhere to these conventions as if they were required by the Federal Rules of Civil Procedure.

Here, then, are some of my legal haiku, in the classic style of the Israel school. I trust they will cleanse your soul.

1. **Meeting A Prospective Client**
   You have a strong case.
   I need the money up front.
   Will you retain me?

2. **Request To An Opponent For Permission To Exceed The Page Limit**
   I will need more space.
   I have so much more to say.
   Will you stipulate?

3. **Request To An Opponent For An Extension**
   I will need more time.
   What goes around, comes around.
   Will you stipulate?

4. **A Discovery Response**
   It's irrelevant.
   It's overbroad; burdensome.
   I will not answer.

5. **Invoking Lincoln On Attorney Fees**
   My hourly rate.
   My time is my stock in trade.
   Yes, time is costly.

6. **In Federal Court**
   Dark suit, a necktie.
   The air: too hot or too cold.
   Hard seats. Marble walls.

7. **A Settlement Proposal**
   You have no just cause.
   Reinstatement, with back pay,
   will resolve the case.

8. **A Discrimination Lawsuit**
   Elliot Larsen,
   the plaintiff's cause of action.
   Employer beware.

9. **Remembering Evidence Class**
   Out of court? For truth?
   I know it when I hear it.
   "Objection! Hearsay!"

10. **Bargaining Pensions In The New Millennium**
    We will not agree,
    not to defined benefits.
    Just contributions.

11. **A Cross-Examination Commandment**
    Don't ask the witness,
    if you don't know the answer.
    Unless you don't care.

— END NOTE —

[1]Quoted in Robert Hass, ed., *The Essential Haiku - Versions of Bashō, Buson, and Issa* (Ecco Press 1994) at 28. ■

PRO BONO LEGAL HAIKU EVALUATION AVAILABLE

"Five, seven, five, with the em*pha*sis on the right syl*lab*le."

I expect some of you read my legal haiku and said to yourselves: "Hey, I can do better than that!" Well, talk is cheap. Put your poetry where your mouth is. Send me your legal haiku. I will professionally analyze them. If they are really good, I will publish them in book form and make money off your labor and creativity. If they are okay, I will publish them in *Lawnotes* and you can put another credit on your resume. If they are bad, I will never mention your legal haiku again. Send your original legal haiku to me by e-mail, israel@martensice.com. Expand your muse. You have nothing to lose but your self-esteem.

– Stuart M. Israel

KELMAN'S CARTOON

"The following question has come up. Are we free to treat your instructions as just so much ritualistic claptrap?"

Editor's Note: This Kelman Cartoon was originally published in *Legal Times* and is reprinted with permission.

MERC REVISES ARBITRATOR SELECTION PROCESS

Ruthanne Okun, ***Bureau Director***
D. Lynn Morison, ***Staff Attorney***
Bureau of Employment Relations, Michigan Department of Labor and Economic Growth

The Commission recently adopted a revision to its policy concerning Grievance Arbitration Services. Pursuant to its authority to assist parties to resolve labor disputes (Section 10 of the Labor Mediation Act, 1939 PA 176, as amended, MCL 423.10), MERC maintains a list of skilled arbitrators qualified to perform grievance arbitration in the field of labor relations. MERC will assist parties to a grievance dispute to select an arbitrator according to the terms of their contract and, thereafter, will appoint the arbitrator to hear the case.

In the past, when one party failed to return the list of proposed arbitrators or otherwise objected to the arbitrability of a grievance, MERC would take a "hands off" approach. Absent the consent of both parties, MERC would refrain from appointing an arbitrator. This was different from the approach followed by the American Arbitration Association and the Federal Mediation and Conciliation Service. Also, it was not in accord with the established premise that the arbitrability of a grievance is a matter for the arbitrator or the courts to decide. For these and other reasons, MERC adopted a revision to the Arbitrator Selection Process that is printed hereafter *in toto.*

MERC's process is especially attractive, because the Commission will assist parties to select and, thereafter, will appoint an arbitrator *without* charge. At a time when parties are seeking any avenue to reduce costs, we encourage you and your clients to consider utilizing MERC's Arbitrator Selection Process. You may do so by including MERC as a source for selecting an arbitrator in an applicable collective bargaining agreement or other written agreement.

MERC ARBITRATOR SELECTION PROCESS

Upon receipt of the items required for filing a Petition for Grievance Arbitration, MERC will assist the parties to select an arbitrator according to the terms of the parties' contract or agreement.

If the arbitrator selection process is set forth in the contract or agreement, MERC will follow that process. If an arbitrator selection process is not set forth in the contract or agreement, MERC will provide the parties with a list of 15 arbitrators, with the biographies and daily rates for those persons listed. The parties must rank at least nine of the 15 arbitrators according to their preference with the number "one" being the most preferred. Each party may cross out up to six names on the list and must return its selection within 10 days.

The arbitrator will be picked based on the parties' mutual selections after MERC receives each party's list. MERC will notify the parties and the arbitrator of the appointment.

If the parties are unable to make a mutual choice from the first list, MERC will furnish up to two additional lists. If the parties are unable to make a mutual choice after three lists, MERC may appoint an arbitrator, depending on the circumstances. MERC will not appoint an arbitrator whose name has been struck by either party.

If, during the arbitrator selection process, a party should fail to return the list within the time specified or fails to rank the names therein, MERC will appoint an arbitrator from the list of the responding, non-objecting party.

The issuance of a panel of names or a direct appointment is neither a determination of whether a matter can be arbitrated, nor an interpretation of the terms and conditions of the collective bargaining agreement or other written agreement. The resolution of such disputes rests solely with the parties.

Adopted: June 11, 2008

OTHER MERC HAPPENINGS

Commissioner Lumberg Re-appointed to 3-Year Term

On July 3, 2008, Governor Granholm re-appointed Eugene Lumberg to a 3-year term as a Commissioner on the Michigan Employment Relations Commission.

Commissioner Lumberg, an attorney in private practice, has represented both employers and labor organizations in the public sector. He represented the Cities of Southfield and Clawson in labor matters and was the attorney for public safety units in various municipalities. He has served on MERC's panel of neutrals in Act 312 and Fact Finding matters and is an arbitrator, as well as a mediator and facilitator in the Oakland and Wayne County Circuit Courts.

Commissioner Lumberg is currently and has been the long-time City Prosecutor for Oak Park and Huntington Woods. He also worked in the Oakland County Prosecutor's office. Prior to practicing law, Commissioner Lumberg was a teacher in the Oak Park Public Schools and was a member of the Michigan Education Association and the American Federation of Teachers.

Commissioner Lumberg's appointment expires on June 30, 2011.

Jim Amar is Appointed Lansing Mediation Supervisor

Jim Amar, a long-time mediator in the Detroit office of the Bureau of Employment Relations, has been appointed to serve as the Division Administrator and Supervisor of the mediation staff in the Bureau's Lansing office. In this capacity, Jim will be responsible for the efficient operation of and for managing, planning and directing mediation functions for that office. He also will be responsible for handling a case load for mediating collective bargaining and grievance disputes, often of a high profile nature.

Jim's background and experience in various capacities/locales of the Bureau will serve him well. He has worked as a mediator in both the Detroit and Lansing offices and served as the Executive Assistant to prior bureau directors. Jim will complete his active Detroit-area cases, while he transitions into his new responsibilities in the Lansing office.

MERC Welcomes Miles Cameron to Lansing Mediation Staff

Miles Cameron joined the Lansing office of the MERC mediation staff in early July. Many of you are acquainted with Miles from his good and hard work as a representative of the United Steelworkers of America.

Miles joined the USW at the age of 18 and since that time, has dedicated himself to working collaboratively to resolve labor issues. Since joining the Union's staff in 1995, his goal has been to assist members to better their employment environment by the amicable resolution of labor disputes.

Miles and his wife, Janet, have been married for more than 30 years. He has two children, Alex and Emily, and one grandchild, Mallory. In his free time, Miles enjoys farming, hunting, fishing, political news, and old westerns. He resides in the city of Coleman, located in the center of the "mitten" - not far from Clare and Mt. Pleasant.

