LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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THE MICHIGAN WHISTLEBLOWERS' PROTECTION ACT: GOING ON THE RECORD

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As a concept, the protection of employee whistleblowers does not appear to be complicated. An employee who suffers an adverse employment action may recover under the statute where the employee:

Reported or was about to report,
Verbally or in writing,
A violation or suspected violation,
Of a law, regulation or rule of the state or political subdivision,
To a public body.[1]

The employee is not protected if the employee knows the claim is false. The statute which has been in effect since 1980 requires that an action be filed within 90 days from the occurrence which is the basis of the claim.

The Michigan Supreme Court in *Shalla v. Catholic Social Services of Wayne County*[2] held that the primary motivation of the employee pursuing the claim must be the desire to inform the public on matters of public concern and not for *personal vindictiveness*.[3] In reviewing the motivation of the plaintiff in the case before it, the court stated that the plaintiff used her situation to extort defendant not to fire her. As such, this was an improper use of the statute since it was not intended to be used as a shield against being fired where the employee knew she was going to be fired before threatening to report her supervisor. It is not the intent of the statute to allow an employee to hold off "blowing the whistle" until it is advantageous for her to do so.

The interpretation of the statute recently has primarily been through unreported court of appeals decisions. From 2008 to the present, the court of appeals has decided 43 cases involving the statute. Of these decisions, 38 were unreported and five were reported. From 2011, there were 21 cases affirmed, and one reversed by the court of appeals. The affirmances were generally upholding summary disposition motions for defendants.[4] Issues reviewed in the cases include whether conduct was protected activity[5]; whether there was a causal connection between the protected conduct and the adverse employment action[6]; and temporal proximity as the only evidence of causation.[7]

The Michigan Supreme Court has granted leave to appeal in two cases decided in 2011—*Whitman v. City of Burton and Debano-Griffin v. Lake County*.[8] In its grant of leave in Whitman, the court directed the parties to include in their briefing whether its earlier decision in Shallal correctly held that the primary motivation of an employee pursuing a whistleblower claim must be to inform the public on matters of public concern rather than for a desire of personal vindictiveness.[9] With respect to *Debano-Griffin*, the court directed the parties to include among the issues briefed whether the plaintiff established a causal connection between her protected activity and the adverse employment action under the act; and whether a whistleblower may challenge an adverse employment action which is claimed to be a matter of business judgment that was based on a fiscal or budgetary reason as a mere pretext over the claim by the city that the separation of powers principle prevents the judiciary from examining the budgetary decisions of a legislative body.[10]

In *Whitman*, the plaintiff was the chief of police. The mayor did not reappoint the chief in November of 2007. The chief alleged the refusal was based on his opposition to an agreement by administrators in 2003 to forego any payout for accumulated sick and personal time and that such leave would be taken during the year. In early 2004, the chief demanded payment for his unused leave and threatened to pursue criminal charges. The city attorney advised the city to pay, and the chief received payment for his unused time. At trial, the mayor testified about the problems and complaints with the chief's job performance. The jury found in favor of the chief, and the trial court denied the request for JNOV and a new trial.

In a 2-1 decision, the panel reversed the denial of the JNOV. The majority held as a matter of law that the chief did not pursue the matter to inform the public of a matter of public concern but rather was motivated by his own financial interests. The majority noted that the case differed from *Shallal* where the plaintiff withheld her threat to report until her termination was imminent but was similar in that the chief attempted to use the act as an "offensive weapon." The chief remained silent about the claimed wrong for months and only raised it when most personally beneficial.

In *Debano-Griffin*, the plaintiff was hired as the director of the 911 department. The plaintiff raised concerns about the transfer of funds from the ambulance fund to the 911 fund to the board of commissioners and the emergency telephone system committee. The money was transferred back. Plaintiff testified that she saw a proposed budget with funding for her position but that after the money was transferred back, she saw another proposed budget that did not include funding for her position. The board approved the budget which did not include funding for her position and transferred her duties to another position.

The facts in *Debano-Griffin* are easier to follow than its procedural history. In granting leave, the Michigan Supreme Court will have a third opportunity to review the unreported decision of the court of appeals.[11] In its third review of the case, the court of appeals held in a 2-1 decision that there was insufficient evidence of a causal connection between the protected activity and the elimination of her position. The majority stated that evidence presented showed a temporal relation but did not have "something more" to establish proximity between the two events as required by the Michigan Supreme Court's decision in *West v. General Motors Corp.*[12] In addition, the fact that the budget was not in deficit or near deficit condition does not help the plaintiff since the courts

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STATEMENT OF EDITORIAL POLICY

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

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

THE MICHIGAN WHISTLEBLOWERS' PROTECTION ACT: GOING ON THE RECORD

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have repeatedly held that neither the courts nor jury may second guess an employer's business judgment as a means of establishing pretext. Challenging the soundness of a fiscal decision would be improper second guessing.[13]

So, can the act be used by employees as a "shield" or as an "offensive weapon"? The *Whitman* and *Debano-Griffin* cases provide an opportunity for the Michigan Supreme Court to address the issues of motivation and causation…on the record.

END NOTES

1 MCL 15.362.

2 455 Mich. 604, 566 N.W. 2d 571 (1997).

3 *Shallal* at 579.

4 The survey of court of appeals decisions was based on reviewing the decisions in the state bar's *eJournal* database. Cases can be accessed by utilizing the search function in the employment and labor law category using the search *Michigan Whistleblowers' Protection Act.*

5 *Denny v. Dow Chem. Co.*, COA # 294278 (1/11/01); *Gore v. Belcher*, COA# 294157 (3/17/11); *Purcell v. Township of Tomkins*, COA# 295772 (4/26/11).

6 *McNiel v. Mich. State Univ.*, COA# 294423 (1/20/11); *Pope v. Brinks Home Sec. Co. Inc.*, COA # 294600 (3/1/11); *Prieskorn v. U. of Mi. Health Sys.*, COA # 298996 (1/24/12).

7 *Vanderlaan v. Michigan Medical, P.C.*, COA# 300600 (1/31/12); *Stay v. Connections Emt. Resource*, COA# 310709 (2/9/12).

8 293 Mich. App. 220 (2011).

9 491 Mich. 913, 811 N.W. 2d 490 (2012).

10 491 Mich. 874, 811 N.W. 2d 570 (2012).

11 It would be an understatement to say that *DeBano-Griffin* has a complicated procedural history. The two prior visits to the Michigan Supreme Court are found at 486 Mich.782 N.W. 2d 502 (2010) and at Nos. SC 142902 (20011).

12 469 Mich. 177, 665 N.W. 2d 468 (2003).

13 Slip. op. at p. 2. ■

WRITER'S BLOCK?

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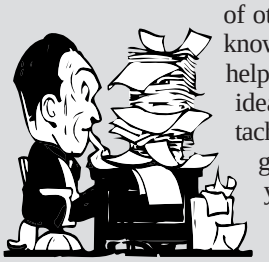


CAN EMPLOYERS REQUIRE DISCLOSURE OF SOCIAL NETWORKING PASSWORDS?

Ryan D. Bohannon
Kienbaum Opperwall Hardy & Pelton, P.L.C.

The most recent hot-button issue on the social networking front is whether employers can require employees to give up their passwords as a condition of employment. News articles are reporting a "trend" among employers to require job applicants to supply their social networking passwords, which will enable employers to check the applicants' Facebook, Twitter, and other sites.

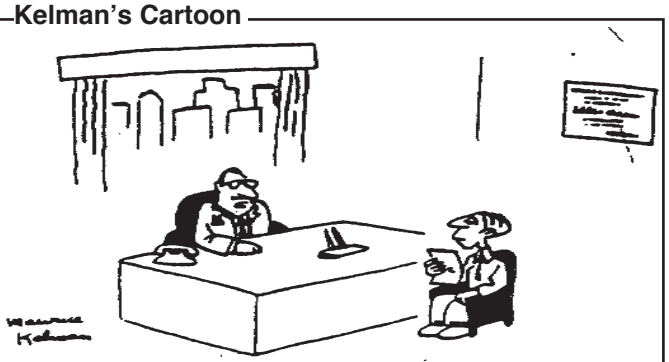
Members of Congress, state legislators, and certain interest groups such as the ACLU have voiced opposition, largely on privacy grounds, and have threatened legislation to stop it if necessary. Maryland recently became the first state to pass legislation that bars employers from asking or forcing employees and applicants to furnish their social networking usernames and passwords. U.S. Senators Richard Blumenthal (D-Conn.) and Charles Schumer (D-N.Y.) have asked the EEOC and the U.S. Department of Justice to investigate whether this practice violates existing federal anti-discrimination statutes, the Stored Communications Act (SCA), or the Computer Fraud and Abuse Act (CFAA). The SCA and CFAA prohibit unauthorized access to electronic information and computers, providing both criminal and civil penalties for violations.

To date, the only reported court case that is analogous is *Pietrylo v. Hillstone Restaurant Group*, which arose under the SCA in a U.S. District Court in New Jersey. Several restaurant employees created a private password-protected invite-only MySpace page, where employees could complain about managers and other job-related issues at the restaurant. When asked by management, one employee gave up her password, testifying that she believed she would otherwise get in trouble. After reviewing the page, management fired two waiters, who then brought suit for unauthorized access under the SCA.

The trial court allowed a jury to decide whether management had accessed the MySpace page without authorization by pressuring the third-party employee to give up her password. Unsurprisingly, the jury found in favor of the plaintiffs, but only awarded modest compensatory damages, as well as punitive damages for a grand total of about $15,000. The restaurant appealed the jury's verdict, but the case settled.

Employers should proceed with the knowledge that requiring access to passwords to social networking sites may place them at some risk for litigation. ■

Kelman's Cartoon



"What it basically says is I agree to file your dumb lawsuit for a huge fee, up front."

SIXTH CIRCUIT HOLDS THAT THE "HONEST BELIEF" RULE PRECLUDES FINDING OF PRETEXT FOR EMPLOYER'S ADVERSE EMPLOYMENT ACTION

William M. Saxton
Butzel Long

In *Seeger v. Cincinnati Bell Telephone Co.* ("CBT"), ____ F.3d ____ (6th Cir. May 8, 2012), plaintiff took Family Medical Leave Act leave and concurrent paid disability leave under CBT's own disability plan to undergo treatment for and to recover from a herniated disc in his back. Employees on FMLA leave were also eligible for paid disability leave under CBT's disability plan. Under CBT's disability plan, an employee was required to work in a light duty position, for as little as two hours a day, if medically able to do so.

Plaintiff complained of severe pain to his doctor and the doctor advised CBT's Medical Director that plaintiff could not perform any work, even light duty work. Four days later, plaintiff and his wife attended the Oktoberfest festival in downtown Cincinnati. At the festival, plaintiff had chance encounters with several of his co-workers. One of the co-workers, who was aware that plaintiff was on disability leave, reported his sighting of plaintiff at the Oktoberfest to CBT's Human Resource Manager.

CBT's Human Resource Manager undertook an investigation. Two of plaintiffs' co-workers who saw him at the Oktoberfest said he was walking around seemingly unimpaired. Plaintiff admitted that he went to the Oktoberfest and walked around for about an hour, but claimed he was in pain the whole time. Based on information compiled in the investigation and review of plaintiff's disability file with CBT's Medical Director, the Human Resource Manager concluded that plaintiff had committed disability fraud by "over reporting" his symptoms to avoid part-time light duty work. Plaintiff was terminated for "disability fraud."

Plaintiff sued CBT, claiming that he was terminated in retaliation for his taking FMLA leave. The Court noted that plaintiff's burden at the prima facie case stage is minimal. Thus, where an adverse employment action occurs very close in time after an employer learns of protected activity, such temporal proximity between the events is enough to constitute evidence of a causal connection "for the purposes of establishing a prima facie case of retaliation."

But, the Court stated that unlike its role in establishing a prima facie case, "temporal proximity cannot be the sole basis for finding pretext."

Under the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), when CBT articulated a non-discriminatory reason for terminating plaintiff, the presumption of discrimination raised by plaintiff's prima facie case was rebutted. Plaintiff was then required to show that CBT's proffered reason for his termination was a pretext for discrimination – "A

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SIXTH CIRCUIT HOLDS THAT THE "HONEST BELIEF" RULE PRECLUDES FINDING OF PRETEXT FOR EMPLOYER'S ADVERSE EMPLOYMENT ACTION

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reason cannot be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Cir. V. Hicks*, 509 U.S. 502, 515 (1993).

Plaintiff sought to establish pretext by contending that there was no basis in fact to support CBT's proffered reason for his discharge. The Court held, however, that "[w]here the employer can demonstrate an "honest belief" in its proffered reason…the inference of pretext is not warranted." The Court set forth the ground rules for the "honest belief" rule, as follows:

> …an employer's proffered reason is considered honestly held where the employer can establish it reasonably relied on particularized facts that were before it at the time the decision was made. Thereafter, the burden is on the plaintiff to demonstrate that the employer's belief was not honestly held. An employee's base assertion that the employer's proffered reason has no basis in fact is insufficient to call an employer's honest belief into question, and fails to create a genuine issue of material fact.
>
> …We have not required that the employer's decision-making process under scrutiny be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action. [citation omitted]. Furthermore, the falsity of a defendant's reason for terminating [a] plaintiff cannot establish pretext as a matter of law under the honest belief rule. [citation omitted]. As long as the employer held an honest belief in its proffered reason, the employee cannot establish pretext, even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless. [citations omitted].

Plaintiff contended that CBT's investigation was not thorough, that CBT failed to discuss the situation with his treating doctor, and that CBT failed to take into account that he had been employed by CBT for 28 years with no disciplinary record. The Court responded that an "optimal investigation" is not a prerequisite to application of the honest belief rule and that the fact that he had a good employment record is "not relevant."

The Court commented that "the determinative question is not whether *Seeger* actually committed fraud, but whether CBT reasonably and honestly believed he did." [citation omitted]. Because plaintiff failed to refute CBT's honest belief that he committed disability fraud, he could not show pretext for discrimination and CBT was entitled to summary judgment. ■

EEOC ADVISES ON USE OF CRIMINAL RECORDS

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On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued an enforcement guidance on the consideration of arrest and conviction records in employment decisions. The EEOC's stance is that the new guidance provides a more in-depth analysis on the use of arrest and conviction records, not that its position has changed. The primary tenets of the EEOC's position include:

• An arrest alone does not establish that criminal conduct has occurred, but an employer may act based on evidence of conduct that disqualifies an individual from a particular position.