MERC welcomes Miles to our staff; he may be reached at (989) 465-6347. ■

MICHIGAN SUPREME COURT RULES ON WORKERS' COMPENSATION BURDEN OF PROOF AND DISCOVERY ISSUES

Richard A. Hooker
Varnum, Riddering, Schmidt & Howlett, LLP

***Stokes v. Chrysler, LLC*, 481 Mich 266 (2008)**

FACTS/HISTORY: Claimant filed a claim for workers' compensation benefits based on a cervical spine injury. He ultimately received an open award of benefits from the magistrate after he demonstrated he had suffered a work-related injury and as a result, could no longer perform either his job or any previous job he had held. In so doing, the magistrate also denied the employer's motion to compel claimant to submit to an interview with the employer's vocational rehabilitation counselor. The Workers' Compensation Appellate Commission and the Court of Appeals affirmed. In its opinion, *Stokes v. Daimler-Chrylser* Corp, 272 Mich App 571 (2006), the Court of Appeals vacated portions of the WCAC's Opinion, ruling that suitable work "…is not limited to the jobs on the employee's resume, but rather, includes any jobs the injured employee could actually perform upon hiring," *id.*, at 588, consistent with requirements set forth in *Sington v. Chrysler Corp*, 467 Mich 144 (2002). In doing so, however, the Court of Appeals placed upon the employer the burden of demonstrating there were no other positions the claimant could perform that were within the employee's training and experience and paid the maximum wage of the claimant's former position. The Court of Appeals, over a dissenting opinion, also ruled the magistrate had not abused his discretion is denying the employer's discovery motion.

HOLDING: The Court reversed and remanded, finding the Court of Appeals had improperly shifted the burden of proof on the question of disability to the employer. The Court held the burden of demonstrating disability always rests with the claimant, who can satisfy that burden via a four-step proof process:

1. The injured claimant must disclose his qualifications and training, including education, experience and training, whether or not they are relevant to the job being performed at the time of injury;
2. The injured claimant must prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of injury;
3. The claimant must show his injury prevents him from performing some or all of the jobs within his qualifications and training that pay his maximum wages; and
4. If the claimant is capable of performing any of the jobs identified, he must show he cannot obtain any of those jobs.

Once the claimant has satisfied this four-part test, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing, and the claimant may thereafter come forward with additional evidence to challenge the employer's evidence. *Stokes v. Chrysler, LLC, supra*, 481 Mich at 281-84.

The Supreme Court also ruled the employer has a right to discovery under *Boggetta v Burroughs Corp*, 368 Mich 600 (1962), so long as the discovery is necessary for the employer to sustain its burden and present a meaningful defense. Here, according to the Court, it was and the magistrate should not have denied the employer's discovery motion.

Justices Cavanaugh (joined by Justice Kelly) and Weaver dissented separately, the former opining that because all of the claimant's positions held had been physically strenuous in nature, the purported "job search" required by the majority of the Court would be an exercise in futility. Justice Weaver agreed and also expressed her agreement with the Court of Appeals and its burden-shifting analysis. *Stokes v. Chrysler, LLC, supra*, 481 Mich at 299 and 320.

SIGNIFICANCE: As a practical matter, the burden of proof analysis is not likely to have tremendous significance beyond forcing counsel for both parties to prepare their cases a little differently and perhaps more carefully. The discovery issue, though, is more novel and is likely to have a very significant impact on cases moving forward, as the overwhelming majority ostensibly involve contests on either the fact or extent of disability. ■

"REDEMPTION" AND WAIVERS UNDER THE WORKER'S DISABILITY COMPENSATION ACT

John G. Adam
Martens, Ice, Klass, Legghio & Israel, P.C.

"My employer would not rehire me because of my redemption," the upset worker told me. What does religion have to do with it? *Bear v. Heasley*, 98 Mich. 279, 300 (1893) (citing a church document: "'We also believe that what is contained in the holy scriptures, to wit, the fall [of] Adam and redemption through Jesus Christ, shall be preached throughout the world.'").

I fell asleep before the redemption part of *Shawshank Redemption*. Fannie Mae (NYSE: FNM) used to "redeem the principal amounts indicated for the following securities issues on the redemption dates indicated below at a redemption price equal..." None of this applied, I thought.

Due to the power of legal research, I discovered that redemption has nothing to do with God, the movies or Fannie or Freddie. Rather, Michigan's Worker's Disability Compensation Act, M.C.L. 418.101 *et seq*., provides for "redemption." Where is the ACLU when we need it?

Under the Act, the parties can agree to a lump sum settlement, that is, "redeem" the claim. The settlement must be approved by a magistrate after a formal hearing. M.C.L. 418.835 (six months after the date of an injury, any liability resulting therefrom may be redeemed by payment of a lump sum to the claimant.)

Because they are paying a lump sum, employers may seek a broad release of all claims and waiver of rehire or reinstatement. Generally, redemption-related waivers, if not induced by fraud, are valid. See *Nunley v. Practical Home Builders, Inc*., 173 Mich.App. 675 (1988) (workers' compensation redemption agreement in which employee waived seniority rights and reemployment precluded civil rights claim alleging failure to recall); *Beardslee v. Michigan Claim Services, Inc*., 103 Mich.App. 480, 482 (1981), *lv. den.* 412 Mich. 872 (1981)(dismissing claim where plaintiff released defendants "from any and all liabilities, causes of action, damages, claims, and demands, of whatsoever kind or nature, and particularly from any and all their actions and statements in the proceedings, investigation and disposition of any and all of my claims under the Workers' Disability Compensation Act."); *Hill v. Terminix International, Inc.*, 617 F.Supp. 1030 (E.D.Mich.,1985) (release signed as part of redemption agreement settling workers' barred wrongful termination claim.)

Arbitrator Richard Kanner denied a union grievance, ruling the employer could refuse to accept a hiring hall referral of a worker who signed a redemption-related rehire waiver. In *Treco Construction Services, Inc.*, 106 Lab. Arb. 983 (1996), Arbitrator Kanner explained that the employer did not engage in illegal discrimination because Michigan law allows waiver agreements and courts enforce them. Arbitrator Kanner discussed in detail the Act and the case law, including *Owens Illinois*, 85 Lab. Arb. 968 (1985) (finding redemption agreement waived seniority rights).

He noted that the union did "not argue that Grievant did not have the right to waive his right to reemployment because he was represented by the union." 106 LA at 985, fn. 1. Such an argument would seem unlikely to prevail in any event. See *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB No. 39 (2007) ("The issue presented is whether the 37 alleged discriminatees waived their right to file charges with the Board—or have charges filed on their behalf— when they executed the termination agreements in exchange for enhanced severance benefits. We agree with the judge that the agreements effected such a waiver and bar the asserted claims for relief under the Act.").

As a result of his "redemption," the worker was out of luck, just like our economy. ■

ANNUAL REVIEW OF MERC CASES IN THE COURT OF APPEALS (March 2007 – February 2008)

D. Lynn Morison[1]
Michigan Bureau of Employment Relations

City of Detroit (Dep't of Trans) -and- AFSCME Council 25 and Its Local 312, Court of Appeals No. 274233, issued February 14, 2008, affirming MERC's decision issued October 19, 2006, 19 MPER 70 (2006). In an unpublished decision, the Court of Appeals affirmed MERC's finding that the respondent, the City of Detroit, violated its duty to bargain under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e) when it initiated enforcement of a commercial driver's license (CDL) requirement for "general automobile mechanics" working in the city's transportation department (DDOT). These mechanics are represented by the charging party, American Federation of State, County and Municipal Employees (AFSCME) Council 25, Local 312.

In 1993, the city amended job specifications and required general mechanics to possess a commercial drivers' license (CDL). The employer instituted the change to comply with new statutory amendments that, according to the employer's interpretation, required all general mechanics who worked with commercial vehicles to have CDLs. After the employer disciplined mechanics who did not have CDLs, AFSCME Local 229 filed suit challenging the requirement on behalf of the mechanics it represented in the employer's Department of Public Works (DPW). The circuit court ultimately held that the majority of those DPW mechanics were not subject to the new statutory amendments requiring the possession of a CDL because they were not regularly employed as drivers.

While Local 229's lawsuit was pending, the employer continued to enforce the CDL requirement and disciplined mechanics who did not comply. In 1996 or 1997, AFSCME Local 312 and the employer reached a verbal agreement that this requirement would not be enforced against the DDOT employees. From that point until October 2002, the employer did not enforce the CDL requirement.

In October 2002, without giving notice to the union that it was going to resume enforcement of the CDL requirement, the employer disciplined two DDOT employees for failing to maintain CDLs. The union grieved the discipline and demanded bargaining over the enforcement of the CDL requirement. The employer did not reply to the bargaining demand and the union filed an unfair labor practice charge.

The Commission found that the verbal agreement to refrain from disciplining employees who did not possess CDLs and the long-term practice of refraining from such discipline created a past practice amending the parties' contract. The Commission held that the employer unilaterally altered that long-standing practice and, therefore, breached its duty to bargain by failing to give the union notice and an opportunity to negotiate.

In finding that the Commission's decision was supported by competent, material, and substantial evidence in the record, the Court of Appeals rejected the employer's argument that the collective bargaining agreement required the mechanics to have CDLs. The Court noted that the master collective bargaining agreements between AFSCME and the employer only provide that employees who are required to possess CDLs may be reimbursed for part of the cost of obtaining a CDL. However, the Court found that the contracts are silent on such issues as the employer's authority to impose a CDL requirement without first bargaining with the union, a designation of the employees required to possess CDLs, and the discipline of employees who fail to comply with the CDL requirement. The Court explained that because the collective bargaining agreements failed to cover the issue and the parties' actions did not contradict any of the contract language, AFSCME should not be held to "the stricter burden set forth in *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 325-327; 550 NW2d 228 (1996), to show that the parties' past practice created a new term or condition of employment. . . . Instead, an agreement can be merely a tacit understanding between the parties that the practice exists and will continue." Thus, the Court held that after the parties agreed that the CDL requirement was unenforceable, the employer could not reverse its position and enforce the CDL requirement without first notifying the union and giving it the opportunity to bargain. Finally, the Court held that MERC did not err by rejecting the city's claim that the union had waived its right to bargain.

City of Detroit –and- Detroit Police Officers Association, Court of Appeals Nos. 268278 (on appeal) & 268425 (on petition to enforce), issued December 4, 2007, affirming MERC's decision issued February 1, 2006, 19 MPER 15 (2006). In an unpublished opinion, the Court of Appeals affirmed the Commission's finding that the City of Detroit committed an unfair labor practice when it suspended a police officer, John Bennett, for engaging in protected activity. The Court also granted the petition for enforcement filed by the Detroit Police Officers Association.

In October 2002, Officer Bennett created and began operating the website www.firejerryo.com. At that time, Jerry Oliver was the police chief of the city's police department. The website was created to provide police officers with a forum to express concerns regarding the police department and a source of information for the community. The website primarily contained articles by Bennett regarding the police department and city officials. Some of the articles included "comic relief and 'edgy' criticism" of police department and city officials. From late 2002 through August or September 2003, the website also included a "guest book" for site visitors to add comments.

In July 2003, Bennett was suspended with pay by Chief Oliver. Bennett was told that the website contained racial material and that he would be suspended without pay, if he did not shut down the site. Bennett continued to maintain the site and, in September 2003, his suspension was changed to one without pay. The Detroit Police Officers Association filed the charge in this matter with MERC and while the charge was pending, the employer began formal disciplinary proceedings against Bennett.

The ALJ found that the employer violated PERA by suspending Bennett for engaging in protected activity and recommended that the employer be ordered to restore Bennett to his previous assignment, make him whole for any losses, and to cease and desist from interfering with, restraining, or coercing employees in the exercise of rights guaranteed under PERA. After reviewing the respondent's exceptions, the Commission affirmed the ALJ's findings and adopted his recommended order.

The Court pointed out that in mixed motive cases such as this one, it has approved MERC's use of the burden-shifting approach set forth in *Nat'l Labor Relations Bd v Wright Line*, 662 F2d 889 (CA 1, 1981). Under this approach, the charging party must demonstrate that protected conduct was a motivating or substantial factor in the employer's action. After the charging party has established a prima facie case, this approach shifts the burden to require the employer to produce evidence that the same action would have been taken in the absence of the protected activity. If the employer meets the charging party's prima facie case, the burden shifts back to the charging party.

The Court then reiterated the test that it applied in *Ingham Co v Capitol City Lodge No 141 of the Fraternal Order of Police, Labor Program, Inc*, 275 Mich App 133; 739 NW2d 95 (2007), to determine whether an employer violated PERA in its application of a disciplinary rule:

> Under the first prong of the test, we look at whether the employer's action adversely affected the employee's protected right to engage in lawful concerted activities under the PERA. Under the second prong, we look at whether the employer has met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule. Finally, under the third prong, we balance the diminution of the employees' rights because of application of the rule against the employer's interests that are protected by the rule.

The Court held that MERC did not commit a substantial and material error of law by applying the test from *Wright Line*. The Court found that MERC went beyond a mere consideration of whether a disciplinary rule could justify Bennett's suspension and that MERC considered the respondent's claim that Bennett's statements undermined public confidence in the department.

In determining whether the employer violated PERA in its application of a disciplinary rule, the Court noted that the union's charge is not based on the employer's response to a particular communication or communications posted by Bennett; instead, the charge is based on the employer's ban of an entire form of communication, i.e. the operation and use of Bennett's internet website. The Court pointed out that since the employer only took issue with certain statements on Bennett's website, it could be concluded that the website as a whole was not conducted in such an abusive manner as to lose the protection of PERA. In addition, the charging party established that Bennett, while acting alone, operated at least part of the website for a protected purpose, to induce group activity for the mutual aid and protection of fellow police officers. Thus, the Court held that the evidence supported an inference that Bennett's protected right to engage in lawful concerted activities was adversely affected by the suspension.

Where an employer's action is based on disciplinary rules, the employer must show a legitimate and substantial business justification for instituting and applying the disciplinary rules. The Court explained that MERC was not required to accept as fact the references to disciplinary rules in the recommended charges made by the chief of police in his memorandum to the Detroit Board of Commissioners, statements made regarding departmental rules at Bennett's *Garrity* interview, or references to disciplinary rules in the formal charges brought against Bennett. Nor was MERC required to find such references adequate to support the city's contention that the suspension could be justified under the police department's rules or regulations. Thus, considering the evidence as a whole the Court concluded that MERC reasonably could find that Bennett's suspension was due to his failure to shut down the website and disciplining him for that failure violated PERA. Finding that MERC's decision is supported by competent, material, and substantial evidence and that the respondent had not demonstrated a substantial and material error of law, the Court affirmed MERC's decision and granted the charging party's petition for enforcement.

Chippewa County –and- AFSCME Council 25, Local 946 –and- Susan Shunk, Court of Appeals No. 268846, issued October 30, 2007, affirming in part and reversing in part MERC's decision issued December 27, 2005, 18 MPER 83 (MERC denied reconsideration 19 MPER 19 (2006)). In an unpublished opinion, the Court of Appeals agreed with MERC's finding that the respondent, Chippewa County, did not commit an unfair labor practice by refusing to vote on ratification of a tentative agreement between the parties after the filing of a decertification petition. The Court reversed MERC's finding that the decertification petition should proceed to an election and remanded the matter for further proceedings.

The respondent, Chippewa County, and the charging party, AFSCME, were parties to a collective bargaining agreement that expired at the end of 2003. The parties then entered a tentative collective bargaining agreement that summarized the changes to the expired contract and was dated and initialed by representatives for each party. The parties then decided that the agreement would first be ratified by the bargaining unit, and then by the employer. Prior to the meeting at which the employer was to vote on ratification of the agreement, a decertification petition was filed by Susan Shunk. The respondent concluded that it would be improper to continue with the ratification and did not proceed with its vote on the matter. AFSCME then filed an unfair labor practice charge alleging that the respondent acted in bad faith by failing to ratify the agreement and asserting that the respondent was attempting to assist the decertification effort.

MERC found that the tentative agreement did not constitute a legally enforceable collective bargaining agreement and, as such, did not serve as a bar to the decertification petition. In addition, MERC found that the respondent did not exercise bad faith in refusing to ratify the tentative agreement as it followed its normal ratification procedure and would have proceeded to ratification if the decertification petition had not been filed. MERC dismissed the unfair labor practice charge and ordered an election on the decertification petition.

The Court of Appeals affirmed MERC's finding that there was no evidence of bad faith on the part of the respondent for failing to take a vote on ratification of the tentative agreement.