• Convictions are considered reliable evidence that the underlying criminal conduct occurred.

• Employer exclusions based on criminal records have a disparate impact based on race and national origin.

• An employer's policy or practice that excludes everyone with a criminal record will not be job-related or consistent with business necessity and thus would violate Title VII.

The EEOC's guidance analyzes how criminal records may play into both disparate treatment and disparate impact analyses under Title VII. Disparate treatment liability occurs when there is evidence that an employer treated employees or applicants differently because of race, national origin, or another protected characteristic. An example of this is when an employer rejects an African American applicant based on the applicant's criminal record but hires a similarly situated white applicant with a comparable criminal record. Another example of disparate treatment is when the employer's decision to reject a job applicant is based on racial or ethnic stereotypes about criminality rather than the qualifications for the position in question. The EEOC's guidance describes the kinds of evidence that may be used to establish that a protected characteristic motivated an employer's use of criminal records in a selection decision, for example, biased statements by the employer or decisionmaker, inconsistencies in the hiring process, and similarly situated comparators who were treated differently.

Disparate impact liability may occur when an employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job-related and consistent with business necessity.

The guidance relies on statistics in noting that African Americans and Hispanics are both arrested and incarcerated at rates disproportionate to their numbers in the general population and that such data supports a finding that criminal record screening policies and practices have a disparate impact based on race and national origin. The guidance references the decision of the U.S. Court of Appeals for the Eighth Circuit, *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977), which held that it was discriminatory under Title VII for an employer to "follow the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense." The Eighth Circuit identified three factors that were relevant to assessing whether

the employer's exclusionary practice was job-related and consistent with business necessity: (1) the nature and gravity of the offense or conduct; (2) the time that had passed since the offense or completion of the sentence; and (3) the nature of the job held or sought.

According to the EEOC, for an employer to show that a criminal record policy passes muster, the employer should develop a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job, so the screen is narrowly tailored to identify criminal conduct with a "demonstrably tight nexus" to the position in question. The guidance acknowledges that validating such a screen pursuant to the Uniform Guidelines For Employee Selection Procedures would be difficult given that studies which would be the basis for such a validation process are rare. The guidance goes on to recommend an "individualized assessment" that would include consideration of the facts or circumstances surrounding the offense or conduct, the number of offenses, the age at conviction, the length and consistency of employment history both before and after the offense, rehabilitation efforts, employment or character references, and whether the individual is bonded.

Finally, the EEOC's guidance describes "employer best practices" as including the following:

• Eliminate policies or practices that automatically exclude people from employment based on a criminal record.

• Train managers, hiring officials, and decisionmakers regarding exclusions due to criminal records.

• Develop a narrowly tailored policy for screening applicants and employees for criminal conduct, which includes essential job requirements, specific offenses that may demonstrate unfitness, and the duration of exclusions for criminal conduct.

• When asking applicants or employees about their criminal records, limit inquiries to records for which exclusion would be job-related and consistent with business necessity.

• Keep information about applicants' and employees' crimina records confidential and only use it for a proper purpose. ■

LOOKING FOR *Lawnotes* Contributors!

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For information and publication guidelines, contact *Lawnotes* editor Stuart M. Israel at Legghio & Israel, P.C., Suite 600, 306 South Washington, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@legghioisrael.com.

MICHIGAN ARBITRATION, CASE EVALUATION, AND MEDIATION 2011-2012 CASE LAW UPDATE

Lee Hornberger
Arbitration and Mediation Office of Lee Hornberger

I. INTRODUCTION

This article supplements "Michigan Arbitration, Case Evaluation, and Mediation 2010-2011 Case Law Update," *Labor and Employment Lawnotes* (Summer 2011), by reviewing significant Michigan cases concerning arbitration, case evaluation, and mediation issued since May 2011. For the sake of brevity, this article uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning arbitration during the review period.

B. Michigan Court of Appeals Published Decisions

1. Court determines whether contract to arbitrate exists

In ***36th Dist Ct v Mich Am Fed of State Co and Muni Employees***, 295 Mich App 502 (2012) (Murray, Talbott, and Servitt), one issue was whether the term of the CBA had ended, and therefore no contract to arbitrate existed, when the court officers were not reappointed. Although some issues survive expiration of a CBA, the right to only be terminated for just cause does not extend beyond the term of the CBA. The Court of Appeals ruled that the Circuit Court erred in ruling that the arbitrator should decide whether the CBA had terminated. The grievances were properly subject to arbitration. Because the CBA did not abrogate the Chief Judge's statutory or constitutional authority to appoint court officers, the arbitrator exceeded his jurisdiction by requiring the Chief Judge to re-appoint the grievants to their former positions.

2. Arbitration clause does not cover CRA cause of action

Hall v Stark Reagan, PC, 294 Mich App 88 (2011) (Kelly [dissent], Gleicer, and Stephens), lv gtd 491 Mich 891 (2012). Plaintiff ex-employees alleged that defendants violated the Civil Rights Act, MCL 37.2101 *et seq*, by discriminating against them. The Circuit Court held that an arbitration agreement barred the lawsuit. The employees argued the arbitration clause in the Shareholder Agreement did not apply to the dispute. The Court of Appeals indicated that the Shareholder Agreement made no mention of any relationships between the parties other than those impacted by the disposition of stock and reversed the Circuit Court decision that had ordered arbitration.

Judge Kelly's dissent opined that the Circuit Court properly ordered arbitration and that the Shareholder Agreement was inextricably linked to plaintiffs' claims.

3. Offsetting decision-maker biases can arguably create neutral tribunal

White v State Farm Fire and Cas Co, 293 Mich App 419 (2011) (Borrello, Meter, and Shapiro [concurring]), was not an arbitration case. It discussed whether a MCL 500.2833(1)(m)

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appraiser who receives a contingency fee for an appraisal is sufficiently neutral. The Court of Appeals indicated at fn 7 " '[c]ourts have repeatedly upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when a neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create an effectively neutral tribunal by building in presumably offsetting biases.'" *Whitaker v Citizens Ins Co of Am*, 190 Mich App 436, 440 (1991), quoting *Tate v Saratoga S & L Ass'n*, 216 Cal App 3d 843, 852 (1989), disapproved of on other grounds by *Advanced Micro Devices, Inc v Intel Corp*, 9 Cal App 4th 362; 885 P2d 994 (1994).

C. Michigan Court of Appeals Unpublished Decisions

1. Strict interpretation of arbitration agreement

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, 303619 (May 31, 2012) (Cavanagh, Fort Hood, and Servitto [dissent]). The Court of Appeals reversed the Circuit Court order denying a motion to vacate an arbitration award. The stipulated order to submit the case to arbitration and the arbitration agreement provided that only claims filed and pending in the Circuit Court at the time the arbitration agreement was entered into were properly before the arbitrator. The arbitrator exceeded his authority when he considered the issue of whether defendants engaged in innocent misrepresentation that induced plaintiff to enter into the franchise relationships. According to the Court of Appeals, MCR 2.118(C)(1), "issues not raised by the pleadings are tried by express or implied consent of the parties," applied to trials, not arbitrations.

2. Arbitration award vacated

MSX Int'l Platform Services v Hurley, 300569 (May 22, 2012) (Owens, Jansen [dissent], and Markey), reversed the Circuit Court's denial of a motion to vacate an award. The issue was whether the employer's written PTO policy granted the employee a vested right to PTO. The Court of Appeals found nothing in the record that supported the notion of an express contract or agreement concerning compensation for PTO; and there was no basis for finding that there was a contract or agreement that entitled the employee to PTO. Judge Jansen dissented, indicating that whether an arbitrator's interpretation of a contract is wrong is irrelevant.

3. Another strict interpretation of arbitration issue submission

Cohen v Park West Galleries, Inc, 302746 (April 5, 2012) (Murphy, Hoesktra, and Murray [concurring/dissent]). Plaintiffs appealed the Circuit Court's ruling that all of plaintiffs' claims were subject to an arbitration agreement. The Court of Appeals held that the only claims subject to arbitration were those arising from agreements containing an arbitration clause. Michigan law generally requires that separate contracts be treated separately, and the language of the agreements that contained the arbitration clause did not reference past purchases.

4. Vacating of domestic relations arbitration award reversed

In ***MacNeil v MacNeil***, 301849 (March 15, 2012) (O'Connell, Sawyer, and Talbot), plaintiff appealed the successor Circuit Court judge's order vacating a domestic relations arbitration award. The Court of Appeals reversed. According to the Court of Appeals, the successor judge misconstrued the arbitrator's assessment of witness credibility as an indication that the arbitrator was prejudiced against defendant, and the successor judge incorrectly determined that the arbitrator was required to reopen the proofs to receive additional evidence of defendant's change in circumstances.

5. Non-signatories sometimes subject to arbitration agreement

Tobe v AXA Equitable Life Ins Co, 298129 (February 21, 2012) (Servitto, Talbot and K F Kelly), affirmed the Circuit Court's order compelling plaintiffs to submit their claims to arbitration. Because the parties performed under the terms of the agreements, plaintiffs could not avoid the terms of the agreements on the ground that the promises made at the beginning of the agreements rendered the agreements illusory. Non-signatories may be bound by an arbitration agreement based on estoppel where they are seeking a direct benefit from the contract.

6. Pre-existing tort claim commenced after domestic relations arbitration

Chabiaa v Aljoris, 300390 (February 21, 2012) (Stephens, Whitbeck, and Beckering). Under a domestic relations arbitration agreement, an arbitrator was to decide property division and support. After arbitration, the Circuit Court entered a judgment of divorce pursuant to the arbitration award. The judgment provided that it resolved all pending claims and closed the case. Subsequently, plaintiff filed an assault and battery complaint against the defendant for events that preceded the arbitration. According to the Court of Appeals, the scope of the arbitration agreement did not include the resolution of tort claims, and an assault and battery cause of action could be brought in a separate proceeding after the domestic relations case and arbitration.

7. Arbitration submission language again strictly interpreted

Midwest Mem Group, LLC v Singer, 301861, 301883 (February 14, 2012) (Fitzgerald, Wilder, and Murray), lv den ___ Mich ___ (2012). Defendants appealed a Circuit Court order denying their motions to compel arbitration. Defendants maintained that the language of the arbitration provisions covered plaintiffs' allegations. The Court of Appeals in a convoluted and complicated opinion affirmed the Circuit Court ruling that the arbitration clauses did not cover the controversy at issue.

8. Party did not waive its right to arbitration

Flint Auto Auction, Inc v The William B Williams Sr Trust, 299552 (November 22, 2011) (Murphy, Beckering and Krause). According to the Court of Appeals, a party is prejudiced by inconsistent acts of the other party when it has expended resources to litigate the merits of its case. Plaintiff argued that it expended tremendous resources due to defendants' discovery requests. Defendants argued that plaintiff's burden was minimal. According to the Court of Appeals, a party must expend more than just some time and resources in litigation to constitute sufficient prejudice. While plaintiff expended some effort responding to discovery requests, it had not exerted the level of effort the Court of Appeals had previously found to require waiver. In light of the public policy favoring arbitration, plaintiff had not satisfied its burden of establishing waiver.

9. Order to compel arbitration vacated

Gardella Homes, Inc v LaHood-Sarkis, 298332 (October 11, 2011) (Murphy, Talbot, and Murray). Construing the releases in the modification agreement with the promissory note, the Court of Appeals held that the Circuit Court erred in holding that the promissory note was subject to arbitration. Engrafting the arbitration clause onto the promissory note would contravene the parties' intent to settle the matter with a payment obligation that was not subject to defenses or counterclaims. Because the promissory note did not contain an arbitration clause, the Court of Appeals vacated the Circuit Court's arbitration order.

10. Second union can be necessary party to labor arbitration

Macomb Co v Police Officers Ass'n of Mich, 299436 (September 20, 2011) (Sawyer, Jansen, and Wilder). This case involved a labor dispute between the County, POAM, and MCPDSA regarding call-in priority for overtime. The arbitrator issued an award in favor of POAM holding there had been no violation of any provision of POAM's CBA, and the overtime call-in procedures were a binding past-practice. The Court of Appeals concluded that MCPDSA was a necessary party to the litigation. MCPDSA's CBA specifically addressed call-in procedures, and the arbitrator's jurisdiction could not extend to deciding the terms of MCPDSA's CBA without MCPDSA being added as a party to the arbitration. To properly interpret POAM's CBA, it was necessary for the arbitrator to consider other related CBAs. Because the Court of Appeals found that MCPDSA was a necessary party to the arbitration, it vacated the Circuit Court order and remanded to the arbitrator for further proceedings.

11. Non-party cannot file motion concerning arbitration award

In ***Dubuc v Dep't of Environmental Quality***, 298712 (July 14, 2011) (Saad, Jansen, and Donofrio), a non-party attorney filed a motion to modify an arbitration award. The Circuit Court granted the motion. The Court of Appeals vacated the Circuit Court's order indicating that it was impermissible for a non-party to file a motion in a case in which he was not a party.

12. Arbitration issue submission language again strictly interpreted

Hantz Group, Inc v Duyn, 294699 (June 30, 2011) (Fort Hood, Donofrio, and Krause). Plaintiffs alleged violations of non-solicitation agreements with defendant former-employees. The Court of Appeals ruled that the Circuit Court erred in ordering the parties into arbitration. The non-solicitation agreements did not contain arbitration clauses. The only agreement to arbitrate was based on FINRA membership, and plaintiffs had not agreed to arbitrate claims arising out of the non-solicitation agreements.