The Court reviewed the contract bar rule as it had been applied by MERC in the past and held that "where the parties have signed and dated a tentative agreement, ratification is a condition subsequent to a valid agreement." Noting that the tentative agreement was dated and initialed by representatives from each party, the court found the parties had a valid contract to which the 30-day contract bar rule applies. Thus, rival unions and dissatisfied bargaining unit members are barred from filing representation and decertification petitions for a period of up to 30 days after negotiation of the tentative agreement. Thus, the Court reversed MERC's order directing an election and remanded the matter to MERC for the entry of an order granting the respondent's board of commissioners 30 days to take action on the tentative agreement.

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ANNUAL REVIEW OF MERC CASES

(Continued from page 15)

The Court ordered that if the respondent rejects the agreement within the 30-day period, or takes no action during that time, an election on the decertification petition shall proceed.

Oak Park Public Safety Officers Association –and- City of Oak Park, Court of Appeals No. 271767, issued October 18, 2007, affirming MERC's decision issued June 27, 2006, 19 MPER 50 (2006). In a published opinion, the Court of Appeals affirmed MERC's findings that the issues of minimum staffing and layoff/recall in dispute in this case are not mandatory subjects of bargaining.

The respondent, Oak Park Public Safety Officers Association (the union), is the bargaining representative for non-supervisory public safety officers employed by charging party, the City of Oak Park (the city). While negotiating a successor contract, the city indicated that it would not agree to continue or negotiate on the minimum staffing provisions contained in the current contract, as they were permissive subjects of bargaining. After reaching impasse, the union filed for Act 312 arbitration. The city filed a charge against the union for unlawfully demanding bargaining on a permissive subject. Subsequently, the city amended its charge alleging that the union unlawfully demanded bargaining on layoff and recall, which are also permissive subjects. The respondent agreed to omit the minimum staffing requirements in the previous agreement, but sought to add a provision titled "safety staffing." The city filed another charge alleging that the union continued to persist in unlawfully demanding bargaining and 312 arbitration on permissive bargaining subjects.

MERC found that the correct standard to apply in determining whether a subject is a mandatory subject of bargaining is the "inextricably intertwined with safety" standard applied by the ALJ and found that this is equivalent to requiring that there be a significant impact on fire fighter safety. The Commission found that "a manning proposal is a mandatory subject of bargaining when there is competent evidence of the proposal's demonstrable and significant relationship to the safety of employees." MERC explained that this requires that there be competent evidence that the proposal "has an impact upon the risk of injury or harm to a member or members of the bargaining unit." MERC concluded that the union's proposal involved a permissive subject of bargaining and found that requiring "bargaining as to the number of officers per shift would be mandating bargaining as to the total size of the work force, a determination clearly reserved to management."

Finding the respondent's position "untenable," the Court of Appeals rejected the union's contentions that the proper standard should be whether the minimum staffing provision "arguably affects, concerns, or relates to safety." The Court held that issues of policy are reserved to management prerogative and "only those matters which have been proven to have a *significant* impact on conditions of employment are subject to mandatory bargaining." (Emphasis in original.) The Court found that the "inextricably intertwined with safety" standard establishes that a significant relationship must be proven to exist between the staffing proposal and the officers' safety. "This standard properly balances . . . the city's right to manage its business and determine the level of services it will provide and the employee's right not to be subjected to unsafe working conditions." Finally, the Court affirmed MERC's finding that certain layoff/recall provisions involved permissive subjects of bargaining and could adversely impact members of other bargaining units. Thus, the union's insistence on including those provisions in the collective bargaining agreement was impermissible.

This case is currently on appeal to the Michigan Supreme Court.

Warren Education Association and James R. Fouts –and- Warren Consolidated Schools Court of Appeals No. 265643, issued April 12, 2007, reversing MERC's decision issued September 19, 2005, 18 MPER 63 (2005). In an unpublished opinion, the Court of Appeals reversed the Commission's dismissal of unfair labor practice charges against the respondent, Warren Consolidated Schools, and found that the respondent discriminated against charging party James R. Fouts, a member of charging party Warren Education Association (WEA), for engaging in activity protected by PERA.

Fouts was employed by the respondent as an American Government teacher. As part of a class assignment, Fouts had his students attend the Warren Consolidated Schools Board of Education meeting. During this meeting, the board's president Jon Green allegedly treated the students in a derogatory manner, leading some observers to conclude that Green was attempting to embarrass Fouts through his students. After hearing of this incident, Fouts asked to view a tape of the meeting. During a meeting with the superintendent and assistant superintendent, Fouts viewed the videotape and discussed the incident. As Fouts was preparing to leave with the videotape, the superintendent asked him to stay to discuss the matter with Green. Fouts objected, expressing concerns about being in the same room with Green and reporting a rumor of alleged drug use by Green. When Green arrived, he started yelling at Fouts. Fouts replied that Green was acting "like he might be on steroids or something." Green then tossed the videotape towards Fouts and left.

After the incident, the WEA filed a grievance on Fouts' behalf requesting a written apology. During the Step II meeting over Fouts' grievance, the respondent's attorney began questioning Fouts regarding his accusations. Following the meeting, the grievance was advanced to Step III. A grievance hearing was held and at its conclusion, Fouts was reprimanded for making defamatory statements about Green. Fouts filed a grievance over his reprimand, but that grievance was withdrawn.

The ALJ found that the respondent's claim that Fouts' reprimand for his statements about Green was a pretext designed to mask its improper motive. He found that, despite the respondent's claims, no investigation was actually held into Fouts' comments and that the letter of reprimand was motivated by anti-union animus and a desire to retaliate against Fouts. MERC reversed this finding stating that while the timing of the questioning occurring during the Step II meeting was suspicious, this "coincidence in timing" was insufficient to find illegal motivation in the absence of any other indication of animus.

The Court of Appeals reversed MERC and held that the Commission improperly substituted its own credibility determinations for those of the ALJ. The Court explained that while the suspicious timing was a factor underlying the ALJ's determination, it was not the only important factor. MERC found the timing to be a "coincidence" because it credited the respondent's explanation, unlike the ALJ who credited the charging parties' witness Locher's testimony and discredited that of respondent's witness. Finding that MERC "improperly substituted its own credibility determinations for those of the ALJ," the Court agreed with the ALJ that the charging parties had established a prima facie case of discrimina-

tion. "This disregard led the Commission to take an overly narrow view of charging parties' case, and led to its ultimate conclusion that the record did not support that Fouts was reprimanded for engaging in protected conduct." Finding that MERC's decision to the extent that it disregarded the ALJ's credibility determinations was not supported by substantial evidence and that there was "ample record evidence" to support the conclusion that Fouts would not have been reprimanded absent his protected conduct of pursuing a grievance against the school board president, the Court reversed MERC's decision.

In a dissenting opinion, Judge Owens held that MERC's decision was supported by competent, material, and substantial evidence on the record as a whole and that MERC did not fail to give due deference to the ALJ's credibility determinations.

Ingham County and Ingham County Sheriff –and- Capitol City Lodge No. 141 of the Fraternal Order of Police, Labor Program, Inc. Court of Appeals No. 263956, issued April 3, 2007, reversing MERC's decision issued June 29, 2005, 18 MPER 44 (2005). In a published opinion, the Court of Appeals reversed MERC's finding that the respondents Ingham County and Ingham County Sheriff committed an unfair labor practice by disciplining Detective Laurie Siegrist, the Division President of charging party Capitol City Lodge No. 141 of the Fraternal Order of Police, Labor Program, Inc. The Court held that the respondents did not violate PERA when they disciplined Siegrist for violating a written work rule prohibiting the faxing of internal documents without prior authorization.

The work rule at issue provided that information learned by employees, by virtue of their positions, may not be "disseminated for other than Departmental purposes and then only through approved procedures." The employer issued an internal memorandum regarding a new policy that required detectives to wear pagers while on and off duty. When Siegrist asked the union's attorney whether the employer could lawfully implement the policy, he requested that she fax the memo to him. Without obtaining authorization from her employer, Siegrist complied with the attorney's request and faxed the memo to him. When the respondent learned of this, Siegrist was given a "written verbal warning" for violating the rule against dissemination of information, and the Union filed an unfair labor practice charge.

MERC agreed with the ALJ's Decision and Recommended Order finding a PERA violation. The Commission stated that while an employer has a legitimate business interest in preventing the unauthorized disclosure of confidential information, here, there was no showing of a business justification for prohibiting Siegrist from sending the union's attorney a document pertaining to a condition of employment affecting bargaining unit employees. The Commission held that Siegrist was engaged in lawful concerted activity under Section 9 of PERA when she sought the attorney's opinion as to the policy. The Commission concluded, "Where there is no overriding legitimate business interest in protecting the information from disclosure, rights guaranteed by PERA remain paramount."

In analyzing whether an employer can lawfully apply a rule to discipline employees for engaging in what otherwise would be protected activity under Section 9 of PERA, the Court applied a three part test: (1) whether the employer's action adversely affected the employee's protected right under PERA to engage in lawful concerted activities; (2) whether the employer has met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule; and (3) whether, when balancing interests, the employer's interests being protected by the rule outweigh the diminution of the employees' rights as a result of the application of the rule. In addressing this final prong, the Court stated that it must be cognizant that it is the primary responsibility of MERC and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of [PERA] and its policy."

Under the first prong of the test, the Court looked at whether the employer's action adversely affected Siegrist's protected right to engage in lawful concerted activities. The Court concluded that there was no diminution in the employee's rights from the application of the rule. Inasmuch as Siegrist was aware of the rule and had previously requested and been granted permission to provide sheriff's department documents to the union, the Court majority found that she could have made such a request on this occasion. Thus, the Court concluded that the employer did not infringe upon her rights under PERA by requiring her to request prior approval of disclosures.

The Court majority noted that the memorandum in this case was not labeled as confidential nor would the information contained in the memorandum have led Siegrist to believe that the information was necessarily of a sensitive nature. However, the majority held that "*any* internal documents produced by the sheriff's department and circulated internally only, are deemed confidential by simple virtue of the sheriff's work rule."

In applying the second prong of the test, the majority held that sheriff's departments have a substantial interest in keeping certain sensitive information confidential, and they are justified in having rules that protect the confidentiality of documents. The Court noted that the information in this document was not confidential and its disclosure could not reasonably be said to compromise the sheriff's ability to protect the public. Indeed, the Court majority found the memorandum's content irrelevant. The relevant issue is the sheriff's interest in ensuring uniformity in disclosure of *potentially* sensitive internal documentation. Further, the Court noted, it is the employer, not the employee, who is in the position to assess the propriety of releasing internal documentation. Accordingly, the majority found that the Commission erred in finding that the employer committed an unfair labor practice.

The dissent, on the other hand, pointed out that the discipline did have an adverse affect on the employee's ability to engage in concerted activity under PERA. Requiring her to request a copy of the document under FOIA would have alerted the sheriff to her efforts to communicate with the union attorney and hindered her ability to seek legal advice in confidence without having to first alert a potential adverse party. The dissent pointed out that in the case relied upon by the majority, the First Circuit stated that the burden of showing a substantial business justification "'falls on the employer to demonstrate "legitimate and substantial business justifications" for his conduct'" and not just for the rule itself. The dissent explained that although the sheriff is entitled to institute such a rule, it was required to show a legitimate and substantial business justification for applying it to the employee in this case when it restricted her right to engage in protected concerted activity under the PERA.

In a Supreme Court order issued December 20, 2007, in a split decision, the majority denied the union's application for leave to appeal. Justices Cavanagh and Kelly would have granted leave.

— END NOTE —

[1]Appreciation is extended to Sarah M. George, Elizabeth A. Young, and Erin Behler for their assistance with the preparation of these case summaries. ■

WHETHER "PROTECTED ACTIVITY" RELATES TO EMPLOYMENT IS IMMATERIAL TO CLAIMS UNDER THE WHISTLEBLOWERS' PROTECTION ACT

Aaron Belville
Garan Lucow Miller, P.C.

The Michigan Whistleblowers' Protection Act, MCLA 15.361 *et seq.*, provides that:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. MCLA 15.362.

The question becomes whether this statute is limited to situations where an employee reports an incident arising within his or her employment. Does any reporting, no matter how unrelated to an individual's employment with a company, invoke the protections of the Whistleblowers' Protection Act ("WPA")? This was precisely the question before the Michigan Court of Appeals recently in *Kimmelman v. Heather Downs Mgmt Ltd*, 278 Mich App 569 (2008).

In *Kimmelman*, the plaintiff was employed by the defendant as a mechanic. One of the plaintiff's coworkers, while away from work and after working hours, was sexually assaulted by a co-owner of the business. The assaulted coworker pressed charges against the co-owner and the plaintiff assisted in the criminal investigation. The plaintiff gave a statement to police and accompanied his coworker to the co-owner's sentencing, apparently for moral support.

The next day, the plaintiff reported for work and was immediately terminated. He then filed suit under the WPA. Unfortunately for the plaintiff, the WPA provides 90 days in which to file suit, which the plaintiff missed. The trial court, therefore, dismissed his claims as untimely.

On appeal, the plaintiff attempted to argue that his case was not covered by the WPA because the protected conduct was not related to *his* employment. Since the activity did not

relate to his employment, the plaintiff argued that his claim was based on a broader public policy discharge claim as opposed to a Whistleblowers' claim. Had this argument been successful, the plaintiff would not have been barred by the previously mentioned 90 day filing deadline.

The Court of Appeals interpreted the WPA much more broadly than plaintiff desired, concluding that "[t]here is absolutely nothing, express or implied, in the plain wording of the statute that limits its applicability to violations of law *by the employer* or to investigations *involving the employer*." Stated differently, "[t]hese activities are protected under the WPA, irrespective of whether the criminal investigation had any connection to his employer or to his employment." Michigan courts follow the rule that, where a statute, in this case the WPA, specifically prohibits a particular adverse employment action, that statute is the exclusive remedy for a plaintiff. Because the Court of Appeals determined that the plaintiff's claim was entirely within the umbrella of the WPA's protections, he could not make a separate public policy claim of wrongful discharge.

While this case ended up limiting the plaintiff's ability to recover against his employer for wrongful discharge, the larger implication of this case will expose employers to greater liability, as *Kimmelman* holds that employees are not required to establish any connection between their protected activity and their employment in a Whistleblowers' lawsuit. Although there are certainly circumstances which would warrant a broader reading of the WPA, to require no connection between a plaintiff's employment and the alleged protected activity would seem to be a stretch of the statute's outer limits. The WPA has traditionally been applied to employees who engage in protected activity relating to their employment. A common sense reading of the statute, rather than strict interpretation, along with the case law interpreting same, would not lead to such a far-reaching statement of the law. The Court of Appeals apparently recognized this, stating "this Court must follow the unambiguous language of a statute, even if doing so would produce an absurd or irrational result."

The Michigan Legislature's use of "employee" and "employer" in the language of the statute would seem to indicate a desire to establish some nexus between the protected activity and an individual's employment. While it is true that the WPA was enacted to protect the public from violations of the law, the *Kimmelman* decision is a significant expansion that should be hesitantly applied. ■

SAVE THE DATE!
LEL Section Mid-Winter Meeting

at the historic

Detroit Athletic Club

JANUARY 30-31, 2009

Friday, January 30

3:30-5:00 p.m.	NLRB Region 7 Practice and Procedure Committee meeting (all Section members welcome)
4:30-6:30 p.m.	Registration
5:00-7:00 p.m.	Reception and Cocktails
7:00 p.m.	Dinner (speaker to be announced)

Saturday, January 31

8:00-10:15 a.m.	Registration
8:00-8:30 a.m.	Continental Breakfast
8:30 a.m.-12:30 p.m.	CLE program (topics and speakers to be announced)

UNITED STATES SUPREME COURT ISSUES FIVE EMPLOYMENT DECISIONS IN JUNE

Regan K. Dahle
Mark W. Jane
Butzel Long

The Court Ends Its Term with Five Employment Cases

1. On June 9, 2008, the Court issued its opinion in *Engquist v. Oregon Dept. of Agriculture*, 128 S. Ct. 2146 (2008). Engquist was an Oregon public employee who sued her employer, her supervisor and a co-worker for claims under the Equal Protection Clause. Engquist alleged that she had been discriminated against based on her race, sex, and national origin. She also brought a "class-of-one" claim, alleging that she was fired not because she was a member of any protected class, but simply for arbitrary, vindictive, and malicious reasons. The jury rejected Engquist's equal protection claims based on Engquist's membership in a protected class, but found for Engquist on her class-of-one claim. The Ninth Circuit reversed in relevant part. The Supreme Court granted certiorari to address whether public employees who are subject to arbitrary discrimination can recover on an equal protection claim without being required to show that the alleged discrimination was based on membership in a protected class.