13. Court of Appeals affirms Circuit Court orders favoring arbitration

In the following cases the Court of Appeals affirmed orders ordering arbitration or declining to vacate awards. *Techner v Greenberg*, 303859 (July 19, 2012) (O'Connell, Jansen, and Riordan); *Piontkowski v Marvin S Taylor, DDS, PC*, 303963 (July 10, 2012) (Gliecher, M J Kelly, and Boonstra[dissent]); *Kutz v Kutz*, 300864 (May 1, 2012) (Meter, Servittot, and Stephens); *Turkal v Schartz*, 303574 (April 17, 2012) (Kelly, Fitzgerald, and Donofrio); *Leverett v Delta Twp*, 302557 (March 15, 2012) (Krause, Donofrio, and Fort Hood); *Olabi v Alwerfalli and Mfg Eng Solutions, Inc*, 300541 March 13, 2012) (Saad, Kelly, and Kelly); *Suszek v Suszek*, 299167 (February 28, 2012)(Saad, K F Kelly, and M J Kelly); *Armstrong v Rakecky*, 301423 (February 21, 2012) (Saad, K F Kelly, and M J Kelly*); Hantz Financial Services, Inc v Monroe*, 301924 (January 24, 2012) (Sawyer, Whitbeck and M J Kelly) (FINRA statute of limitations case); *CCS, LLC v IWI Ventures, LLC*, 300940 (January 24, 2012) (Shapiro, Whitbeck, and Gleicher); *Frankfort v Police Officers Ass'n of Mich, Inc*, 298307 (October 18, 2011) (M J Kelly, Fitzgerald, and Whitbeck), lv den ___ Mich ___ (2012) (labor arbitration award); *McDonald Ford, Inc v Citizens Bank & Citizens Banking Corp*, 296814, 299324 (September 27, 2011) (Shapiro, Wilder, and Murray); *Bird v Oram*, 298288 (September 27, 2011) (M J Kelly, Owens, and Borrello); *Souden v Souden*, 297676, 297677, 297678 (September 20, 2011) (M J Kelly, Owens, and Borrello) (remand for clarification); *Reynolds v Parklane Investments, Inc*, 298777 (September 20, 2011) (Murphy, Fitzgerald, and Talbot); *Police Officers Ass'n of Mich v Lake Co*, 298055 (August 11, 2011) (Saad [dissent], Jansen, and Donofrio) (reinstatement enforcement); *Oakland Co v Oakland Co Deputy Sheriff's Ass'n*, 297022 (August 9, 2011) (Fitzgerald, Sawyer, and Beckering) (pension-service credits*); J L Judge Constr Services v Trinity Electric, Inc*, 295783 (August 2, 2011) (Sawyer, Markey, and Fort Hood)(case evaluation costs); *Cumberland Valley Ass'n v Antosz*, 294799 (May 26, 2011) (Owens, Connell, and Meter) (postponement of arbitration hearing request issue); *Roosevelt Park v Police Officers Labor Council*, 295588 (May 12, 2011) (Sawyer, Whitbeck, and Wilder), lv den ___ Mich ___ (2012) (Circuit Court order vacating arbitration award reversed by Court of Appeals).

III. MCR 2.403 CASE EVALUATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning case evaluation during the review period.

B. Michigan Court of Appeals Published Decisions

1. Extremely important required reading attorney fee case

Van Elslander v Thomas Sebold & Assocs, Inc, ___ Mich App ___, 301822 (June 28, 2012) (Talbot, O'Connell, and Sawyer), and *Smith v Khouri*, 481 Mich 519 (2008), should be carefully studied concerning hourly rates, fee agreements, time sheets, case evaluation, and attorney fee petitions. Plaintiff appealed the award of case evaluation costs of $776,076.48. The Court of Appeals affirmed in part and reversed in part. Plaintiff rejected the $173,500 case evaluation. The first jury trial resulted in a $680,838.82 award for plaintiff. Defendants appealed. The Court of Appeals reversed and remanded. The second jury trial resulted in a no cause of action verdict for defendants. Plaintiff contested the case evaluation costs award, arguing that the issue tried on remand was not comparable to the issues originally submitted for case evaluation and that the favorable outcome he obtained at the first trial should preclude an award of costs. The Court of Appeals affirmed the granting of costs.

The Court of Appeals exhaustively discussed the Circuit Court's rulings concerning recovery of (a) expert witness fees, (b) appeal bond costs, (c) transcript costs from the first trial, (d) deposition transcript costs, (e) deposition witness preparation costs, (f) non-dispositional motion fees, and (g) subpoena fees. The Court of Appeals remanded the case to the Circuit Court on some of these miscellaneous issues.

(Continued on page 8)

MICHIGAN ARBITRATION, CASE EVALUATION, AND MEDIATION 2011-2012 CASE LAW UPDATE

(Continued from page 7)

C. Michigan Court of Appeals Unpublished Decisions

1. Sometimes the first will be the last

In ***Shafer Redi-Mix, Inc v J Slagter & Son Constr Co***, 297765 (June 14, 2012) (Borrello, O'Connell, and Talbot), defendants appealed the Circuit Court awarding them case evaluation costs of $100,000. The case evaluation had been $100,000 in favor of plaintiff. Plaintiff rejected the evaluation, recovered a verdict of $107,781.51, and was liable for case evaluation costs. Defendants requested costs of $199,000. The Circuit Court awarded $100,000. The Court of Appeals affirmed the Circuit Court's determination of S100,000 costs rather than the higher amount requested by defendants. The Circuit Court considered *Wood v DAIIE*, 413 Mich 573 (1982), and MRPC 1.5(a). Because costs are limited to a reasonable fee, it was appropriate for the Circuit Court to examine whether the extent of defense counsel's preparation was reasonable. According to the Circuit Court, there was too much lawyering, the preparation was overly thorough, and the number of hours was too great. The Court of Appeals considered whether the Circuit Court's decision was within the range of reasonable and principled outcomes. This case should be read in conjunction with *McDonnell v Colburn*, 292601 (October 21, 2010) (Murphy, Beckering, and MJ Kelly), where the Court of Appeals held that the Circuit Court's denial of costs did not fall outside the range of principled outcomes.

2. Another attorney fee amount determination case

Ponte v Hazlett, No 298193; 298194 (April 24, 2012) (Hoesktra, Sawyer, and Saad). Plaintiff argued that the Circuit Court erred in awarding case evaluation costs that were not necessitated by plaintiff's rejection of the case evaluation. The Court of Appeals held that the Circuit Court abused its discretion in awarding attorney fees related to events that occurred before, and simultaneously with, plaintiff's rejection of the case evaluation, but properly exercised its discretion in awarding fees related to trial and defending against plaintiff's motion for a new trial because those fees were necessitated by plaintiff's rejection of case evaluation. The case was remanded for recalculation of the case evaluation costs. This decision is important concerning measurement of case evaluation costs, hours included in fee calculation, importance of accurate time sheets, and allocation of attorney time.

3. Effect of non-revealed to the court case evaluation acceptance

In ***Petz v Coffman Electrical Equip Co***, 301289 (January 17, 2012) (Hoekstra, Markey, and Borrello), the Court of Appeals affirmed the Circuit Court setting aside a summary disposition order. The Circuit Court did not know that both parties had accepted case evaluation. The circumstances were extraordinary because the parties accepted the case evaluation weeks before the summary disposition order was entered. The dismissal based on acceptance of the evaluation had not yet been entered because payment does not have to occur for 28 days. MCR 2.403.

4. Party should have raised case evaluation issue with arbitrator

In ***J J Judge Constr Services v Trinity Electric, Inc,*** 295783 (August 2, 2011) (Sawyer, Markey, and Fort Hood), after case evaluation, the parties agreed to arbitration. Defendants prevailed in arbitration so as to be arguably entitled to case evaluation costs. Instead of requesting these costs from the arbitrator, defendants requested them from the Circuit Court. The AAA rules provided that the award may include attorney fees if authorized by law and the arbitrator was entitled to assess fees among the parties. Despite authority to grant attorney fees, the arbitrator held that the parties were to bear their own fees. According to the Court of Appeals, defendants should have submitted the attorney fee issue to the arbitrator.

5. Effect of statutory interest on case evaluation

Berger v Katz, 291663, 293880 (July 28, 2011) (Wilder [dissent], Saad and Donofrio), lv den ___ Mich ___ (2012). In this complicated case there was a unitary verdict, claims and counterclaims, and issues decided by the jury and issues decided by the judge. Plaintiffs appealed the Circuit Court's refusal to grant case evaluation costs. According to the Court of Appeals, the Circuit Court should have added the statutory interest figure to the jury verdict amounts. The Court of Appeals reversed the Circuit Court's order denying costs and remanded for a determination of costs. Judge Wilder's dissent would have affirmed the Circuit Court's denial of costs

IV. MEDIATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning facilitative mediation during the review period.

B. Michigan Court of Appeals Published Decisions

There do not appear to have been any published Michigan Court of Appeals decisions concerning facilitative mediation during the review period.

C. Michigan Court of Appeals Unpublished Decision

1. Mediated agreement enforced

Unit 67, LLC v Hudson, No 303398 (June 7, 2012) (Donofrio, Jansen, and Shapiro). The Court of Appeals affirmed a Circuit Court entry of consent judgment because defendant had agreed to the terms of the consent judgment and the mediator did not engage in fraudulent conduct.

2. Mediated agreement enforced

Roe v Roe, 297855 (July 19, 2011) (Talbot, Hoekstra, and Gleicher). The Court of Appeals held that the mediation agreement evidenced the intent of the parties to value the retirement assets, the agreement was enforceable and binding, and property settlement provisions in a divorce judgment typically are final and cannot be modified by the court.

V. CONCLUSION

Michigan appellate decisions since May 2011 concerned the following ADR issues.

1. Who rules concerning arbitrability? *36 Dist Ct*.
2. Scope of arbitration agreement. *Hall*, *Wireless Toyz Franchise, LLC*, *Cohen*, *Tobe*, *Chabiaa*, *Midwest Mem Group, LLC*, *Gardella Homes, Inc*, *Hantz Group, Inc*, and *JJ Judge Constr Services*.
3. An arbitration award will sometimes be vacated. *MSX Int'l Platform Services*.
4. Arbitration right waiver. *Flint Auto Auction, Inc*.
5. Second union might be necessary party. *Macomb Co*.
6. Attorney fee calculation. *Van Elslander*, *O'Neill*, *Shafer Redi-Max, Inc*, *Ponte*, and *Berger*. ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

Pharmaceutical Detailers are Exempt Outside Salespeople under the FLSA

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156; 183 L. Ed. 2d 153 (2012), the issue before the Court was whether pharmaceutical sales representatives or "detailers" fell within the definition of exempt outside salespeople under the Fair Labor Standards Act. The plaintiffs were two pharmaceutical sales representatives whose primary duties involved obtaining non-binding commitments from physicians to prescribe the drug they represented. They sued their employer alleging that, because they did not actually "transfer title" of the drug to the physician, their conduct did not amount to making a "sale" under the FLSA regulations. The Department of Labor filed an amicus brief agreeing with the plaintiffs' interpretation of the definition of "sale" and arguing that this interpretation was entitled to deference.

The Court noted that, while ordinarily an agency's interpretation of its own regulation should be afforded deference, that deference should be withheld when the agency's interpretation is "plainly erroneous or inconsistent with the regulations." *Id.* at 2166. Deference is also inappropriate where "it appears that the interpretation is nothing more than a convenient litigation position . . . or a post-hoc rationalization advanced by an agency seeking to defend past agency action against attack." *Id.* The Court concluded that the DOL's current interpretation of the word "sale" as requiring a transfer of title is "flatly inconsistent with the FLSA," and in a 5-4 decision delivered by Justice Alito, held that the plaintiffs were exempt outside sales people. *Id.* at 2169.

IRCA Preempts Arizona Law Imposing Criminal Penalties on Unauthorized Immigrants Seeking Employment

To combat the many consequences Arizona bears due to unlawful immigration, that State enacted the Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070. The United States sued the State of Arizona claiming that federal law preempted S.B. 1070. In *Arizona v. United States*, 132 S. Ct. 2492; 183 L. Ed. 2d 351 (2012), the issues before the Supreme Court concerned four provisions of S.B. 1070. One of those provisions, Section 5(C), made it "a misdemeanor for an unauthorized alien to seek or engage in work in the State." *Id.* at 2497-98.

While recognizing that "the problems posed to the State by illegal immigration must not be underestimated" the Court applied basic principles of preemption to conclude that Section 5(C) was preempted by the Immigration Reform and Control Act of 1986 (IRCA). *Id.* at 2500. The Court held that the criminal prohibition established by Section 5(C) is in direct conflict with Congress' "deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment," as reflected in IRCA. *Id.* at 2530. Because Section 5(C) violated the well-settled rule that "a state law is preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Supreme Court affirmed enjoining Arizona's enforcement of that provision of the statute. *Id.* at 2501.

Special Assessment Violated the First Amendment Rights of Non-Member Bargaining Unit Employees

The Court's decision in *Knox v. Service Employees Local 1000*, 132 S. Ct. 2277; 183 L. Ed. 2d 281 (2012) settled the issue of whether "the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities." *Id.* at 2284. The defendant SEIU was a public-sector union in the State of California. All employees in the bargaining unit were required to pay the union an annual fee for collective bargaining services, but were not required to join the union, *i.e.*, an agency shop. After SEIU sent its annual notice giving bargaining unit members the option to opt-out of those annual fees not associated with collective bargaining, it sent another notice proposing an increase in employee fees. The increase was intended to cover costs associated with lobbying against two State propositions affecting union fees and public-employee compensation. SEIU ultimately did increase membership fees, advising members that the increase would be used to defeat Proposition 75 and Proposition 76, as well as for other political activities.

A group of SEIU members filed a class action suit against the Union claiming that they were not provided sufficient notice to object to and opt out of the increase in fees to be used solely for political purposes. The District Court granted summary judgment in favor of the plaintiffs, and a divided panel of the Ninth Circuit Court of Appeals reversed. The Ninth Circuit held that the District Court erred by not applying the balancing test established in *Teachers v. Hudson*, 475 U.S. 292 (1986), which provided that the appropriateness of SEIU's procedure should be measured by weighing whether it "reasonably accommodated the interests of the union, the employer, and the non-member employees." *Id.* at 2287.

The Supreme Court granted certiorari, finding that "[f]ar from calling for a balancing of rights or interests, *Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights." *Id.* at 2291. The Court held that the SEIU's conduct in assessing this rate increase was "indefensible." The Court found no justification in the SEIU's failure to provide members the opportunity to opt-out of the increase in dues for political activities. Indeed, the Court held that the Union violated the plaintiff's First Amendment rights by failing to give them notice of the right to opt-in to the special fee, not out of it. ■

FEDERAL COURTS ISSUE INTERESTING FMLA DECISIONS

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Here are some of the more interesting Family and Medical Leave Act (FMLA) cases recently decided by the federal courts.