The Court recognized that while it has allowed class of one equal protection claims in the legislative and regulatory contexts, it was not prepared to recognize such a claim in the employment context. The Court reasoned that the government as an employer has "far broader powers than the government as sovereign." *Id.* at 2151. The Court acknowledged that, as an employer, the government makes employment decisions that are often subjective and individualized. Not wanting to "constitutionalize the employee grievance," the Court rejected Engquist's argument that there existed a class of one claim for a public employee under the Equal Protection Clause. *Id.* at 2157. The Court reasoned that "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that state officials are entrusted to exercise." *Id.* at 2154.

2. On June 19, 2008, the Court issued its opinion in *Metropolitan Life Ins. Co. v. Glenn*, No. 128 S. Ct. 2343 (2008). When Glenn was diagnosed with a heart condition, she applied to Metropolitan Life Insurance Company ("MetLife") for 24 months of benefits under Sears, Roebuck & Company's Long Term Disability ("LTD") policy, because she could not perform the material duties of her job. MetLife, as the insurer and claims administrator of the LTD policy, approved Glenn's claim for 24 months of LTD benefits. MetLife also directed Glenn to a law firm to assist her with applying for Social Security disability benefits, which MetLife would have been eligible to receive as an offset to the plan benefits. The Social Security Administration eventually granted Glenn permanent disability benefits on the grounds that her illness prevented her not only from performing any jobs for which she could qualify, but also from performing any other jobs of significance. After her first 24 months of benefits under the LTD policy expired, Glenn was required to meet the plan's stricter standard to continue receiving benefits—a standard very similar to that of Social Security disability. MetLife denied her continued benefits on the basis that she was capable of performing sedentary work.

Glenn sued MetLife on the grounds that it operated under a conflict of interest when it both evaluated her claim for benefits under the LTD policy and paid out the benefits claim as well. The Court agreed with Glenn, in part, and held that a reviewing court should consider such a conflict of interest as a factor when determining whether a plan administrator has abused its discretion in denying benefits. The Court reasoned that while a fiduciary interest might counsel in favor of granting a borderline claim, the immediate financial interest counsels to the contrary. This conflict is no less important as applied to third-party insurers as it would be if the employer administered and paid for benefits itself, due to the higher fiduciary standards imposed by ERISA. The significance of the conflict of interest as a factor, however, varies on a case-by-case basis. Due to the fact that the record was replete with examples of MetLife's bias towards denying the claim (namely, encouraging Glenn to apply for Social Security benefits, and then ignoring the ruling of the Social Security Administration), the Court ruled in favor of Glenn.

3. Also on June 19, 2008, the Court issued its opinion in *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008). In that case, the State of Kentucky had a retirement plan ("KRS") for state and county employees who occupied hazardous positions. The plan calculated pension benefits by taking a percentage of the retirees' final pay and multiplying that by the retirees' years of service. Pursuant to the plan, employees had two ways to become eligible for normal retirement benefits: (1) after the employee attained 20 years of service; and (2) after the employee attained 5 years of service, provided the employee was at least age 55. The plan also provided that where a hazardous-position worker not yet eligible for normal retirement benefits became disabled, the employee could retire at once if the employee was disabled in the line of duty or had worked for 5 years. In calculating the benefit of those individuals, the plan added imputed years of service to the pension calculation in order for the employee to either have 20 years of service or the years of service the employee would have had if the employee retired at age 55.

Charles Lickteig, a hazardous-position worked who became disabled at the age of 61, complained to the EEOC that the plan discriminated against older workers because employees who had already attained age 55, and subsequently became disabled, were not eligible to receive imputed years of service. As such, the plan gave younger workers a better benefit. In reversing the Sixth Circuit's finding of age discrimination in violation of the Age Discrimination in Employment Act (ADEA), the Court found that age did not actually motivate KRS' decisions in providing benefits. The Court, relying on its earlier decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), reasoned that age and pension status remain analytically distinct concepts, because it is easy to conceive of decisions that are actually made because of pension status and not age, even where pension status is itself based on age. Moreover, pension status did not serve as a proxy for age, because every hazardous position employee, when hired, is promised disability retirement benefits should he or she become disabled prior to the time that he or she is eligible for normal retirement benefits.

4. On June 19, the Court also issued its opinion in *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008). In *Meacham*, the defendants terminated the plaintiffs' employment as part of a reduction in force. The plaintiffs brought a claim under ADEA, 29 U.S.C. § 631(a), alleging that the defendant's reduction in force policy had a disparate impact on older workers. A jury found in favor of the plaintiffs and agreed that the defendant's facially neutral reduction in force policy had a discriminatory impact on older employees. The Second Circuit affirmed the verdict. The court held

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UNITED STATES SUPREME COURT ISSUES FIVE EMPLOYMENT DECISIONS IN JUNE

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that the defendant's reliance on subjective factors to select employees for the reduction in force was not a "business necessity" and that there were available alternatives that would not have adversely impacted older workers. *Meacham*, 381 F.3d 56 (2d Cir. 2004)

The Court granted certiorari, vacated the Second Circuit's order and remanded for reconsideration in light of *Smith v. Jackson*, 544 U.S. 228 (2005). In *Smith*, the Court held that a plaintiff may bring a disparate impact claim under the ADEA, but rejected the "business necessity" test in favor of a "reasonableness" test. The reasonableness test precludes a finding of liability if the adverse impact can be attributed to a reasonable factor other than age. The reasonableness test does not involve an inquiry into whether there were other ways for the defendant to reach its goals that would not result in a disparate impact.

On remand, the Second Circuit changed its position and reversed the jury verdict. *Meacham*, 461 F.3d 134 (2d Cir. 2006) The court reasoned that the "business necessity" test was not applicable to ADEA claims and that the appropriate test was whether the defendant's reliance on "reasonable factors other than age" constituted a reasonable means to achieve the defendant's legitimate business goals. The court also held that the plaintiffs held the burden of proof.

The plaintiffs sought review on the issue of burden of proof, and the Court again granted certiorari. The issue before the Court was whether plaintiffs alleging a disparate impact claim of age discrimination have the burden of proving that the defendant did not rely on reasonable factors other than age or whether this is an affirmative defense on which the defendant bears the burden of proof and persuasion. The Court found in favor of the plaintiffs and held that just like the bona fide occupational qualification exemption, the reasonable factors other than age exemption was an affirmative defense on which the employer bore the burdens of proof and persuasion, since it is the employer who claims the benefit of the defense. While recognizing that its ruling could make age discrimination claims costlier and harder for employers to defend, and that it might change the way employers did business, the Court concluded that it could not ignore the plain language of the statute that described the reasonable factors other than age exemption as an affirmative defense.

5. Finally, on June 19, the Court issued its opinion in *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct 2408 (2008). In *Brown*, the Court granted certiorari to decide whether certain provisions of the California Government Code prohibiting several classes of employers from using state funds to "assist, promote or deter union organizing" were pre-empted by federal law requiring that certain types of labor activity be unregulated.

The State of California's AB 1889 prohibits certain employers that receive state funds from using those funds to "assist, promote or deter union organizing." Exempted from AB 1889's prohibition, however, are any activities performed or expenses incurred in connection with certain activities that promote unionization. Several organizations doing business with the State of California brought an action against the State to enjoin enforcement of AB 1889. Two labor unions intervened in defense of the statute. The District Court granted partial summary judgment in favor of the plaintiffs on the grounds that the National Labor Relations Act (NLRA) preempted the relevant portions of AB 1889 because those provisions regulated employer speech about union organizing. The Ninth Circuit reversed, holding that Congress did not intend to impose such restrictions on a State's use of its own funds.