Employee's Suspension for Leaving Violated FMLA. In *Romans v. Michigan Dept. of Human Services*, 668 F.3d 826 (6th Cir. 2012), the U.S. Court of Appeals for the Sixth Circuit overturned the trial court's dismissal of an FMLA claim where the employee had been terminated after accumulating several disciplinary infractions, one of which was for abandoning his shift to go to the hospital to help his sister decide whether to take their mother off life support. Although Romans said that he had found a co-worker to cover his shift, his supervisor would not give him permission to leave. The trial court found that, because Romans' sister was present to care for their mother, the FMLA did not entitle Romans to leave as well (i.e., he was not "needed to care for" his mother, as specified in the U.S. Department of Labor FMLA regulations). The Sixth Circuit disagreed, however, and found that the regulations state that an employee who is "needed to care for" a family member is entitled to FMLA leave, and the fact that other family members were available to provide that care did not preclude Romans from taking FMLA leave. The Sixth Circuit also found that there was a genuine issue of material fact regarding whether the employer had retaliated against Romans for exercising his FMLA rights where Romans had complied with company policy by finding a volunteer to fill his position and advising management of the circumstances.

Employers Must Say How FMLA Leave Will Be Computed. In *Thom v. American Standard*, 666 F.3d 968 (6th Cir. 2012), the Sixth Circuit affirmed partial summary judgment for Thom, finding that American Standard had improperly interfered with his FMLA leave by failing to inform him how his leave was being calculated. Thom initially sought FMLA leave from April 27 to June 27, 2005 for a non-work-related shoulder injury. When his shoulder healed more quickly than expected, his doctor gave him a note that cleared him for light duty beginning on May 31, with a probable return to full duty on June 13. But when Thom attempted to resume light duty work on May 31, his employer sent him home because the company did not offer light duty work for non-work-related injuries. Thom did not return on June 13, and, when his employer contacted him, he said he was experiencing increased pain and would return to work on June 27 — the original end date of his approved leave. He also said he would get a doctor's note confirming this. On June 17, he came to work with a note extending his leave to July 18. In the meantime, though, American Standard terminated him for his unexcused absence from June 13 to 17. American Standard also claimed that Thom had exhausted his FMLA leave on June 13 based on the "rolling" calculation method (i.e., calculating the leave year backward from the date an employee uses any FMLA leave), which had been changed in the company's FMLA policy a few months earlier. Thom's leave would not have been exhausted had the original "calendar" method been followed. American Standard had not told Thom that his leave time would be governed by the "rolling" method, and the only written communication Thom had received stated that his FMLA leave would expire on June 27. Unsurprisingly, the Sixth Circuit affirmed summary judgment in Thom's favor and held that American Standard had wrongfully interfered with his leave by failing to comply with DOL regulations requiring employers to notify employees of the change in eligibility calculations at least 60 days in advance.

Supervisors May Be Held Individually Liable for FMLA. In *Haybarger v. Lawrence County Adult Probation & Parole*, 667 F.3d 408 (3rd Cir. 2012), the U.S. Court of Appeals for the Third Circuit held that supervisors (in both the private and public sectors) can be personally liable for FMLA violations. The trial court had found that Haybarger's supervisor lacked final authority to terminate, and therefore did not have sufficient control over her employment for liability to attach under the FMLA. The Third Circuit disagreed. It found that the statutory language that defines an employer as "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such an employer" includes an individual who was responsible in whole or in part for an alleged violation, even if that individual was not the ultimate decision-maker. The court concluded that Haybarger's supervisor exercised substantial control over her termination, and refused to dismiss the FMLA case against him.

No FMLA Claim for Care of Terminal Same-Sex Partner. In *Copeland v. Mid-Michigan Regional Medical Center*, 2012 U.S. Dist. LEXIS 19459 (E.D. Mich. April 6, 2012), the U.S. District Court for the Eastern District of Michigan found that Copeland had failed to establish a viable FMLA claim when her employer denied her FMLA leave, demoted her, and ultimately terminated her for absences incurred for the care of her same-sex partner and co-worker who had terminal brain cancer. The court found that Copeland's FMLA claim failed as a matter of law because the FMLA only provides leave for employees to care for a "spouse," which is defined in the DOL regulations as "a husband or wife defined or recognized under State law for the purposes of marriage in the State" where the employee resides, including common law marriage. Because same-sex marriages and common law marriages are not recognized in Michigan, Copeland's partner was not a "spouse" for FMLA purposes. The court also rejected Copeland's claim that the employer had violated its internal FMLA policy because its handbook defined "family member" to include persons such as her same-sex partner. The court reasoned that any possible claim relating to the internal policy, by virtue of the definition of "family member" in the handbook, did not provide a basis for a statutory claim under the FMLA.

Employer Exonerated for Terminating Employee for Misconduct During FMLA Leave. In *Sabourin v. University of Utah*, 676 F.3d 950 (10th Cir. 2012), the U.S. Court of Appeals for the Tenth Circuit affirmed summary judgment for the University after it terminated an employee for misconduct while on protected FMLA leave. Sabourin, a University program manager, was conducting an internal audit of the University's grant processes when he requested FMLA leave for childcare needs. Prior to his request for leave (and unbeknownst to Sabourin), his supervisor had decided to do a workforce reduction that would eliminate Sabourin's position. After his FMLA leave commenced, Sabourin impeded efforts by his supervisor to get the audit completed (e.g., he removed needed materials from his office, failed to return the University's files upon request, and erased information from his computer). The University terminated his employment for insubordinate conduct. Sabourin sued claiming the University violated the FMLA when it eliminated his position and subsequently converted his layoff to a discharge while he was on FMLA leave. The court dismissed Sabourin's FMLA claims because the University's actions were not based on his taking FMLA leave, but instead for his disloyal and obstructive conduct while on leave. ■

OBSERVATIONS FROM THE LAW SCHOOL BUBBLE: HOPE AND CHANGE IN A LAW MARKET CONTRACTION

Zach Adams

I am in my third year of law school and I am worried. I'm in the law school bubble. The bubble gained notoriety when the *ABA Journal* published recent data compiled by the National Association for Law Placement. Only 65.4% of 2011 law grads were employed nine months after graduation at positions requiring bar membership, a record low. Only 55% had long-term positions. "Long-term" means the position is expected to last longer than one year. I plan to graduate in 2013 and I aspire to a "long-term" position. So, I am worried.

Coming out of seven years of higher education with large debt and no job is not exactly the American Dream. Some burdened bubble barristers have turned to the courts. These pleas so far have been unsuccessful. See *e.g., MacDonald v. Thomas M. Cooley Law School*, 1:11-CV-831 (W.D. Mich. July 20, 2012) (dismissing graduates' fraud claims based on Cooley's "literally true" but poetically-distorted post-graduation employment statistics). A large number of new lawyers are in for some serious pain that likely will *not* be remedied by class actions seeking tuition reimbursement from their *alma maters.*

The bubble may burden taxpayers, too. As student-loan debt skyrockets, debt forgiveness is becoming a popular campaign promise among certain vote-seekers. Erstwhile students with some of the highest debts are recent law graduates. Student-loan forgiveness would spread the pain to the rest of the country, at least to those who pay taxes. And those unemployed lawyers will not be contributing much in the way of income taxes. This will worsen the increasing tax burden on the aging and shrinking American workforce. On the other hand, parents who don't mind their newly-minted Juris Doctor living in the basement may figure out a way to make adult-child-support deductible.

The bubble likely will have other significant systemic effects. There already is a buyer's market for new lawyers. Law firms looking to expand, or to fill desks vacated by retiring baby boomers, can now select from the legion of new law graduates vigorously competing for jobs and willing to work hard for modest compensation. This should lead to more profit for firms, the direct beneficiaries of legal-bubble Darwinism.

In addition, the bar and law school placement educrats will be looking for better ways to connect lawyers with consumers of legal services. The initiatives have begun. the New York City Bar is convening a blue-ribbon committee to address bubble problems. The University of Michigan Law School asked its alumni to broaden networking efforts to help new graduates looking for work.

Another significant consequence of the bubble may be fewer, smaller, and better law schools. Some law schools are likely to close. Others may shrink class size. Student applications will fall as word spreads about the depressed market. The *National Law Journal* reports that the number of people taking the LSAT fell so much that the Law School Admission Council raised test fees by as much as 20%. Schools competing for fewer applicants will have to offer a better, and maybe more reasonably-priced, product.

The bubble may produce the most significant reform in the law school curriculum since Dean Langdell introduced the Socratic Method. As pointed out by Professor Peter Hoffman, law schools historically lag behind developments in the profession. A generation ago, law schools produced graduates with plenty of decision-parsing experience — and no trial skills. Now, most law schools have one or more trial practice courses — when 98% of cases resolve on motion or by settlement. Law school emphasis on ADR is belatedly on the rise — just as the profession adjusts to new paradigms driven by technology and the shrinking and changing market. See Peter Toll Hoffman, "Law Schools and the Changing Face of Practice," 56 *N.Y.L. Sch. L. Rev.* 203, 205-208 (2012).

Law schools will likely be forced to adjust with greater alacrity to respond to prospective graduates' short-term job needs and financial realities. Reforms may turn many law schools from their lofty policy orientation to concerns about what their graduates must do next after hanging up their shingles. Some call for two-year law schools, or programs qualifying bachelor's degree graduates to take bar examinations, or a return to Lincoln-like apprenticeships, or some combination of reforms that will address the problems of an increasingly flawed model.

Consumers of legal services may benefit. As producers exceed the legal services demand, or set too-high prices, or ineffectively compete with banks, real estate brokers, the guy at the bowling alley who has some good advice, and LegalZoom.com, legal fees will likely fall. Clients will have broader choices and more purchasing power. Structural corrections may result in a more balanced, sustainable legal services market in the long run, while it reduces the hopes and dreams of those who saw that Juris Doctor degree as the ticket to big bucks and summer mornings on the golf course.

I've gone this far, however, so I'm compelled to be an optimist. Wholesale panic is premature. Certainly new lawyers who work hard and adapt to the changing landscape will find work in the new legal market — I hope. You can do your part. I expect my Juris Doctor in May 2013. I expect to pass the July 2013 Michigan bar examination. Feel free to make me a job offer at zaa104@psu.edu. I look forward to hearing from you. ■

ADA IS STILL GENERATING NEW ISSUES

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There has been considerable recent activity by the Equal Employment Opportunity Commission and in the federal courts under the now 20-year-old Americans with Disabilities Act. Here are some recent items of note.

EEOC Focuses On The ADA. Disability claims are on the rise and have become a main focus of the EEOC. The passage of the ADA Amendments Act (effective January 1, 2009) relaxed the standards for an employee to demonstrate a covered "disability." The EEOC issued implementing regulations last year leading to increased enforcement. Currently, about a quarter of all EEOC charges include disability allegations.

The EEOC has shown particular interest in leave cases. Employers with "no fault" attendance policies should beware. The agency is closely scrutinizing them to see if there are exceptions for absences necessitated by a disability, and has filed several lawsuits against large employers with centralized leave policies. While courts agree that employers need not provide unfettered leaves to disabled employees, close consideration should be given whether a specified period of leave can serve as a reasonable accommodation and whether an exception to attendance policies may be warranted.

The EEOC also issued an "informal discussion letter" (dated November 17, 2011) regarding job qualification standards, especially employer requirements that job applicants have a high school diploma. The agency warned that this may improperly screen out individuals with learning disabilities if the qualification standard does not measure an applicant's ability to perform the responsibilities of the job in question. The EEOC is taking the position that such an applicant should be allowed to demonstrate qualification in another way. This could be troublesome for employers that use the achievement of a degree to screen for a certain caliber of applicant and it is not obvious whether an applicant's failure to attain the degree was due to disability or a simple lack of initiative and perseverance to satisfy graduation standards. Employers should review job descriptions to ensure that they accurately state essential functions and identify minimum qualifications that are genuinely related to essential functions.

Sixth Circuit Adopts "But-For" Causation Standard. In a recent en banc decision in *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012), the U.S. Court of Appeals for the Sixth Circuit adopted a restrictive standard for proving causation under the ADA. Lewis was a registered nurse who claimed she was fired due to a disability (conditions affecting her lower extremities, which required use of a wheelchair). The original Sixth Circuit opinion reluctantly followed earlier precedent under the Rehabilitation Act in holding that Lewis must show her disability was the "sole reason" for her discharge. In its new en banc opinion, the Sixth Circuit rejected the "sole reason" standard, which had been drawn from language specific to the Rehabilitation Act that was not included in the ADA. The court considered whether Title VII's "motivating factor" standard should apply to ADA claims, i.e., that a plaintiff may prove a claim by showing that a disability played a role in an adverse job decision. But the Sixth Circuit rejected that approach as well. The court concluded that the text of the ADA requires a "but-for" standard. In other words, the adverse job action would not have occurred if the plaintiff had not been disabled. Thus, even though Title VII and the ADA have the shared goal of preventing discrimination, and despite the ADA's adoption of the remedies and enforcement mechanisms of Title VII, the court held that Congress' use of "because of" language in the ADA must be respected. The Sixth Circuit is the second federal circuit court of appeals (along with the Seventh Circuit) to conclude that "but-for" causation is necessary under the ADA.

Accommodating Employee's Commute Is Not Required. The Sixth Circuit recently joined other circuits in holding that the ADA does not require an employer to take measures to accommodate an employee's commute. In *Regan v. Faurecia Automotive Seating, Inc.*, 679 F.3d 475 (6th Cir. 2012), the plaintiff sought accommodation for her narcolepsy. Regan had a 79-mile drive to work. When her employer changed her department's start time by an hour, Regan claimed her condition would make it difficult to commute in heavier traffic. She claimed she would need to pull over and rest during her drive, so she asked to be allowed to keep her prior hours. The employer determined that the prior work schedule was not productive and denied her request. Regan resigned and sued, claiming she had been denied a reasonable accommodation. The Sixth Circuit affirmed summary judgment for the employer. It assumed that Regan's narcolepsy qualified as a disability, but held that the employer was not obligated to provide the requested non-workplace accommodation related to her commute. The court reasoned that, while an employer must provide reasonable accommodations that eliminate barriers in the work environment, the ADA does not require accommodations aimed at eliminating barriers outside it.

Return-To-Work Policy Not Indicative Of Discrimination. The U.S. Court of Appeals for the Seventh Circuit recently rejected an employee's claim that his employer perceived him as disabled when it insisted that he be fully cleared medically before returning to work. In *Powers v. USF Holland*, 667 F.3d 815 (7th Cir. 2011), the plaintiff truck driver had a history of on-the-job back injuries. After being off work for over a year, he sought to return to work with restrictions on the type of driving and loading he could do. USF Holland told him he could not return until he was 100% healed. Powers sued, alleging he was "regarded as" disabled and had been discriminated against on that basis. The court reasoned that USF Holland only considered Powers unable to perform a narrow set of tasks, which it determined was insufficient to show that the company regarded him as disabled. In so holding, the Seventh Circuit noted a split in the federal circuits on this point – the Sixth, Ninth, and Tenth Circuits have held that evidence of a "100% healed" policy may alone be enough to support a "regarded as disabled" claim.

Associational Disability Claim Based on "Distraction" Dismissed. The U.S. District Court for the Eastern District of Michigan recently dismissed a plaintiff's claim that she had been discharged based on her employer's belief that her association with a disabled person would "distract" from workplace duties. In *Copeland v. Mid-Michigan Regional Medical Center*, 2012 U.S. Dist. LEXIS 19459 (E.D. Mich. 2012), the plaintiff's partner had terminal cancer (the case also involved sexual orientation and marital status discrimination). Copeland pointed to a series of disciplines she had received for minor infractions soon after her employer found out about her partner's cancer. The court ruled, however, that Copeland failed to furnish evidence that her employer took adverse action out of concern that her performance would suffer in the future for that reason. In other words, she failed to show the necessary causal connection to support her associational discrimination claim. ■

SIXTH CIRCUIT UPDATE

Scott R. Eldridge
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District Court Erred by Applying McDonnell Douglas to a Motion to Dismiss

In *Keys v Humana*, Docket No. 11-5472 (July 2, 2012), the plaintiff, a former employee of the defendant, filed a class-action lawsuit alleging race discrimination under federal law. The defendant moved to dismiss the complaint arguing that it failed to plead a prima facie case of race discrimination under the *McDonnell Douglas* burden-shifting paradigm. According to the complaint, the plaintiff was discriminated against because she is an African American. For example, she claimed that her Caucasian supervisor did not initially give her the correct job title of "Director," but did give comparable Caucasians the "Director" title; that she was not provided a compensation plan equal to her fellow Directors who were Caucasian; that her duties were eventually removed and transferred to a Caucasian male; that she was eventually eliminated from weekly sales meetings even though the other Directors, all Caucasian, were invited; that she was demoted to the role of "Individual Contributor" as part of a management reorganization, under which no Caucasian Director of Vice President was demoted; and that she and ten-to-twelve African American manager-level employees were placed on performance improvement plans and then were eventually forced to resign or terminated, unlike similarly-situated Caucasian employees.

The trial court granted the defendant's motion to dismiss, concluding that, under the *McDonnell Douglas* analysis, the plaintiff failed to allege plausibly that she was treated differently than similarly-situated non-protected employees. It noted her failure to allege facts suggesting that white employees were similarly-situated in performing similar tasks as the plaintiff and doing so to the same standards as the plaintiff, and then concluded that "the absence of any such allegations from the complaint prevents the court from inferring that the employees who were not terminated were similarly-situated to plaintiff." The Sixth Circuit reversed.

Specifically, the Sixth Circuit held that the district court improperly applied the *McDonnell Douglas* analysis to a motion to dismiss. It explained that the district court mistakenly relied upon a previous Sixth Circuit decision, *White v Baxter Healthcare Corp*, which applied the *McDonnell Douglas* burden-shifting paradigm in the context of a *summary judgment* motion. Relying on the US Supreme Court's decision in *Swierkiewicz v Sorema*, the Sixth Circuit stated that "the prima facie case under *McDonnell Douglas* is an evidentiary standard, not a pleading requirement." Moreover, the Court explained, "the Supreme Court's subsequent decisions in *Twombly* and *Iqbal* did not alter its holding in *Swierkiewicz*." In fact, the Sixth Circuit noted, "*Twombly* distinguished *Swierkiewicz*" and "reemphasized that application of the *McDonnell Douglas* prima facie case at the pleadings stage 'was contrary to the Federal Rules' structure of liberal pleading requirements'."

Because the district court erred in requiring the plaintiff to plead a prima facie case under *McDonell Douglas* and "because Keys's Amended Complaint tender[ed] more than the 'naked assertions' devoid of 'further factual enhancement' that *Twombly* and *Iqbal* prohibit," the Sixth Circuit reversed.

Salvation Army May Be Subject to the Rehabilitation Act Even Though it May Be a Religious Organization

In *John Doe v Salvation Army*, Docket No. 11-3019 (July 11, 2012), a John Doe job applicant sued the defendant for employment discrimination under § 504 of the Rehabilitation Act when one of its Ohio adult rehabilitation centers refused to hire him as a truck driver. The Sixth Circuit heard only one issue on appeal in this case of first impression: whether the plaintiff satisfied the fourth element of a prima facie case under § 504, which requires a plaintiff to establish that the program or activity accused of discrimination is receiving federal financial assistance. Under the Rehabilitation Act, the phrase "program or activity" permits consideration of the whole organization if the organization is principally engaged in the business of providing social services. Granting summary judgment to the defendant, the district court concluded that the defendant is a religious organization and therefore could not be principally engaged in the business of providing social services. The Sixth Circuit reversed and remanded to the district court.

The plaintiff sued the defendant and one of its warehouse supervisors in September 2005, alleging that the supervisor asked unlawful questions about the types of medications he was taking. According to the plaintiff, the supervisor refused to hire him when he said that he was taking "psychotropic" medications. The defendant moved for summary judgment arguing that the local program of the Salvation Army that declined to hire the plaintiff, the Columbus Adult Rehabilitation Center did not receive federal funds. The plaintiff responded that congress had rejected a program-specific analysis and that the actions of the local rehabilitation center were subject to the Rehabilitation Act because other parts of the Salvation Army received federal assistance and the organization as a whole was "principally engaged in social services." The defendant never argued in the district court that religious organizations were exempt or that it was not principally engaged in the business of providing social services. Nonetheless, the district court, relying on the defendant's answers to interrogatories, concluded that the local rehabilitation center was a religious organization and, thus, not principally engaged in providing social services. In its interrogatory answers, the defendant stated that it is "an international religious charitable organization, the primary purpose of which is to preach the Gospel of Jesus Christ to men and women untouched by ordinary religious efforts, the underprivileged, homeless, alcoholics, drug addicts, and all those rejected by society." It also stated that the local rehab centers "operated without assistance from the government."

According to the Sixth Circuit, although the local rehab center is not a recipient of federal assistance, the Salvation Army admitted that it received $148 million of government funds in 2005. This, according to the Court, was enough to show that the plaintiff had establish a threshold question of whether the fourth prong of the prima facie case had been satisfied. It explained that Congress in 1988 expressly defined "program or activity," as it ap-

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SIXTH CIRCUIT UPDATE

(Continued from page 13)

pears in § 504, as including "all of the operations of…an entire corporation, partnership, or other private organization" if either federal financial assistance is extended to the corporation, partnership, or private organization "as a whole" or the organization is "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation" and "any part" of the organization received federal financial assistance. The statute, the Court noted, does not further define what it means to be "principally engaged" in one of the enumerated businesses, or what "social services" entails.

The Court turned next to those issues. In examining the statutory language, the Sixth Circuit concluded that the Rehabilitation Act does not exclude religious organizations from coverage and that the Salvation Army is principally engaged in providing social services. First, the Sixth Circuit explained that the Rehabilitation Act does not per se exclude "religious organizations" from coverage. Noting that "[a] natural reading of the statute does not explicitly exclude or include religious organizations," the Court concluded that "the plain meaning of the relevant terms does not weigh in favor of creating an implicit exception for religious organizations," as the list of businesses in the statute "easily could be religious organizations" and religious groups "have a long tradition of providing education, health care, and social services." Further, the Court concluded, "the provision of social services may be a form of religious worship, but that makes it no less the provision of social services." The Sixth Circuit, thus, rejected the district court's reliance on a Senate Committee Report in which it was stated that "religious organizations institutions such as churches, dioceses and synagogues would not be considered to be principally engaged in the business of providing…social services." Instead, according to the Court, "[t]here is nothing in the legislative history that suggests that Congress intended to exclude *all* religious organizations from § 504."

Second, in addressing (but rejecting) the defendant's "better argument" that "the Salvation Army, like many churches, is not principally engaged in providing social services because such services are only incidental to its other activities," the Sixth Circuit disagreed with the district court's conclusion that the Salvation Army should not be distinguished from other churches "simply because it uses different methods to spread its message." This, according to the Sixth Circuit, incorrectly "implies that social services cease to be social services when done as a form of worship or religious exercise." It concluded: "Even starting from the proposition that the Salvation Army is a church and conducts these social programs as a form of worship, there remains a genuine issue of material fact regarding whether the Salvation Army's principal activities are the provision of 'social services' within the plain meaning of those terms." Specifically, the Court pointed to the record that shows that the Salvation Army runs day cares, nursing homes, rehabilitation centers, and homeless shelters "that offer numerous services to the public." Viewing this evidence in a light most favorable to the plaintiff, the Sixth Court remanded the case because "the fact that the Salvation Army views its social service as a way of spreading its spiritual teachings is not dispositive – an activity can be both."

Cat's Paw Theory Viable Even if Ultimate Decision-Maker Exercises Independent Judgment

In *Chattman v Toho Tenax American, Inc*, Docket No. 10-5306 (July 13, 2012), the Sixth Circuit, following recent Supreme Court precedent, reversed the district court and remanded for trial the plaintiff's race discrimination claims. At issue was whether under the 2011 US Supreme Court decision in *Staub v Proctor Hospital*, which was decided after the district court entered summary judgment for the defendant, the plaintiff's supervisor's alleged discriminatory animus could – on a "Cat's Paw" theory – be imputed to the ultimate, unbiased decision-maker who terminated his employment.

The plaintiff, an African American, worked as a shipping coordinator for the defendant for 20 years at its Rockwood, Tennessee plant. He alleged that the Caucasian HR Director at the plant, harbored racial bias against him and other African Americans demonstrated by alleged racial comments the HR Director made on at least three separate occasions toward African Americans. According to the plaintiff, the HR Director's biases motivated him to recommend that upper management terminate the plaintiff's employment following an incident of horseplay between the plaintiff and a Caucasian coworker, who gave different account of incident.

Pending an investigation, the HR Director suspended the plaintiff. Thereafter, during discussions with the Vice President of HR at the defendant's parent company, the HR Director recommended that the plaintiff be terminated, and falsely told him that the Vice President of Operations had agreed. At his deposition, the HR Director gave confusing accounts of the nature and scope of his investigation and whether he kept upper management fully apprised of what he was doing. The defendant, nonetheless, gave both employees final written warnings, which, under company policy, rendered employees ineligible for receiving a promotion for one full year. The plaintiff was disciplined for engaging in horseplay; his coworker for exaggerating alleged injuries that he claimed he incurred during the horseplay and for falsely recounting the details of the incident during the company's investigation.

The plaintiff sued and alleged that the final written warning kept him from receiving a promotion when his immediate supervisor's job opened and that Toho, thus, violated Title VII of the Civil Rights Act and of the Tennessee Human Rights Act. The trial court granted summary judgment in the defendant's favor, concluding that the plaintiff failed to make out a prima facie case and failed to prove pretext. On appeal, the plaintiff argued that the HR Director's racial animus, which he described as "direct evidence" of racial bias, could be imputed to the members of the defendant's upper management, who ultimately decided to issue the final written warning.

The Sixth Circuit agreed that the HR Director's alleged racist comments could constitute "direct evidence" even though they were not "temporally proximate to" the employment decision, but it concluded that the plaintiff's claims should also survive under the *McDonnell-Douglas* burden-shifting paradigm, which does not require a showing of "direct evidence." Focusing on whether the plaintiff could show a causal link between his race and his adverse employment action and whether the defendant's justification for disciplining him was a pretext, the Court noted

that the record was replete with evidence suggesting that the plaintiff received harsher discipline than Caucasian workers who engaged in similar horseplay. The Court also specifically rejected the defendant's argument that the coworker's version of the horseplay – that it resulted in an injury – made the plaintiff's conduct more serious than others' horseplay. According to the Court, the plaintiff presented evidence that his coworker exaggerated, if not invented, his injury and that the defendant's upper management should have known. In addition, the Court noted, the plaintiff presented evidence that the defendant's upper management was aware that horseplay was common in its Rockwood facility, and that it often went unpunished. The Sixth Circuit, accordingly, concluded that a fact dispute existed regarding the fourth prong of the plaintiff's prima facie case and whether the defendant's justification was a pretext for race discrimination.

Next, the Court addressed whether the HR Director's alleged racial animus could be imputed to upper management – the ultimate decision makers – because "[p]roof of [the HR Director's] racial animosity toward African Americans does not establish [the defendant's] liability." According to the Court, the plaintiff must show that by relying on the alleged "discriminatory information flow," the ultimate decision-makers "acted as the conduit of the supervisor's prejudice – his cat's paw." After examining the Supreme Court's reasoning in *Staub*, which it believed to be "dispositive in this case," the Sixth Circuit determined that the district court erred in dismissing the plaintiff's Cat's Paw theory. *Staub* defined Cat's Paw liability as "if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, and that if that act is a proximate cause of the ultimate employment action, then the employer is liable." That the ultimate decision maker undertook his own investigation does not resolve the issue, the Court explained. The supervisor's "biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified." As such, the *Staub* decision, according to the Sixth Circuit, "refused to completely absolve an employer based on its claim to have conducted an independent investigation."

Noting further that all discipline at the Rockwood plant went through the local HR Director, the Sixth Circuit concluded that there was ample evidence in the record to create a fact dispute as to whether the HR Director intended to cause the adverse action and whether his discriminatory animus was the proximate cause of the ultimate employment action. Specifically, according to the Court, "[t]here can be little doubt that [the HR Director] desired [the plaintiff's] termination when he made his recommendation and fabricated the agreement of the other supervisors in his communications with [upper management]." And because, under *Staub*, the supervisor's actions need not be the sole cause of the adverse action, the plaintiff could rely on the HR Director's "discrimination in what information he presented to senior managers" to show proximate cause. For example, the Court pointed out, the HR Director knew, but chose not to report to upper management, that white employees had engaged in similar horseplay. Thus, upper management's decision to discipline the plaintiff was not "unrelated" to the HR Director's actions. Summary judgment, according to the Court, was therefore improper. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

I had a lunch date with *Lawnotes* editor and labor law guru Stuart Israel not long ago, but I was stuck wrestling with an arbitration decision. I called Stuart to beg off, and explained that I had a decision that was resisting my efforts. Knowing nothing about the case, Stuart offered: "Reinstatement without back pay."