The Supreme Court reversed the Ninth Circuit and held that the relevant sections of AB 1889 were preempted by the NLRA under *Machinists'* preemption. Under that preemption doctrine, based on *Machinists v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132 (1976), the National Labor Relations Board and the States are forbidden from regulating conduct that Congress intended to "be unregulated because left 'to be controlled by the free play of economic forces.'" *Id.* at 140. The Court reiterated the longstanding principle that nothing in the NLRA prohibits an employer from expressing views on labor policies or problems as long as it is done in a non-coercive manner. The Court held that provisions of AB 1889 violated Congress' "explicit direction to leave noncoercive speech unregulated" and remanded the case. *Id.* at 2414. ■

NLRB UPDATE

Stephen M. Glasser
Regional Director – Region 7 (Detroit)
National Labor Relations Board

The Board, currently comprised of Chairman Peter C. Schaumber and Member Wilma B. Liebman, continues to issue decisions where the two agree and thus constitute a quorum of a three-member panel under Section 3(b) of the National Labor Relations Act. Obviously, where the two are unable to agree, the case will pend, awaiting additional appointments to the Board. As a result, it goes without saying that until the Board is fully constituted, major changes in the case law will not occur. In the meantime, in the Regional Offices it is business as usual. Unfair labor practice charges and representation petitions are processed in the customary manner without any immediate consequence of a reduced Board complement. Charges are dismissed, complaints issue, cases are sent to the General Counsel's Division of Advice, and injunction proceedings under Section 10(j) of the Act are decided by the General Counsel (pursuant to a delegation of such authority by the Board). Trials and representation case hearings are conducted and elections are held in normal course. The impact of a two-member Board has not affected day-to-day field operations.

On October 16, 2008, the 16th Bernard Gottfried Memorial Labor Law Symposium was held at Wayne State University Law School in the Spencer M. Partrich Auditorium. The topics included discussion of voluntary recognition under the Board's *Dana Corporation* (351 NLRB No. 28) decision, and a panel discussion regarding employee use of workplace email under the Board's *The Register-Guard* (351 NLRB No. 70) decision. The luncheon speaker was Board Member Wilma B. Liebman. There were afternoon sessions addressing "salts" and resulting backpay obligations under the Board's *Toering Electric* (351 NLRB No. 18) and *Oil Capitol* (349 NLRB No. 118) decisions, and what constitutes protected activity and concerted activity. For more information about the presentations, or if you want to find out what materials may be available,please call Group Supervisor Patrick Labadie at (313) 226-3213, or e-mail at patrick.labadie@nlrb.gov.

THE BOSTON CHICKEN PROBLEM

Barry Goldman
Arbitrator and Mediator

Boston Chicken was a Wall Street darling in the '90s. On the day of its initial public offering in November of 1993 its share price went from $10 to $23. In December of 1996 it hit $41½. But in October of 1998 its share price fell to $.50 and the company went into Chapter 11. Why?

Evidently the revenue numbers that got investors so excited weren't coming from selling chicken; they were coming from selling *franchises.* Even if you have a great concept and great media buzz, even with fancy financing and even fancier accounting, somewhere underneath it all somebody has to be selling some chicken or the business model just will not work.

This is also a problem for the mediation business. The concept, we all agree, is wonderful. The buzz is exciting. The field is growing enormously. But it turns out there ain't many of us selling much chicken.

This is all explained in a paper by Harvard economist Urska Velikonja called "Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice" available at http://works.bepress.com/urska_velikonja/1/.

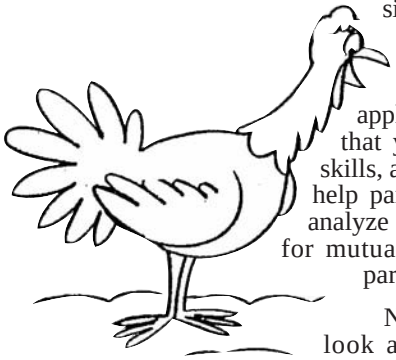
I highly recommend the full article, but I'll just quote from the abstract:

> The article presents data that the supply of willing mediators by far exceeds the demand for their services, and suggests possible economic explanations for the excess entry, including overoptimism and the lack of formal barriers to entry. Excess entry is socially suboptimal: many aspirant mediators spend money pursuing what is likely an illusory career and forgo other career options, even though they were never going to be able to make money as mediators. The article also presents data that income distribution is uneven in the market for private mediation and suggests that the market is a winner-take-all market. . . . The analysis has important implications for aspirant mediators and for the design of mediation training programs. . . . Mediation training programs ought to be redesigned to convey to aspirant mediators the realities of mediation practice.

In other words, much of the growth we're seeing in the field is coming from training, not from mediating cases.

This was brought home just this week when I received notification of an opportunity to serve as a mediator for the Key Bridge Foundation. Actually, I received more than one notice of this opportunity. One of my sources listed it under Job of the Month. Here is the announcement:

> The U.S. Department of Justice Americans with Disabilities Act (ADA) Mediation Program is looking for experienced mediators who are familiar with mediating "under the umbrella of the law." . . . In 1994, the Department of Justice established the ADA Mediation Program. . . . [T]he ADA Mediation Program now operates under a contract with the Key Bridge Foundation.
>
> The ADA Mediation Program would like to identify potential mediators from specific regions of the country who will, after successfully completing the Department of Justice's ADA mediation training, be added to the ADA Mediation Roster.
>
> To be considered for the U.S. Department of Justice ADA Mediation Program's mediator roster, you must submit a completed application. Formal mediator training and experience serving as a mediator are basic requirements for admission to the roster. Prior experience resolving civil rights disputes is highly desirable. Additionally, your application must demonstrate that you have the experience, skills, abilities, and knowledge to help parties communicate better, analyze risks, and explore options for mutual satisfaction within the parameters of the ADA.



"The Boston Chicken Problem."

Nice, right? Maybe. But let's look a little further. The Key Bridge Foundation website http://www.keybridge.org/ has a few additional facts to add. They are these:

- Since 1994, KBF Center for Mediation has handled nearly 1000 ADA complaints.
- KBF Center for Mediation manages a national roster of over five hundred professional mediators who have received training on the requirements of the ADA.

If I'm dong the math right, that's an average of something less than two mediations per mediator over 14 years, or not quite one case every seven years.

That's fine for the Key Bridge Foundation, but from the point of view of the mediator, that ain't sellin' no chicken. ■

PURSUING "LITTLE JUSTICES"

"Justice, justice shalt thou pursue . . ." Deuteronomy 16:20. Many of us were attracted to the legal profession to do just that. Sometimes, however, it seems there is a wide gulf between the pursuit of justice and what we spend our time as lawyers doing hourly, daily, weekly, monthly and over the years.

Professor John M. Burkoff of the University of Pittsburgh School of Law offers solace. He is a 1973 graduate of the University of Michigan Law School and was a U-M undergraduate in the late 1960s. He observes that in those days "many people went to law school to change the world" but became "frustrated and disillusioned" when they "failed to have a massive visible impact on the legal system." These idealists, he writes, "had the right idea, but the wrong scale of vision."

Whether you are a 1960s-era erstwhile world-changer or had a different sort of idealistic view of what it means to be a lawyer, Burkoff's statement of the right "scale of vision" is something you might want to have creweled for an office wall hanging.

> What lawyers can accomplish is what might be called "little justices." In representing people day to day, lawyers can get justice for people and change lives for the better. If over the course of a career, a lawyer does a thousand little justices for people, that's big justice.

Burkoff concludes: "That seems to me to be a prime reason to go to law school." It also is a reason to go to work every morning.

– Stuart M. Israel

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth:

But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.

– Matthew 5:38-39

This is difficult advice to follow, especially for lawyers. But it is very valuable advice, and following it will improved your lawyering.

I am talking, of course, about the tiny little points your opposing counsel scored when he was examining a witness. Somewhere there must have been a class where they taught that no point your opponent makes should go unrebutted. So what happens - and I've seen this over and over again with some very highly skilled attorneys - is this. Opposing counsel finishes his examination and passes the witnesses. Counsel flips backward in her legal pad to the beginning of the notes she took during her opponent's questioning and begins to explore each point.

Q: You just testified under direct that you saw the body, grabbed your hat and ran outthe door. Do you remember that testimony?

A: Yes.

Q: I'm going to show you what has been marked as Employer Exhibit 386. Can youidentify that?

A: Yes, that's my statement.

Q: Why don't you read it over. Do you see anything in there about a hat?

A: No. I didn't mention a hat.

Q: Would you say your memory of the incident was better on the day it happenedor better today, nearly two years later?

A: It would be better on the day it happened, I guess.

Q: But today you told us about a hat, and back on the day it happened you didn't sayanything about a hat. Is that right?

A: Um, yeah.

Q: You believe it's important to fill out Incident Reports accurately, do you not?

And on and on.

Much later we will get to the equally pivotal question of whether it was a push door or a pull door.