I get it. Reinstatement without back pay is a punch line. Everybody knows the arguments. If the discharge was defective, the grievant is entitled to be made whole. If it wasn't defective, the employer is entitled to be rid of the bum.

I know there are those who say reinstatement without back pay is cowardly and craven and unprincipled and used by arbitrators solely to preserve the possibility of future work. I know there are arbitrators who will not award reinstatement without back pay on the grounds that it is our business to make the tough calls and not to straddle, prevaricate and tergiversate. And I know that arbitrators who do award it routinely are derided as baby-splitters.

Nevertheless, I am going to argue that reinstatement without back pay has its place. In fact, it has two places: it is a relatively painless settlement point, and in the right case it is the right award

Reinstatement without back pay is a good settlement point because neither side incurs any additional out of pocket expense. The employer doesn't have to write a check, and the grievant has a restored source of income. If the grievant really is a bad guy, he will screw up again, and the employer will get another swing at him – this time without the weaknesses in the case that caused them to consider settlement. And if he's really not a bad guy, he gets another chance to prove it. Lots of cases settle for reinstatement without back pay. It's an obvious solution.

But many lawyers believe that reinstatement without back pay is not the correct result if a matter goes all the way to hearing and award. They believe there is an important conceptual difference between the point at which a case should settle and its expected outcome. The idea is that accepting a settlement eliminates risk. By accepting a settlement, you are buying certainty. You are agreeing to a certain outcome instead of running the risk of an uncertain one. If a grievant accepts reinstatement without back pay, he gives up the chance that he would have gotten the full back pay remedy. If the employer agrees to reinstatement without back pay, it gives up the chance that it would have gotten a clean discharge. But if they don't take the deal, the argument goes, they don't give up the chance at the whole enchilada. In fact, they're entitled to it.

"Was it in or was is out, Mr. Arbitrator? Fair or foul? Make the call. Don't give me reinstatement without back pay. Reinstatement without back pay is like a tie, and a tie is like kissing your sister."

There is a legitimate, first year law school argument in support of this position. If the evidence produces a perfect tie, the party with the burden of proof loses. And if a party loses, it doesn't get half of what it wants. It loses!

I understand all that too. But suppose you've got a case like this. The grievant did the bad thing, no question about it. No question that he did it, and no question that it's one of the deadly sins for which discharge is appropriate. The employer, in its eagerness to get rid of him, disregards all the procedural requirements of the CBA. No hearing, no union representation, no opportunity to be heard, nada. Fatal procedural error. What result?

If I award reinstatement with full back pay, the grievant gets a windfall, and I reinforce the belief that labor arbitration is little more than a complicated and expensive game of Mother May I. If I uphold the discharge, the employer gets a gift, and I encourage the belief that the protections in the CBA are meaningless, and collective bargaining is a charade.

Neither outcome is acceptable. The proper result is reinstatement without back pay. Even if it is a punch line. And even if it means Stuart was right.

RETIREMENT HEALTHCARE, AGGREGATE STATISTICS, AND THE SANCTITY OF CONTRACT

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In a victory for the sanctity of contract, the Michigan Court of Appeals enforced a municipal employer's collectively-bargained promise to provide retirement healthcare "at the same level of coverage that was provided at the time" of each retiree's "separation of employment with the City." *Loftis v. City of Oak Park*, 2012 WL 3021659 (Mich.App. 7/24/12) (*per curiam;* Murray, Fort Hood, and Borrello).

During the 1960s, industrial unions, the UAW and the Steelworkers prominent among them, began to negotiate lifetime employer-paid retirement healthcare promises in collective bargaining agreements ("CBAs"). See, *e.g., Cole v. ArvinMeritor, Inc.*, 516 F.Supp.2d 850 (E.D. Mich. 2005) (preliminary injunction); 515 F.Supp.2d 791 (E.D. Mich. 2006) (summary judgment and permanent injunction); and 549 F.3d 1064 (6th Cir. 2008) (affirming preliminary and permanent injunctions and summary judgment, citing *inter alia UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied* 465 U.S. 1007 (1984)). *Cole* enforced retirement healthcare promises in various CBAs from 1962 to 2003 between UAW and Rockwell, Meritor, and ArvinMeritor governing plants in Michigan, Wisconsin, Ohio, Indiana, Illinois, and Kentucky.

Over the years, cities and counties made similar promises in CBAs governing union-represented public sector workers. It was common, too, in both the private and public sectors, for employers to make "me, too" commitments, promising salaried and non-union workers the same lifetime retirement healthcare benefits promised to their "unionized" co-workers. See, *e.g., Helwig v. Kelsey-Hayes Co.*, 857 F.Supp. 1168 (E.D. Mich. 1994) (preliminary injunction), *aff'd*, 93 F.3d 243 (6th Cir. 1996), *cert. denied* 519 U.S. 1059 (1997).

Promising retirement healthcare seemed like a good idea in the 1960s and 1970s. Employers committed to these desirable and then-modestly-priced benefits, often trading them for reduced wage demands from union bargainers. This was in a world where people didn't use healthcare as much, and didn't have retirements as long.

That was then, this is now. Medical inflation, defensive medicine, longer life expectancy, expensive medical technology, the impending doctor shortage, FASB and GASB OPEB (other post-employment benefits) accounting requirements, the economy and financial exigencies, and other systemic factors have raised the stakes, make healthcare promises harder to keep, and increase incentives to break those promises.

The result has been litigation. Employers unilaterally change or eliminate retirement healthcare and retirees sue. In the private sector, the battleground typically is federal court, where retirees and unions sue employers, often in class actions, under Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. §185, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq.*, and where salaried and non-union retirees sue under ERISA and, sometimes, under contract and tort theories. In the public sector, retirees and unions sue in state court for CBA breach and sometimes also make constitutional and tort claims, and salaried and non-union retirees sue in state court making constitutional, contract, and tort claims.

The employer typically argues that there were no promises, that the "course of conduct" seemingly evidencing obligations is really nothing more than a reflection of gratuitous post-retirement healthcare provided out of the goodness of the employer's institutional heart. In the alternative, the employer typically argues, even if there were promises, they are limited, and they certainly permit the employer to make unilateral "reasonable" changes, or even, as one employer recently asserted, to unilaterally "amend, modify, suspend, replace, or terminate" retirement healthcare "in whole or part, at any time and for any reason," at least by "appropriate company action" and to "the fullest extent permitted by law." In another case, the employer pled 44 affirmative defenses. As the aphorism says, necessity—including OPEB reporting obligations—is the mother of invention.

In *Loftis*, the City made promises to union-represented public safety officers in a CBA. During retirement they would have "the same level of coverage that was provided at the time of their separation of employment with the City, with cost to be paid by the City." The fly in the ointment was the City's notice that "because of increasing costs in employer sponsored healthcare premiums," the City was changing retirement healthcare. Among the changes: "prescription co-pays would be increasing from $10 to $15 generic and $30 specific." The retirees sued.

As reflected in the opinion, the City offered various justifications, among them that the "same level" standard was met in the aggregate. The City argued that enhanced benefits, like newly-reduced office-visit copays, balanced things out. The City argued that it complied with the "same level" standard based on "an assessment of all healthcare benefits" provided under "the hospital, medical, surgical, dental, optical, and prescription riders."

Such "aggregate" arguments, favored by employers making unilateral healthcare changes and the employers' actuaries, do not work. After all, Danny DeVito (5') and Shaquille O'Neal (7'1") are, in the aggregate, 12'1" tall. On average, they are 6'½" tall. In the words of Mark Twain, who attributed the phrase to Benjamin Disraeli: "There are three kinds of lies: lies, damned lies and statistics."

Indeed, the Court of Appeals was not persuaded by the City's "aggregate" argument. Under the "same level of coverage" language, the Court held, the retirees "are entitled to healthcare coverage under each rider category that is identical and equal to that which was received at the time of their respective retirements." The Court continued:

> Although defendants argue that the "same level" means equality formed from an assessment of the overall healthcare coverage across all six rider categories, this interpretation is contrary to the plain meaning of the contract. The contract specifically states that each rider coverage for hospital, medical, surgical, dental, optical, and prescription will be available to plaintiffs at the same level. It does not provide that defendants may decrease benefits in one rider category as long as they also increase benefits in another rider category. Such an interpretation would not permit identical and equal healthcare coverage to plaintiffs.

The Court concluded that the CBA terms "are clear and unambiguous" and that the retirees "are entitled to the identical and equal prescription rider coverage of $10 prescription co-pay."

That seems just right. Healthcare services are not fungible.

If you want a $10 refill of your name-brand painkillers, extra office visit coverage won't make up for that new $30 co-pay. And if you need a mammogram, a prostate exam won't do.

In addition, we know from kindergarten and first-year contracts that a promise is a promise. Cornell University's Legal Information Institute defines "sanctity of contract" as the "general idea that once parties enter into a contract they must honor their obligations under that contract." Indeed, a promise is a promise even if it is inconvenient to keep. See *Noe v. PolyOne Corp.*, 520 F.3d 548, 564 (6th Cir. 2008) (citation omitted):

> We are cognizant of the overall climate in which this case reaches the court; rising healthcare costs and foreign competition have certainly placed corporations such as PolyOne in a difficult economic position. However, in the absence of impossibility of performance, it is not the prerogative of the judiciary to rewrite contracts in order to rescue parties from "their improvident commitments."

So, "increasing costs in employer sponsored healthcare premiums" notwithstanding, absent explicit contractual authority or retiree consent, an employer cannot lawfully modify vested retirement healthcare. And another thing. *Loftis* prompts the Seinfeldian question: What's up with this *per curiam* unpublished stuff? As the saying goes: "Not only must justice be done; it must also be seen to be done." ■

"Your colonoscopy isn't covered, but I'll make up for it with a free flu shot."

APPELLATE REVIEW OF MERC CASES (MARCH 2011–FEBRUARY 2012) PART II

D. Lynn Morison
Michigan Bureau of Employment Relations

5. *DETROIT (WATER & SEWERAGE) -&- AFSCME -AND- HOOKS*, (Court of Appeals No. 298364, unpublished decision issued September 29, 2011, affirmed MERC Case No. C08 E-093, C08 I-195 & CU08 E-024, issued March 11, 2010; 23 MPER 15.)

Donald Le Paul Hooks (Hooks) alleged that his former employer, the Detroit Water & Sewerage Department (DWSD), violated PERA by discriminating against him or retaliating against him for engaging in union or otherwise protected concerted activity when it declined to offer him reinstatement to his former bargaining unit position on the terms he requested. In addition, Hooks contended that his former labor organization, AFSCME Council 25, Local 107 (Union), breached its duty of fair representation by failing to enforce the terms of the collective bargaining agreement between the Employer and the Union with respect to his efforts to obtain reinstatement.

On appeal, the Court agreed with MERC's conclusion that the Union did not owe Hooks a duty of fair representation. The Court relied on the Michigan Supreme Court's holding in *Goolsby v Detroit*, 419 Mich 651, 661 (1984), that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory, or in bad faith." Moreover, before one can maintain an action against a union for breach of its duty of fair representation, "they must demonstrate that they are a member of the union's collective bargaining unit." In the present case, the Court found that Hooks' claim that the Union breached its duty of fair representation was properly dismissed because he failed to provide evidence of his membership in the bargaining unit or a compelling argument explaining why he should be considered a member. As a result, the Court affirmed MERC's decision to dismiss the charge against the Union.

The Court also agreed with MERC's ruling that Hooks' mere allegations of unfairness or violation of the collective bargaining agreement do not suffice as a valid claim under PERA. Hooks' claim stems from his unsuccessful attempt to have the DWSD accommodate his requests for uniform items and for assignment to the midnight shift. He failed to show that his requests were in any way related to union or protected concerted activity. Further, Hooks offered no contention that the provision of uniforms was a topic of dispute between the Union and the DWSD. Hooks failed to show that he had engaged in union activities or that the Employer's failure to assent to Hook's requests was in any way related to antiunion animus. Therefore, the Court affirmed MERC's dismissal of the charges against both the DWSD and Union.

6. *MACOMB COUNTY, MACOMB COUNTY ROAD COMMISSION, AND 16TH JUDICIAL CIRCUIT COURT -AND- AFSCME COUNCIL 25 LOCALS 411 AND 893, INTERNATIONAL UNION UAW LOCALS 412 AND 889, AND MICHIGAN NURSES ASSOCIATION*,

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APPELLATE REVIEW OF MERC CASES (MARCH 2011-FEBRUARY 2012) PART II

(Continued from page 17)

(Court of Appeals No. 296416, Order issued September 20, 2011 for publication, affirmed MERC Case Nos. C07 D-083, C07 D-086, C07 D-087, & C07 E-115, issued January 25, 2010, 23 MPER 8.)

In a published decision, the Court of Appeals majority affirmed the Michigan Employment Relations Commission's decision, holding that the Respondents violated their duty to bargain in good faith by unilaterally changing the method for calculating retirement pension benefits.

Macomb County, Macomb County Road Commission, and 16th Judicial Circuit Court (Respondents) provide pension benefits to their employees. Employees choose from various pension plan options, including the "joint and survivor pension" in which payments continue until the death of both the employee and his or her spouse. Respondents use a mortality table to calculate the joint and survivor pension plan benefits. Prior to 1982, Respondents calculated the joint and survivor pension plan benefits using a method that considered the gender of the employee, because the average life spans of men and women differed. When the United States Supreme Court held that using separate calculation tables for men and women was unlawful gender discrimination, Respondents adopted a gender-neutral mortality table. The Retirement Commission adopted a 100% female/0 % male combination mortality table although their actuary informed Respondents that this method would increase costs to the retirement system because it was the only way to ensure that employees would not receive lesser benefits than under the previous system. The actuary's report also stated that the retirement ordinance required the joint and survivor pension plan to be the "actuarial equivalent" of the standard benefit. This method was used from 1982 until 2006.

In 2006, the Retirement Commission adopted a new gender-neutral mortality table that changed the ratio to 60% female/40% male and lowered the monthly retirement benefits for employees on the joint and survivor pension plan. AFSCME Council 25 Locals 411 and 893, International Union UAW Locals 412 and 889, and Michigan Nurses Association (Charging Parties) filed a charge against Respondents, alleging that Respondents committed an unfair labor practice when they lowered pension benefits without bargaining. Respondents asserted that they do not have a duty to bargain over "actuarial assumptions," which they contended are the responsibility of the Retirement Commission.