It is only when every point on this list has been carefully explored that we can get back to hearing the case. In this class I am imagining the instructor must have said it is very important to do this because if you let a point go unanswered the arbitrator will think you don't have an answer to it and it will weaken your case.

Friends, this is complete and utter nonsense. What the arbitrator is thinking is: SO FREAKING WHAT?

If the answer to the question you are asking the witness does not matter either way, if the only reason you are asking it is that it appears on a list you prepared while your opposing counsel was doing his examination, do not ask that question.

Yes, it important to make a list of the points your opponent gets from the witness. But the next step is to go over that list and think about it. When you get to points that make a difference, by all means pursue them. Smite them hip and thigh (Judges 15:8).

But I say unto you: If your opponent makes a meaningless point, let him make another also.

AN LEL SECTION MEMBER IN IRAQ

Michael J. Pelot, ***Staff Attorney,***
Michigan Department of Civil Rights and LTC,
Michigan Army National Guard

As the Command Judge Advocate to the Commander of the Michigan National Guard's 177th Military Police Brigade in Taylor, MI, I looked forward to the challenges we would face as we were notified of our pending deployment to Iraq. I was a Major with 17 years in the Reserve and Guards and had previously deployed with the unit to Guantanamo Bay in 2003-2004. The unit was scheduled to leave in May of 2007 for 400 days. We were taking four lawyers and three paralegals and knew we would be in Baghdad working within the detention system. Specific details of our mission were hard to gather because we were bringing a substantially larger staff than the staff of the active duty unit we were replacing.

We began the deployment with 70 days of mobilization training at Ft Bliss in El Paso, TX. We used the training ground just across the state border in New Mexico at Camp McGregor. The hot, desert climate was suitable for acclimating us to the harsh environment we would encounter in the Middle East. The entire time was nonstop training that included basic training skills, weapons training, soldiering skills unique to current combat and staff leadership exercises that would prepare us for the decision making required to accomplish our mission. Particularly difficult physical demands included low crawling under barbed wire while pulling a soldier on a stretcher and the five mile march while carrying 30 pounds in our ruck sack with full body armor. In the first two weeks I dropped 15 pounds and reached an ideal body weight. I was healthy and felt strong. Meanwhile, the Commander and the training were mentally preparing me for the year ahead and the possible difficult situations we might encounter. Issues regarding mass riots and high profile investigations were examined and responses planned. After a four day pass to say goodbye to our families, we were ready to ship out to Baghdad. My Commander allowed me to finish a career leadership course at Ft Dix, NJ, that I had started before mobilization and I met the unit two weeks later.

Upon arrival in theater I learned that our legal staff had been split in many different directions. I was assigned to the Detention Operations Legal Office and was given supervision over an eight person legal staff in the Detainee Assistance Center. This office always served the military but had a unique function to monitor the detainee's and address issues they had with the legal process that had been implemented pursuant to the Geneva Conventions. My

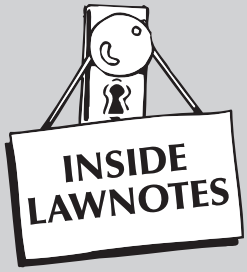
office was located in the Victory Base Complex in Baghdad near the airport. After four months in this position I traveled to Camp Bucca in southern Iraq and served as a Board President on over 500 Multi-National Force Review Committee Hearings. Here the detainee was allowed to personally appear in front of a three member panel and a recommendation was made whether to continue detention, release or offer vocational training. I had the honor to conduct a board with GEN David Petraeus during his visit to Bucca. I have a great photograph of us reviewing a detainee's file and asking the detainee questions about the circumstances of his capture. The test was whether this detainee was still a threat to Coalition Forces, the Iraqi government or the Iraqi people. I received an award in the form of a coin from GEN Petraeus and it is one of the highlights of my deployment.

LTC Mike Pelot (r) in consultation with GEN David Petraeus (l) in Iraq.

It was time for my Rest and Relaxation and I met my family at an Armed Forces Recreation Center in Germany over the holidays. Probably the strangest Christmas of my life but yet one filled with joy of being together with my family in the middle of a deployment in a very beautiful setting in the German Alps. Upon my return to Baghdad I had four months left on the deployment and the Legal Commander sent me to the Embassy in the International Zone to work with the Central Criminal Court of Iraq as a Liaison Officer. In many ways we were the staff attorneys that assisted the Iraqi court in the prosecution of terrorists and criminals. Although there were regional criminal courts, our court was set up in Baghdad to prosecute the more notable cases. The court was run by Iraqi judges and Iraqi staff with our office mainly assisting in gathering evidence and bringing the cases to court. I was primarily involved in the Investigative Hearing stage. If there was enough evidence to send the case to the Trial Panel and the next stage, then that court would find guilt or innocence. At a minimum we needed two witnesses and two photographs. We would try to have a hearing within 14 days of a detainee's capture and the trial panel tried to hear the case approximately 6 weeks after that hearing. That panel could pronounce the death penalty and the detainee would have an automatic 30 day period of appeal at the Court of Cassation. Although it may not have had all the safeguards of our centuries old American system, it worked and I felt justice was being served. Improvements were being made constantly. It was the new Iraqi Judicial system being developed in front of my eyes. I had the opportunity to present evidence on approximately 30 cases and started to hear the results on some of my early cases from the trial panel before I redeployed. I was curious to know the results on some of the more serious cases but due to constant movement of staff I lost track of a good contact at the court. Maybe it is better this way.

Thus far I had a relatively quiet tour and the surge had kept relative peace in the areas I had worked and lived. There were occasional rockets that came in with the sound of an alarm and boom but they had been off target. That all changed on Easter morning as I attended mass and a rocket came dangerously close to tragic results. The shelling was in response to the effort by Nouri Al Maliki, the Iraqi Prime Minister, to clamp down on the armed special groups in Sadr City and Basrah. Sadr City is a poor, populated area in Baghdad that is on the other side of the Tigris River from the International Zone. For weeks the Embassy was on lockdown with constant barrages of rockets. As the rockets continued to shell my area, my time to leave the International Zone arrived. I was moving back to Victory Base to begin the process of returning to the States. The second night in our tents we were shelled there and once again a rocket landed close enough to earn a second Combat Action Badge. At this time we were just trying to leave Iraq and return to our families, unfortunately, some events transpired that delayed us leaving by a week or so. Finally, we arrived back at Ft Bliss and started out processing.

Some things I learned in Iraq were that the Iraqi people for the most part are an amazingly resilient and brave people. Under the most dire of circumstances I would see Iraqis display a sense of humor. They have to live in a war zone and continue on with life. Concrete barriers, barbed wire and armed forces are everywhere with possible death and destruction always present. The small percentage of people using violence kept everybody in fear. When the Coalition removed Sadaam, the Geneva Conventions require that the country be left in a stable state before we withdraw. The Multi- National Forces are working hard at building prisons, courts and police forces that can assume responsibility for security of the Iraqi people. My Commanders were trying to do that in a humane way that treated people with care, dignity and respect. Iraq is one of the more dangerous places on Earth right now, but I hope my efforts are part of a vision that will bring peace to the area. Only history will answer that question. ■



INSIDE *LAWNOTES*

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- Ruthanne Okun and Lynn Morison describe BER's new arbitrator selection process and Lynn also reviews a year's worth of MERC cases in the Court of Appeals.
- Chicago NLRB Regional Director Joe Barker (who learned all he knows in Detroit) writes about technology and the NLRB.
- Stuart Israel goes all poetic, writing legal haiku and musing on the pursuit of "little justices."
- MDCR attorney Mike Pelot describes his Army service in Iraq.
- Dick Hooker, Regan Dahle and Mark Jane describe what is happening in various Supreme Courts.
- Larry Gagnon and Andy Nickelhoff address ERISA issues.
- Aaron Belville offers observations about "protected activity" issues addressed in the Sixth Circuit and under the Michigan Whistleblowers' Protection Act.
- 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 John G. Adam, Aaron Belville, Joseph A. Barker, Regan K. Dahle, Larry Gagnon, Stephen M. Glasser, Barry Goldman, Richard A. Hooker, Stuart M. Israel, Mark W. Jane, Maurice Kelman, Saraphoena B. Koffron, D. Lynn Morison, Andrew Nickelhoff, Ruthanne Okun, Michael J. Pelot, and more.

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