Whether Respondents committed an unfair labor practice when they adopted the new mortality rate table to calculate joint and survivor benefits turned on three issues: whether "actuarial assumptions" are mandatory subjects of bargaining; whether the use of the term "actuarial equivalent" in the collective bargaining agreement is ambiguous; and whether the parties' use of the 100% female/0% male table for 24 years constituted a binding past practice. The Court held that employers are bound by their bargaining obligations, regardless of any actions taken by an independent pension board. The ordinance granting the Retirement Commission the authority to adopt actuarial assumptions used to calculate benefits does not cut off Respondents' duty to bargain. Even if the ordinance purported to remove the issue from the scope of collective bargaining, the ordinance would be in conflict with PERA, and therefore invalid. If actuarial assumptions used to calculate benefits are mandatory bargaining subjects, a local ordinance cannot foreclose collective bargaining. The Court majority concurred with MERC's finding that the mortality table used to calculate pension benefits is within Respondents' control, and therefore a mandatory bargaining subject. If a term in a collective bargaining agreement is ambiguous, an implied agreement between the parties that a past practice will continue acts to make that practice a term of employment that cannot be unilaterally changed. If a term is unambiguous, then past practice may constitute a term of employment if it is mutually accepted and acknowledged as amending the contract. Based on testimony provided by the Charging Party, the Court majority held that the term "actuarial equivalent" was ambiguous. However, the Court majority noted that whether the term was ambiguous was immaterial to finding past practice. Past conduct that is "so widely acknowledged and mutually accepted" to show a "meeting of the minds" serves to establish a term or condition of employment that cannot be unilaterally amended, even if it is not specifically included in the collective bargaining agreement. The parties used the 100% female/0% male mortality table uninterrupted for 24 years, even after an actuarial review in 1993. Even if the term "actuarial equivalent" was unambiguous, the parties' actions over 24 years modified the contract such that it may not be unilaterally changed. Because the method of calculation is a mandatory subject of bargaining, Respondents violated their duty to bargain when they unilaterally changed the method used to calculate joint and survivor benefits under the collective bargaining agreement.

The Dissenting Opinion found that the Retirement Commission is vested with the sole authority to determine mortality tables and actuarial assumptions, and therefore these matters are not subject to bargaining under PERA, and that the Respondents did not violate their duty to bargain because the matter is covered by the parties' collective bargaining agreement. According to the dissent, the Retirement Commission decides which mortality tables or calculation methods to use, not Respondents. As the Retirement Commission is not a public employer as defined by PERA, the decisions of the Retirement Commission are not subject to bargaining. The dissent further reasoned that the matter is contained in the parties' collective bargaining agreement by referencing the ordinance allowing the Retirement Commission to adopt mortality tables as necessary in the Retirement System on an actuarial basis. Because the term is covered by the collective bargaining agreement, the Dissent concluded that the Respondents have satisfied their duty to bargain.

This case is currently before the Michigan Supreme Court on an application for leave to appeal.

7. *CITY OF FLINT V POLICE OFFICERS LABOR COUNCIL (FLINT POLICE SERGEANTS ASSOCIATION) AND POLICE OFFICERS LABOR COUNCIL (FLINT POLICE CAPTAINS AND LIEUTENANTS ASSOCIATION),*

(Court of Appeals No. 295913, Order issued April 14, 2011 vacated and remanded for further proceedings, MERC Case Nos. C07 B-022 and C07 B-023; Decision issued December 21, 2009, 22 MPER 107; Order Denying Reconsideration issued March 16, 2010, 23 MPER 18 (2010).)

The Employer created a new bureau within its police depart-

ment and staffed it with five new command positions at salary levels higher than those of the positions in the two bargaining units represented by Charging Parties. The Employer promoted patrol officers to those positions without following the established procedures within the parties' collective bargaining agreements and without bargaining over promotion procedures. MERC adopted the ALJ's finding that the Employer violated PERA by unilaterally changing established promotion procedures.

Before the Court of Appeals, the Employer argued that the case was moot. The Employer pointed to a document indicating that the new bureau would be "reintegrated" into another bureau within the police department. The Court upheld MERC's refusal to consider the document because it was not part of the record before the ALJ, noting that "a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). The Court also agreed with MERC's conclusion that the matter was not moot because the unfair labor practice charge involved the broader issue of whether the Employer may create new positions and make appointments to those positions without bargaining. Since such action was capable of being repeated, the issue raised by the charges was not moot. Further, the Court agreed with MERC's finding that the new bureau's creation and the appointment of patrol officers to fill the new bureau's command positions was presented as a fait accompli because Respondent's press release regarding the bureau and the appointments indicated they were to be effective immediately and made no mention of prospective negotiations. The Court also found that the record supported MERC's finding that the positions were not being provisionally filled. Nothing in the record indicated that the positions were only being filled temporarily or until permanent replacements could be chosen pursuant to established procedures.

However, the Court agreed with the Employer that the subject matter of the dispute was covered by provisions within the parties' collective bargaining agreements. The Court cited *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309 at 321-322, for the proposition that when the disputed issue is covered by the contract, such that the contract's provisions can be reasonably relied on for the action taken, and the collective bargaining agreement provides for a grievance procedure that culminates in binding arbitration, enforceability of the contract's provisions should be left to arbitration. The collective bargaining agreement in this case had a grievance procedure that culminated in binding arbitration. Additionally, the contract had provisions detailing the procedures to be used in making promotions.

The Court disagreed with MERC's factual finding that a past practice existed regarding the promotion procedures utilized in this instance. The positions at issue were newly created and not mentioned in the parties' collective bargaining agreements. All evidence regarding past promotions involved promotions to positions explicitly mentioned in the collective bargaining agreements. Because no evidence indicated that the contractual promotional procedures were ever extended to positions not listed in the contract, the Court found that MERC's finding was not supported by the record. The Court, therefore, remanded the case to MERC to determine if the unfair labor practice charge should be dismissed.

8. *COUNTY OF WAYNE –AND- AFSCME COUNCIL 25, AFSCME LOCAL 25, LOCAL 101, LOCAL 49 AND LOCAL 1659,*

(Court of Appeals No. 295536, issued March 22, 2011 affirmed MERC Case Nos. CU07-J050, 051, 052, 053, 054; issued November 24, 2009, 22 MPER 102).

In an unpublished opinion, the Court of Appeals affirmed MERC's dismissal of the Employer's unfair labor practice charge alleging that the Union violated PERA when it filed a breach of contract action in circuit court. Three retired bargaining unit members were also named plaintiffs in the initial complaint. The circuit court complaint alleged that the Employer violated the collective bargaining agreement, and the vested rights of retirees, by changing the premium structure for supplemental life insurance (SLI) benefits. The circuit court dismissed the Union as a party and limited the class of plaintiffs to retired bargaining unit members who purchased SLI.

The Employer filed an unfair labor practice charge with MERC alleging that the Union was violating PERA by attempting to represent members outside the bargaining unit and, thus, unlawfully coercing the Employer. The ALJ issued a show cause order and subsequently dismissed the charge without conducting an evidentiary hearing or oral argument. MERC ultimately affirmed the ALJ's Decision and Recommended Order.

On appeal, the Employer argued that MERC improperly relied on four "factual premises" and erred in reaching its legal conclusion that the charge was an improper collateral attack on the circuit court action. The "factual premises" challenged on appeal were: 1) AFSCME was a named party but not the class representative; 2) AFSCME has an interest in the outcome of the circuit court action as it bargained for the insurance benefit at issue in the circuit court action; 3) AFSCME may represent retirees who consent to its representation in efforts to enforce the contract; and 4) Retirees may take action to pursue enforcement of their contractual rights with or without union assistance.

The Court of Appeals found that the Employer's challenges to MERC's "factual premises" were moot. The Employer's arguments focused on the appropriateness of the Union's alleged representation of a class that included retirees who had never been covered under the collective bargaining agreement negotiated between the County and the Union and who did not consent to representation by the Union. Because the circuit court removed the Union from the class of plaintiffs and limited the class to retirees who had formerly been members of the union, it was no longer possible for the Union to engage in the action the Employer complained about. Thus, there was no issue or remedy left to be addressed through the unfair labor practice charge filed by the Employer.

As to the claim MERC erred in finding that the Employer's unfair labor practice charge was an impermissible collateral attack on the circuit court action, the Court stated that retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit. Here, the Employer failed to allege that the Union filed suit without any reasonable basis. The Court also found the issue moot, as the only relief sought at MERC was a cease-and-desist order. Because the Union had already been forced to cease action at the circuit court, a remand to MERC for further proceedings would be futile.

—END NOTE—

Appreciation is extended to Sidney McBride, Joshua Leadford, Iryna Sazonova, Simon Haileab, and Emily Warren for their assistance with the preparation of these case summaries. ■

LABOR AND EMPLOYMENT LAW SECTION ANNUAL REPORT

Tim Howlett

The Labor and Employment Law Section has closed another fiscal year. The year began tragically with the loss of George Wirth shortly after he had been elected Chair of the Section in September. Not only did we lose George's leadership, but we lost one of our most tireless contributors to the Section. Appropriately, we recognized George at the Mid-Winter meeting with the Distinguished Service Award.

The Council has always believed that its primary service to the Section members is through *Lawnotes* and the programs the Council presents throughout the course of the year to provide continuing education and the opportunity for fellowship. *Lawnotes* continues to be an outstanding publication. It is easy to take Stuart Israel's contributions for granted because they have been outstanding over a number of years, but we should all take time to thank Stuart for his efforts.

The members of the Council gave a substantial amount of time and effort to ensure a successful year. In particular, I want to mention those Council members whose terms expired in September: Larry Murphy, Brad Glazier, Niraj Ganatra, Dennis Boren, and Ron Robinson. They each contributed significantly to the Council and the Section. Their contributions go well beyond attending monthly meetings. They were active members of committees and substantially added to the success of the Section's events. In addition Darcie Brault has been exemplary in her contribution as the former Chair. She energetically helped fill the void from the loss of George and contributed well beyond the normal role of the former Chair.

We started with a great program at our annual meeting in Dearborn on September 15, 2011: Judge David McKeague of the Sixth Circuit Court of Appeals discussed his observations on appellate advocacy. Leonard Page and Bob Vercruysse debated the NLRB/Boeing case; Jim Moore and Craig Lange discussed the recent initiatives in public sector bargaining. Tom Barnes was moderator for both panels. A social hour followed.

On October 12, 2011, the Section co-sponsored the Bernard Gottfried Memorial Labor Law Symposium held in Detroit at Wayne State University Law School.

The Section's Holiday Party took place on December 9, 2010 at the Birmingham Country Club, and we had more than one hundred attendees. This event has continued to grow and has become a year-end tradition for many Section members.

The Section's Mid-Winter Meeting took place on January 20 and 21, 2012 at the Detroit Athletic Club. The dinner speaker was Steve Babson, one of the authors of *The Color of Law,* Steve introduced Hon. Claudia House Morcom who was presented with the Section's Award for Courage and Vision. The Distinguished Service Award was awarded posthumously to George Wirth. The Section also presented a seminar on January 21, 2012 with Legal Updates presented by Mike Shoudy, Gary Francis, Rob Boonin and Jeff Steele. Dan Swanson moderated a panel of judges including Judge Nancy Edmonds, Judge David Viviano and Judge Philip Rodgers, Jr.

On April 9, 2012 the Section sponsored, with 27 law firms as co-sponsors, a reception for Terry Morgan, the new Regional Director of Region 7 of the NLRB.

The Section again cosponsored the ICLE "Labor and Employment Law Institute" with a new lawyer promotion in April.

On May 14, 2012 the Section co-sponsored a west side event with the Grand Rapids Bar Association featuring U.S. District Court Judge Robert Holmes Bell and roundtable discussions on the latest developments in labor and employment law.

On June 7, 2012, the Section presented the "Spring Board" program with roundtable discussions focusing on the ABCs of Agency Practice at the Big Rock in Birmingham with a social gathering afterwards. This event has also continued to grow with more than one hundred attendees this year.

At its Annual Meeting on September 20, 2012, the Section presented a program featuring Terry Morgan, the Regional Director of Region 7 of the NLRB, followed by a panel discussion with Craig Schwartz and David Radtke. David Lopez, General Counsel of the EEOC, also spoke followed by a panel discussion with Larry Murphy, Stephen Drew, and Rhett Pinsky. Dave Calzone moderated both panels.

We have arranged for Kevin Boyle to return as the Friday evening speaker for the Mid-winter Meeting at the DAC on Friday, January 25, 2013. Kevin will speak about his upcoming book on the Sacco and Vanzetti case.

The Council members have worked hard to continue to provide excellent programs for you, and we appreciate the support you have given us for those programs. Thank you. ■

MERC UPDATE

Nicole M. Cowell
White, Schneider, Young & Chiodini, P.C.

A brief summary of two recent decisions issued by the Michigan Employment Relations Commission follows. Recent decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/merc.

Detroit Public Schools – and – Teamsters, Local 214, **Case No. C10 G-175 (November 15, 2011)**

On April 19, 2012, the Administrative Law Judge ("ALJ") issued her Decision and Recommended Order finding the Respondent-Employer, Detroit Public Schools, did not violate Section 10 of the Public Employment Relations Act ("PERA"), 1965 PA 379, and accordingly the unfair labor practice ("ULP") charge filed by Charging Party, Teamsters, should be dismissed. Neither party filed exceptions to the Recommended Decision and Order of the ALJ. Accordingly the Commission adopted the decision as its final order on May 22, 2012.

The ULP charge initially alleged that Respondent violated its duty to bargain by "refusing to acknowledge a bid for services based on cost savings that had been earlier demanded, refusing to bargaining for a collective bargaining agreement that would have provided the cost savings that had been demanded, refusing to allow the union to submit a bid prior to negotiating with a third party, and intentionally delaying the collective bargaining agreement." The allegations were based in large part on new statutory language in PERA, Section 15(3)(f) and 15(4), added in 2009. The outsourced services in the instant case were those of the school district's security officers. There was no dispute that the series provided by those individuals were "noninstructional support services" and therefore fell within the purview of the statutory amendments.

On August 4, 2010, Respondent filed a motion for summary disposition alleging that Charging Party had notice of Respondent's desire to subcontract, but Charging Party failed to submit a bid. Respondent claimed it had no obligation to bargain with Charging Party over any aspect of the contract or its impact on employees. Charging Party responded to the motion and filed an amended charge arguing that while it did not submit a formal bid it had effectively bid on the contract by presenting a proposal to Respondent during collective bargaining that included significant wage and benefit concessions to meet Respondent's previous demands.

Shortly after Charging Party amended its charge, ALJ Peltz issued a decision dismissing a ULP in *Lakeview Cmty Schs*, Case No. C10 C-059 and *Mt Pleasant Pub Schs*, Case No. C10 E-104 that involved the 2009 amendments. ALJ Peltz rejected the argument that a bargaining proposal could constitute a "bid" under the amendments to PERA.

Following this decision, Charging Party again amended its charge alleging, namely, that "the layoffs or termination of its members violated … [Section 10(1)(e) of PERA] because it constituted a repudiation of the parties'… [CBA]." Respondent responded by amending its motion for summary to include this new argument.

Administrative Law Judge Stern considered the charges and found as follows:

The concessionary proposal by Charging Party did not constitute a formal "bid" as required by PERA's amendments.

Charging Party alleged the instant case was distinguishable from *Lakeview* because the parties here had a contract in effect that prohibited "Respondent from terminating its members after subcontracting their work." However, this provision would be unenforceable if interpreted to prohibit subcontracting. Therefore, subcontracting during the term of this contract did not constitute repudiation. Instead, this constituted a bona fide contractual dispute which acted as a bar to repudiation being found. ALJ Stern further stated, "finding Respondent guilty of a repudiation violation in these circumstances would violate the Legislature's clearly expressed intent to give public school employers broad authority to act unilaterally to contract for noninstructional support service."

Where a subcontracting decision is motivated by anti-union animus it is unlawful. There are four elements to establish a prima facie case for anti-union animus. The first is that the union or its members engaged in protected activity. The second is that the employer was aware of this activity. The third is that there is "anti-union animus or hostility to the employees' protected rights." The fourth is that there is a suspicious timing or other evidence that the protected activity was a motivating reason for the subcontracting. Charging Party demonstrated the first two elements. However, Charging Party fell short on demonstrating the remaining elements. While, there was a history, from 2007-2010, of contentious bargaining and ULPs being filed by Charging Party against Respondent, Charging Party did not do more than "show that it had been vigorously defending the interests of the employees when Respondent decided to subcontract." Further, "suspicious timing, by itself, is not sufficient to show unlawful intent." Therefore, Charging Party did not meet its burden in establishing a prima facie case for anti-union animus being the reason for the subcontracting.

ALJ Stern ultimately granted Respondent's motion for summary disposition and dismissed the charges. As no exceptions were filed, the Commission adopted this decision and order.

Traverse Area District Library – and – Margaret Kelly, **Case Nos. C11 G-121 (May 15, 2012)**

On December 15, 2011, the Administrative Law Judge ("ALJ") issued his Decision and Recommended Order finding that Charging Party, Margaret Kelly's, unfair labor practice against Respondent-Employer, Traverse Area District Library, was time barred from relief under Section 16(a) of PERA. The ALJ found that the charge had been filed more than six months after the alleged retaliatory conduct by Respondent. The Decision and Recommended Order was served on the parties and Charging Party filed exceptions while Respondent filed a brief in support of the Recommended Order. In her exceptions, Charging Party alleges that the ALJ erred in recommending the charges be dismissed based on the statute of limitations. The Commission reviewed the exceptions and found them without merit.

Charging Party's ULP centered around her discharge which she claimed was in retaliation for her having engaged in concerted activity by participating in the effort to accrete several positions into the existing affiliate of the Teamsters' union. She asserted that she waited to file the ULP because there was a provision in her CBA that required her to engage in facilitative mediation before she sought outside remedy on the discharge. Charging Party alleged that because she was contractually mandated to submit to and complete a mediation process, the statute of limitations should have been tolled until the contractually mandated process was completed.

In considering this argument the Commission pointed out that "the limitations period… is jurisdictional and cannot be waived." The Commission went on to state, "we have consistently held that internal efforts to remedy unfair labor practices will not toll the limitations period for filing those complaints before us. We have also rejected the claims that internal remedies set forth in an agreement must be exhausted prior to filing a charge under PERA." In coming to this conclusion, the Commission upheld the ALJ's recommended decision and order dismissing the ULP as untimely. ■

REESE II: "JUST WHEN I THOUGHT I WAS OUT...THEY PULL ME BACK IN"

Stuart M. Israel
Legghio & Israel, P.C.

The majority opinion in *Reese v. CNH America LLC*, ___ F.3d___ (6th Cir. 9/13/12) (*"Reese II"*) (Sutton and Gibbons, JJ.; Donald, J,. dissenting), begins: "In litigation, as in film, sequels rarely satisfy." Of course, there are exceptions to this rule, like *The Godfather Part II*. And even *The Godfather Part III* has memorable moments, like Michael Corleone's lament, quoted in the title of this column. See www.youtube.com/watch?v=UPw-3e_pzqU.

Here, just when we thought a contract was contract, the *Reese II* majority pulls us back in, and says: maybe not.

The district court entered judgment in *Reese* for retirees challenging the company's unilateral changes in retirement healthcare. 2007 WL 2484989 (E.D. Mich.) (Duggan, J.). *Reese I*, 574 F.3d 315 (6th Cir. 2009) affirmed that the collectively-bargained retirement healthcare was vested, applying the "ordinary principles of contract interpretation," but remanded for the district court to answer the question: "What does vesting mean in this setting?" Phrased another way, "does the scope of this promise permit [the company] to alter these benefits in the future?" 574 F.3d at 321, 324.

Judge Sutton clarified the question in his concurrence denying rehearing. 583 F.3d 955 (6th Cir. 2009). He explained: "there was something different about this case—something that implicated the distinct question of what 'vesting' means in this context." He wrote that on remand the parties "were free to develop evidence" on their course of conduct. Were past healthcare changes "approved" by retirees or the UAW? Did past changes "not diminish the nature of the benefits package that existed upon retirement"? If either was the case, the concurrence seemed to suggest, "plaintiffs should win as a matter of law." Or, should the company "be allowed to make reasonable modifications to the health-care benefits of retirees, consistent with the way the parties have interpreted and implemented prior CBAs containing similar language"? 583 F.3d at 956.

These questions, it seemed clear from the *Reese I* rehearing-denial concurrence, required fact-specific inquiry. This seemed consistent with decades of *Yard-Man* precedent, which gives effect to "the explicit language" of the CBA, contractual "context," "implied terms," "the parties' practice, usage, and custom," and, as necessary, "extrinsic" evidence like bargaining history, "course of conduct," and the parties' "words and deeds." See e.g., *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-1480 (6th Cir. 1983), *cert. denied* 465 U.S. 1007 (1984); *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 915 (6th Cir. 2000); *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 578-579 (6th Cir. 2006), *cert. denied* 549 U.S. 1019 (2006); and *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1069-1070, 1074-1075 (6th Cir. 2008).

On remand, Judge Duggan considered the parties' history. He held that the company had no contractual authority to make unilateral changes, and "to the extent" it could modify retirement healthcare, the company could do so "only through an agreement with the UAW." 2011 WL 824585 (E.D. Mich.).

Not so, says the *Reese II* majority: Judge Duggan "misread" *Reese I*. The majority remanded again, for consideration of "facts not in the record" and the district court's determination of the "reasonableness" of the unilateral company changes. It seems that even where a company is entitled to make unilateral changes in vested healthcare, the company must respect the boundaries of "reasonableness." Otherwise promises of vested retirement healthcare would be "illusory" and "nugatory," to use *Yard-Man* terms.

So, it seems that *Reese II* turns on the parties' history of "[p]ast changes to retiree healthcare benefits." The changes implemented by the company, the majority posited, "had not been collectively bargained." Among the changes was "managed care," which the *Reese II* majority found "represented a reduction in the effective choices of coverage available for all retirees" and in "the coverage actually provided to many, if not most, of them." Indeed, if the "ordinary principles of contract interpretation" govern *Reese II*, the following seems evident. If the parties agreed to permit unilateral company changes, then "reasonableness" is the salient question. On the other hand, if the parties did not agree to unilateral company authority, then no unilateral change would be permissible, "reasonable" or otherwise.

Here lies the confusion in the *Reese II* majority opinion. It goes beyond the law and the CBA and the "extrinsic" evidence, as the dissent points out, "to resolve the case equitably." But, as the dissent points out, the court "is one of law and not equity." The dissent observes that the majority offers "thoughtful analysis of the policy issues" when "it is the law that should determine the outcome of this case."

Confusion lies in the majority observations about what retirees and companies "want" and "do not want" rather than what the parties negotiated into their CBAs. The majority opines:

> Retirees, quite understandably, do not want lifetime eligibility for the medical-insurance plan in place on the day of retirement, even if that means they would pay no premiums for it. They want eligibility for up-to-date medical-insurance plans, all with access to up-to-date medical procedures and drugs. Whatever else vesting in the healthcare context means, all appear to agree that it does not mean that beneficiaries receive a bundle of services fixed once and for all. Companies want the freedom to change health-insurance plans.

The last proposition seems correct. Companies "want" to change, or even terminate, vested retirement healthcare at will, to serve company self-interest. Many companies have imposed unilateral changes, however, only to be told by the Sixth Circuit that doing what they wanted, not what they promised, was a CBA breach and an ERISA violation. The legal question is what companies contracted to do, and not what they "wanted" way back when (and did not get into the CBA), and not what they "want" now, long after-the-fact, informed by hindsight.

The *Reese II* majority observes that healthcare and healthcare costs "have not been remotely static in modern memory." The majority opines that this "has little to do with traditional causes of inflation" and "more to do" with "the remarkable growth in modern life-saving and comfort-improving medical procedures, devices and drugs." This may very well be true. The fact that it may be true is exactly why unions typically do not bargain escape clauses to indulge company *post hoc* buyer's remorse. This is why that when unions and companies bargain retirement healthcare limits, they typically express them as specific-dollar "caps" or precise cost-increase-sharing-percentages.

Retirees want the benefit of their bargain. So, typically unions bargain contractual commitments that lifetime retirement healthcare benefits will be the same as, and will not be inferior to, the benefits in effect at retirement. Unions typically negotiate specific promises precluding unilateral reduction: the company "shall pay the full premium"; the company will maintain the benefits current "at the time of retirement"; the company will provide 100% coverage with no deductibles, $3 prescriptions, and comprehensive "hospital, surgical, medical, hearing aid, prescription drug, dental and vision" coverages.

Another source of confusion: the *Reese II* majority view that the "reality" is that "vesting in the context of healthcare benefits provides an evolving, not a fixed, benefit." But unions do not bargain what the *Reese II* majority seems to view as the norm: ephemeral and "evolving" unilaterally-mutable commitments which entail perpetual uncertainty. Unions *never* bargain clauses like this:

> The Company shall pay the full premium for the hospital, surgical, medical, hearing aid, prescription drug, dental and vision coverages effective at retirement, with 100% coverage and no deductibles and $3 prescriptions, UNLESS AND UNTIL at some future point the company unilaterally decides to impose co-insurance and deductibles on retirees, to shift company costs and risks to retirees, to raise retiree prescription co-payments, and to otherwise modify, or even terminate, coverages, so long as the company imposes these changes within the boundaries of "reasonableness," PROVIDED THAT "reasonableness" will be an evolving standard—depending on, maybe, factors like average out-of-pocket annual retiree costs, per-beneficiary company costs, healthcare quality comparisons, medical technology developments, comparison with healthcare available to "demographically similar employees" at other companies, etc.—as that evolving "reasonableness" standard may someday be applied by a district court with suitable Section 301/ERISA jurisdiction, as many times and as often as may be necessary, in perpetuity, if and when the retirees are able to sue to enforce company CBA and ERISA obligations.

It remains to be seen whether *Reese II* means that a company always may unilaterally modify retirement healthcare, so long as it does so with "reasonableness." On the one hand, that reading seems untenable. Indeed, the *Reese II* majority opinion seems to fit into the framework of *Yard-Man* and its CBA-enforcing progeny—if read as remanding to apply "extrinsic" evidence to ascertaining the parties' intent in an ambiguous CBA.

If, however, on the other hand, *Reese II* is read as a prescription for judicially-determined case-by-case year-by-year "reasonableness" based on developing medical technology and changing costs and what, in hindsight, is "sensible," *Reese II* bodes ill for the sanctity of contract. If read as a mandate to apply "evolving" standards, *Reese II* would require that every CBA interpretation entail a "that was then, this is now" assessment, perpetually seeking to accommodate the ever-present "growth in modern life-saving comfort-improving medical procedures, devices and drugs." If read as a prescription for judicially-imposed "equity" rather than CBA interpretation, *Reese II* would seem to depart drastically from almost 30 years of Sixth Circuit precedent. See, e.g., *Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008) (citation omitted): "it is not the prerogative of the judiciary to rewrite contracts in order to rescue parties from 'their improvident commitments.'"

How should *Reese II* be read? Where the CBA contemplates unilateral company changes, courts can decide "reasonableness" to protect retirees from "nugatory" and "illusory" promises. But where parties bargained lifetime benefits at retirement-date levels, or changes only upon "mutual agreement," or changes only with "union consent," the courts ought to enforce those promises, even if the march of medical progress and the fluid healthcare marketplace now cause the company to view its CBA promises as "improvident commitments."

Indeed, retirement healthcare benefits "are typically understood as a form of delayed compensation or reward for past services" and it is "unlikely" that "such benefits" would be "left to the contingencies of future negotiations." *Yard-Man*, 716 F.2d at 482. At the least, it is equally unlikely that "such benefits" would be left "to the contingencies of future" company *fiat*. Or to "evolving" judicial assessments of what is "reasonable" years or decades after those benefits were earned by 30-plus years of industrial labor, and promised in CBAs, and vested. See e.g., *Moore v. Menasha Corp.*, 690 F.3d 444 (6th Cir. 2012) (citation omitted) (an "employer that contractually obligates itself to provide vested healthcare benefits renders that promise 'forever unalterable' "). ■

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- Bill Saxton, Jay Boger, and Shannon Loverich write about FMLA and ADA developments
- Ryan Bohannon asks whether employers can require employees' social network passwords and Jennifer Zinn reports on the EEOC's views on using criminal records in employment decisions.
- 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 Kelman cartoon, and more.
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